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GROLIER, INCORPORATED, ET AL.

Docket 8879. Order, Nov. 3, 1972.

Respondents' motion to dismiss the complaint for failure to join indispensable parties denied.

ORDER DENYING MOTION TO DISMISS

This matter is before the Commission upon the certification of October 26, 1972 by the administrative law judge of respondents' motion to dismiss the complaint filed June 9, 1972 and complaint counsel's answer in opposition thereto filed June 20, 1972.

The certification relates to respondents' contention that the order as proposed would affect the contractual rights of third parties and, absent their joinder as indispensable parties, the complaint should be dismissed. Only recently did the Commission have the occasion to consider a similar contention in the "soft drink bottling company" cases. Docket Nos. 8853-57 and 8859; *Coca-Cola Company v. F.T.C.*, 342 F. Supp. 670 (N.D. Ga. 1972) (dismissed for lack of subject matter jurisdiction, appeal pending); *Pepsico Inc. v. F.T.C.*, 343 F. Supp. 396 (S.D. N.Y. 1972) (dismissed for lack of subject matter jurisdiction appeal pending); *Seven-Up v. F.T.C.*, 349 F. Supp. 551 (E.D. Mo. 1972) (dismissed for lack of subject matter jurisdiction). In those cases the Commission reviewed the precedents applicable to this issue and concluded that third parties whose contractual rights will be affected by the issuance of an order to cease and desist are not necessarily indispensable parties to the proceeding from which such an order may issue. *Crush International Ltd*, Docket No. 8853, Order Ruling on Motions to Dismiss for Failure to Join Indispensable Parties, March 23, 1972, 3 CCH TRADE REG. REP. ¶ 19,954. Based on the authorities set out in *Crush International*, the instant motion will be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint for failure to join indispensable parties be, and it hereby is, denied.

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JEWEL COMPANIES, INC., ET AL.

Docket 8788. Order, Nov. 10, 1972.

Order denying motion to dismiss as to certain respondents; granting application for review of judge's grant for issuance of subpoena; setting aside the said grant, and quashing the subpoena.

ORDER RULING ON ADMINISTRATIVE LAW JUDGE'S CERTIFICATION FILED
OCTOBER 10, 1972 AND COMPLAINT COUNSEL'S APPLICATION
FOR REVIEW FILED OCTOBER 3, 1972

This matter is before the Commission on two separate requests: (1) the administrative law judge's certification filed October 10, 1972, of the motion of respondents Jack Stires, Inc., a corporation, and John C. Stires II, individually and as an officer of Jack Stires, Inc., to dismiss the complaint as to them; and (2) complaint counsel's application for review, filed October 3, 1972, of the order of the administrative law judge of September 26, 1972, granting the application of respondent Jewel Companies, Inc., for the issuance of a subpoena for the production of certain Commission records. Respondent Jewel Companies, Inc., on October 18, 1972, filed an answer in opposition to complaint counsel's application for review.¹

I

The Motion to Dismiss

On September 12, 1972, respondents Jack Stires, Inc., and John C. Stires II filed with the administrative law judge a motion to dismiss the complaint as to them on the grounds that Jack Stires, Inc., was merged into another corporation, Parker Farms, Inc., in 1969, and that thereafter Jack Stires, Inc., ceased to exist;² further, that John C. Stires II has retired, and did retire prior to the merger, from the fruit and vegetable brokerage business and has no intentions of re-entering such business in the future.³

¹ Additionally, complaint counsel, on October 25, 1972, filed a supplemental memorandum of law in connection with their application for review.

² In his affidavit John C. Stires II states in part that on September 22, 1969, an agreement of merger was filed with the Corporation Commission of the State of Arizona, pursuant to which Jack Stires, Inc., was merged into Parker Farms, Inc.; that a copy of the agreement was filed with the Secretary of the State of California on October 3, 1969, and as of these dates Jack Stires, Inc., ceased to exist.

³ In his affidavit John C. Stires II states in part that he ceased engaging in fruit and vegetable brokerage transactions several months prior to the dissolution of Jack Stires, Inc., and has not been directly or indirectly engaged in such business since that time. He further states that he has no intention of ever being engaged in the fruit and vegetable or food brokerage business in the future and that his retirement from the brokerage business was the result of business and commercial considerations and was in no way related to the instant proceeding.

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Complaint counsel filed an answer to the motion, in which they dispute the claims of the moving respondents and assert that a number of circumstances, such as the continued use of the family name in a new entity styled Stires Bros., Inc., the fact that such new business operates out of the same address as that of Jack Stires, Inc., and other factors, show that in essence the Stires brokerage business is a continuing affair.

The moving respondents replied to complaint counsel's answer on October 4, 1972, and submitted an additional affidavit by John C. Stires III. In this answer they represent that there is no relationship between the new corporation, Stires Brothers, Inc., and the moving respondents.⁴

The administrative law judge, in his certification, recommends that the motion be granted.⁵ He believes the situation is similar to that in *Borman Food Stores, Inc.*, Docket No. 8789, wherein the Commission, by an order issued August 3, 1972 [p. 201 herein] dismissed the complaint as to certain of the respondents, Frank V. Condello and P & R Brokerage Co. In the opinion of the administrative law judge, the moving respondents have made a showing that they are out of the brokerage business, that they have been out of it for three years, and, finally, that there is no reasonable expectation they will reenter.

We disagree with the administrative law judge's conclusions and his recommendation on this question. There is a substantial dispute here on questions of fact which we do not believe can be disposed of on the basis of affidavits and counsel's representations. First, there is the question whether or not Stires Brothers, Inc., is a continuation of the old firm. Complaint counsel contend that it is, and the representations made in affidavits and otherwise are inadequate to resolve the issue. There are also the questions of whether or not John C. Stires II has gone out of the fruit and vegetable brokerage business and will not return to it. These questions are not necessarily resolved by an affidavit of discontinuance since such, without more, may not be sufficient to warrant dismissal as to an individual. See, for example, *Lester S. Cotherman v. Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969). The *Borman* case, relied on by the administrative law

⁴ The affiant, John C. Stires III, states that Stires Brothers, Inc., is operated by the son and by the brother of John C. Stires II, the named individual respondent, and that while Stires Brothers, Inc., engages in the fruit and vegetable brokerage business there are significant differences in the buyers and sellers with which it deals compared with those with which Jack Stires, Inc., dealt. This affiant further states that there is no other connection between the new business and the moving respondents and that the address is the same because such is the former residence of John C. Stires II, who sold it to his brother, Buel Stires, an officer in the new business, Stires Brothers, Inc.

⁵ The administrative law judge certified the matter because he believed the motion was addressed to the Commission's administrative discretion.

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judge, does not constitute a precedent for dismissal here. That case is quite different on the facts. The Commission dismissed as to the individual Frank C. Condello and as to the brokerage partnership, P & R Brokerage Co., of which he was the sole operator, on the basis of a showing that Mr. Condello planned to retire because he was in ill health, over seventy years of age and under strain caused by the litigation and several deaths in his family. No showing has been made here of any circumstances of similar significance.

In summary, we do not believe that the questions raised here should be decided on a partial record. Accordingly, we will deny the motion to dismiss the complaint as to Jack Stires, Inc., a corporation, and John C. Stires II, an individual.

II Complaint Counsel's Application for Review

The second question before the Commission is complaint counsel's application for review of the administrative law judge's order granting respondent Jewel Companies, Inc.'s application for issuance of a subpoena requiring the production of certain records in the Commission's files for the purpose of discovery. The documents sought include internal communications, minutes and records concerning the Commission's decision to issue a complaint against respondents herein and complaints against others engaged in the fruit and vegetable brokerage business.

More specifically, the demand covers documents, among others, as follows: memoranda, communications and minutes relating to a motion filed May 23, 1969, entitled "Motion To Refrain From Issuing Proposed Complaints In Shipping Point Broker Cases;" the minute or related document concerning the decision to issue complaints as described in a communication from the Secretary of the Commission to "Respondent" dated March 24, 1969; the minute or minutes relating to the determination to issue the complaint against "Respondent;" communications or memoranda relating to recommendations to issue complaints as a result of the investigation by the Commission of the fruit and vegetable brokerage practices; communications with trade associations, legislators and others with regard to issuance of designated complaints; certain minutes and communications relating to the matter of Jack Herzog & Co.; memoranda showing the Commission's policy to consider or not to consider the public interest in connection with decisions to issue the complaints; and other described documents.

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The administrative law judge, in his order of September 26, 1972, granting respondent Jewel Companies' request for production, asserted that the relief sought by the respondent in this instance and that sought and obtained in a United States District Court, *Jewel Companies, Inc. v. Federal Trade Commission*, Civil No. 69-C-1673 (D.C.N.D. Ill., motion for production of documents granted August 15, 1969),⁶ are the same. He concluded that the government had its full day in court on the issue of production of the Commission's records, that it had lost, and that it cannot now, under the doctrine of collateral estoppel, attack the order issued by the court.

Complaint counsel, in their petition for review, argue that respondent Jewel Companies, Inc. has not made the showing required by Commission rule Section 3.36. They also contend that the district court order in the *Jewel Companies, Inc.* case, *supra*, relied on by the administrative law judge is not binding because the order therein for production "never became finalized, and was never put in issue, and directly determined by a Court of competent jurisdiction" (complaint counsel's application, page 6). Complaint counsel, in their supplemental memorandum, argue that *res judicata* and related doctrines accord finality only to a valid final judgment and that the unappealed interlocutory order in this case is not entitled to *res judicata* effect.

In an adjudicative proceeding an application for subpoenas for confidential documents of the Commission must be made under Commission rule Section 3.36. This rule requires, among other things, a showing of general relevancy of the material or information and the reasonableness of the scope of the request and a showing that the material or information is not available from other sources. Respondents have not adequately complied with the requirements of this rule.

The claim of respondent Jewel Companies, Inc., that the district court action (*Jewel Companies, Inc.*, *supra*) in effect remanded the respondents to the administrative proceedings for the production of the documents and a preliminary adjudication of the jurisdictional and statutory issues being litigated (see page 5, application for issuance of subpoena filed August 14, 1972) is rejected. The collateral action in

⁶ The citations and the history of this litigation are as follows: The District Court for the Northern District of Illinois on November 28, 1969, found that there was no basis at law to support a motion to dismiss complaint, and that the court had jurisdiction of the subject matter and the parties. The court certified the question to the court of appeals and leave was granted to appeal; *Jewel Companies, Inc. v. Federal Trade Commission*, Civil No. 69-C-1673 (D.C.N.D. Ill.); *Jewel Companies, Inc., et al. v. Federal Trade Commission*, 432 F. 2d 1155 (7th Cir. 1970); on remand from circuit court, *Jewel Companies, Inc. v. Federal Trade Commission*, No. 69-C-1673 (D.C.N.D. Ill., decision and order August 17, 1972); *Jewel Companies, Inc. v. Federal Trade Commission*, appeal docketed, No. 72-1382 (7th Cir.).*

*Judgment in favor of the Commission entered March 15, 1973.

the district court does not require the production here sought. Upon the appeal of the district court decision, the Circuit Court of Appeals for the Seventh Circuit held that the district court had no jurisdiction over three of the four claims made by respondents and, with regard to the remaining claim, that is, the assertion that Commissioner MacIntyre did not properly exercise his statutory discretion in voting for the issuance of the complaint, the appeals court remanded to the district court for further proceedings, stating that the remaining question was inherently a legal one and did not involve factual considerations. *Jewel Companies, Inc., et al. v. Federal Trade Commission*, 432 F. 2d 1155, 1159 (2d Cir. 1970). The district court, in its decision and order on remand, also found that there was no further factual issue to be decided and held that Commissioner MacIntyre voted properly by exercising his discretion in favor of issuance of the complaint. *Jewel Companies, Inc. v. Federal Trade Commission*, No. 69-C-1673 (D.C.N.D. Ill., March 17, 1972). Thus, all issues were decided in the Commission's favor (one is on appeal, but it involves no factual determination) and there is no basis for the claim that the matter was remanded to the Commission for the production of the documents.

Moreover, there is no other support for *Jewel Companies'* position that the result of the court adjudication was to remand the matter to the Commission for the resolving of the issues at the administrative level. Of the claims made by the respondents in their collateral action it appears that the documents here sought could have relevance possibly only to two of them—that is, the claim as to Commissioner MacIntyre's exercise of his discretion and the claim the Commission did not make a finding that the issuance of the complaint was in the public interest. The former claim was found by the courts not to involve a factual issue; the latter, we think, was disposed of by the circuit court where it holds there is nothing in the language of Sections 2(c) and 11 of the Clayton Act, as compared with Section 2(a) of that Act and Section 5 of the Federal Trade Commission Act, which requires a finding that the issuance of the complaint be in the public interest. The court further stated that the plaintiffs there were attempting to interfere with the discretion of the Commission in issuing its complaint and the courts have no jurisdiction to decide such inherently prosecutorial decisions.

The case of *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583 (8th Cir. 1940), relied on by the administrative law judge to support his position of collateral estoppel, is not controlling here. In that case a district court, in a separate libel suit, prior to the Commission action had resolved the basic issue of the alleged falsity of

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that respondent's advertising. Later, the court of appeals on review of the Commission's case held the Commission could not, on an issue settled by a court of competent jurisdiction, reach a contrary conclusion. The Commission here is not going contrary to an issue finally settled by a court. Thus, the *Lee* case is clearly distinguishable.

The records sought, to the extent they exist, would cover confidential internal memoranda and papers of the Commission, including those which relate to the mental processes of the Commissioners. The courts have not generally allowed any such inquiry. In *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971), the court held that the granting of discovery, if ever, for this kind of internal document would be an extraordinary step, not a routine one. Respondent Jewel Companies, Inc., has failed entirely to justify any such extraordinary step in this proceeding. In the collateral suit, *Jewel Companies, Inc., supra* (decision and order dated March 17, 1972), the district court held that for the court to inquire into a Commissioner's reasoning or state of mind, beyond Mr. MacIntyre's statement, is not only unnecessary but also unjustified. Accordingly, we hold the administrative law judge was in error in applying the doctrine of collateral estoppel and directing discovery of the Commission documents requested by respondent Jewel Companies, Inc. We will set aside his order.

It is ordered, That the motion to dismiss the complaint as to Jack Stires, Inc., a corporation, and John C. Stires II, an individual, certified to the Commission by the administrative law judge on October 10, 1972, be, and it hereby is, denied.

It is further ordered, That complaint counsel's application for review of the administrative law judge's order granting respondent Jewel Companies, Inc.'s application for issuance of a subpoena, filed October 8, 1972, be, and it hereby is, granted.

It is further ordered, That the administrative law judge's order filed September 26, 1972, granting application for subpoena requiring the production of documents, papers and other materials in the records of the Federal Trade Commission, be, and it hereby is, vacated and set aside.

It is further ordered, That the subpoena *duces tecum* issued by the administrative law judge October 5, 1972, in connection with this matter, addressed to the Secretary of the Commission, Charles A. Tobin, returnable November 7, 1972, be, and it hereby is, quashed.