

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL



_____)
In the Matter of)
)
GRACO INC.,)
a corporation, and)
)
ILLINOIS TOOL WORKS INC.,)
a corporation, and)
)
ITW FINISHING LLC,)
a limited liability company,)
Respondents.)
_____)

DOCKET NO. 9350

ORDER DENYING RESPONDENT GRACO INC.'S *IN CAMERA* MOTION

I.

On January 30, 2012, Respondent Graco Inc. (“Graco”) filed an Opposition to a motion filed by third party Complete Automation, Inc. (“Complete”) seeking to quash and/or limit a subpoena served on it by Graco (“Opposition”). That motion was resolved by Order dated February 2, 2012. At the same time that Graco filed its Opposition on January 30, 2012, Graco also filed a Motion to File *In Camera* Graco’s Opposition. (“*In Camera* Motion”). The deadline for filing any opposition to Graco’s *In Camera* Motion, February 10, 2012, has passed and no opposition has been filed. As explained below, Graco’s *In Camera* Motion is DENIED as moot.

II.

Graco filed its *In Camera* Motion pursuant to Commission Rule 3.45(e) and Paragraph 9 of the Protective Order entered in this case on December 16, 2011.¹ Commission Rule 3.45(e) states: “If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked ‘*In*

¹ Respondent Graco filed its *In Camera* Motion pursuant to Commission Rules 4.2(c)(2) and 4.2(c)(3)(ii) also. These rules govern requirements as to form and filing of documents and are consistent with Commission Rule 3.45.

Camera' or 'Subject to Protective Order,' as appropriate, on the first page . . ." 16 C.F.R. § 3.45(e).

Commission Rule 3.31(d) sets forth: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the Protective Order in this case was issued verbatim as it appears in Appendix A to § 3.31.

Paragraph 9 of the Protective Order entered in this case states: "In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera* . . . Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge."

The provision in Paragraph 9 of the Standard Protective Order that states that pleadings that contain confidential material "shall be filed *in camera*" is confusing and, to the extent that wording was meant to refer to standard "*in camera* treatment" in Part 3 cases at the Federal Trade Commission, is in conflict with Commission Rule 3.45 and existing Commission precedent. Commission Rule 3.45(b) states: "A party . . . may obtain *in camera* treatment for material . . . offered into evidence only by motion to the Administrative Law Judge." 16 C.F.R. § 3.45(b) (emphasis added). Commission Rule 3.45(b) goes on to require that "the Administrative Law Judge shall order that such material, whether admitted or rejected, be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b).

Commission precedent makes clear that *in camera* treatment is appropriate only for documents "offered into evidence." As the Commission explained: *in camera* treatment's "purpose is to prevent the incorporation of sensitive data in the public record. The need for it therefore does not arise until the material is about to be submitted in evidence. It is an extraordinary device when applied as provided in the Commission's Rules to material about to be submitted." *The Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1669, 1671 (1967). See also *In re Bristol-Myers Co.*, 90 F.T.C. 455 ("Commission Rule 3.45(a) allows . . . [the ALJ to] grant *in camera* treatment for information at the time it is offered into evidence . . ."); *Lehigh Portland Cement Co.*, 74 F.T.C. 1629, 1968 FTC LEXIS 287, at *7, n.6 (1968) (premature to grant *in camera* treatment where there is a possibility that none of the information will be offered into evidence).

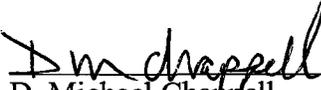
Accordingly, "*in camera* treatment" is not appropriate for materials until they have been "offered into evidence." 16 C.F.R. § 3.45(b). Because Graco's Opposition is not being "offered into evidence," Graco is not required to file a motion for *in camera* treatment. Instead, Commission Rule 3.45(d), "Briefs and other submissions referring to *in camera* or confidential information," governs the proper treatment of submissions not

being “offered into evidence,” such as the Opposition. In accordance with Rule 3.45(d), “parties shall not disclose information that . . . is subject to confidentiality provisions pursuant to a protective order in the public version of proposed findings, briefs, or other documents.” 16 C.F.R. §3.45(d).

III.

Consistent with Commission Rule 3.45(d), Graco properly labeled its Opposition as “Confidential – FTC Docket No. 9350 – Subject to Protective Order” and showed the redactions of confidential information that Graco made from its public version of the same filing. Due to the confusing wording in the Rules, as discussed above, it is understandable that a party would feel compelled to file a motion such as the instant *In Camera* Motion. Because Graco’s Opposition is in compliance with Rule 3.45(d), no further action is necessary and the confidential information contained in Graco’s Opposition will continue to be treated as Confidential. Because Graco was not required to file a motion for *in camera* treatment, its *In Camera* Motion is DENIED as moot.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 13, 2012