

concentrate companies; (2) allowing complaint counsel to offer corrected sales data of Crush International, Inc., so as to give complete picture of market shares; (3) directing General Counsel to submit proposed orders containing an agreement to settle third-party subpoena enforcement actions to the D.C. District Court for approval; (4) remanding case for further proceedings in accordance with Commission's order; and (5) with respect

to procedural ruling, the law judge must promptly notify the Commission when the law judge certifies a motion for enforcement of subpoena but later rules the information is not needed or will not be allowed into evidence.

### *Appearances*

For the Commission: *Amy R. Richter, Stephen G. Stocker, Ira A. Nordlicht and James E. Egan.*

For the respondent: *Edward Howrey, of Howrey, Simon, Baker and Murchison, Washington, D.C.; James Frangos and John Kirby, of Mudge, Rose, Guthrie & Alexander, New York, New York.*

### ORDER RULING ON INTERLOCUTORY APPEALS AND OBJECTIONS TO PROPOSED SETTLEMENT OF SUBPOENA ENFORCEMENT SUITS

Before the Commission are three matters: (1) application by complaint counsel, filed September 13, 1973, for review of administrative law judge's ruling denying request to offer corrected sales data of Crush International, Inc., into the record; (2) request of complaint counsel, filed September 14, 1973, for review of administrative law judge's ruling denying request to offer subpoenaed data of other third-party soft drink concentrate companies once they are received; and (3) proposed settlement of third-party subpoena enforcement actions.

Upon request of complaint counsel the administrative law judge granted permission for them to file interlocutory appeals from his rulings.<sup>1</sup> Respondent has filed an opposition to said appeals. As to the proposed settlement of the subpoena enforcement actions, this matter was negotiated by the Commission's General Counsel with the third-party defendants. Counsel for PepsiCo was informed of the proposed settlement and has been invited to comment on its terms, which it has done by letter dated September 19, 1973. Complaint counsel has filed a reply to PepsiCo's comments.

#### I. PROPOSED SETTLEMENT OF THIRD PARTY SUBPOENA ENFORCEMENT ACTIONS

We will first take up the proposed settlement since disposition of that matter affects the outcome of the other matters.

On July 5, 1973, the administrative law judge certified in writing to the Commission a request by complaint counsel that court enforce-

<sup>1</sup> Although Rule 3.23(b) specifies that the hearing officer certify in writing that the matter meets certain criteria for interlocutory appeal, the law judge's "certification" here was given orally. However, it appears this was due to the exigencies of time and the requirement that the certification be made in writing will be waived in this case.

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ment of four subpoenas *duces tecum* be instituted against the chief executive officers of the Coca-Cola Company, the Seven-Up Company, Royal Crown Cola Company, and Cott Corporation. The law judge reported that the subpoenas had been issued at the request of complaint counsel and called for information "which will allow complaint counsel to establish market shares and concentration in the sale of soft drink concentrate and to establish respondent's rank among competitors." Also, they called for information relevant to an alleged trend towards vertical integration among leading manufacturers of soft drink concentrate manufacturers.

The administrative law judge further reported that following service of the subpoenas, the above-mentioned third parties filed motions to quash or in the alternative for protective orders granting so-called *Mississippi River* treatment (69 F.T.C. 1186-89) to the requested data. These motions were denied but the law judge entered a protective order for the information.<sup>2</sup> The law judge denied motions by the third parties for permission to file an interlocutory appeal and certified the request for court enforcement with the suggestion that the General Counsel be directed to seek such enforcement on an expedited basis.

Pursuant to the administrative law judge's certification, the Commission directed the General Counsel to seek court enforcement of the subpoenas on an expedited basis, and on September 5, 1973, the United States Department of Justice filed enforcement petitions on behalf of the Commission in the United States District Court for the District of Columbia (Civil Action Nos. 1700-73, 1701-73, and 1703-73) against three of the defaulting parties.<sup>3</sup> Subsequently, the General Counsel and the parties negotiated a proposed settlement which has now been submitted to the Commission for its approval. As indicated, the Commission solicited the views of PepsiCo on the terms of the settlement.

The proposed settlement would take the form of a court order directing the third parties to submit the data called for in the original subpoenas. Also included in the court order would be provisions protecting against public disclosure of details of the third-parties' sales data. Only counsel for the Commission and their economist witnesses, PepsiCo's independent retained outside counsel and outside economist

<sup>2</sup> The protective order entered by the law judge would have permitted disclosure of the data to four officials of PepsiCo who were subsequently identified as PepsiCo's director of market research, manager of information analysis, senior vice president, and chairman of the board of Rheingold Corp.

<sup>3</sup> No action was filed against the Cott Corporation, the fourth defaulting party. After receiving notice of the Commission's intent to seek court enforcement of the subpoena, Cott voluntarily agreed to turn the requested data over to complaint counsel.

witnesses, and the administrative law judge, Commission, and reviewing courts, would be able to see the underlying data.

Other protective provisions are included: *e.g.*, counsel and their witnesses, before seeing the data, must sign a statement agreeing that they will not violate the terms of the protective order, shall use the information only in connection with this proceeding, and shall return all notes and other papers reflecting the information to the responding company at the conclusion of the proceeding.

There is also a provision which restricts not only counsel, but the law judge, the Commission, and reviewing authorities, from publicly disclosing the information except "to show the combined total sales of all companies in the industry, the combined total sales of the largest four companies, the percentage which the latter bear to the former, the relative ranking of PepsiCo, Inc. in the industry (*e.g.*, first, second, third), whether PepsiCo's sales are more than 50% (or 100%, or any fifty percentage point increment) greater than the next leading member of the industry, or such other data as shall not reveal data or information as to any of the individual companies that are not respondents in Docket No. 8903".<sup>4</sup>

Respondent PepsiCo objects to the Commission accepting the proposed settlement order. Its threshold argument is that the settlement order would "unilaterally and summarily abrogate" the June 7, 1973, protective order of the administrative law judge contrary to the Commission's rules which provide for interlocutory appeals and the right of respondent to be heard thereon.

We find this objection to be without merit. The fact that our rules provide for interlocutory appeals does not prevent the Commission from negotiating a settlement of a court suit which it is satisfied adequately protects the rights of the parties below.

Furthermore, although this is not necessarily a controlling factor, we find nothing in the rulings and orders of the administrative law judge which would lead us to believe that the proposed protective order

<sup>4</sup>This type of *in camera* provision, which binds the Commission and purports to bind even reviewing courts, is not generally favored by the Commission. See Section 3.45 of the Commission's Rules of Practice which provides in part: "The right of the [Administrative Law Judge], the Commission, and reviewing courts to disclose *in camera* data to the extent necessary for the proper disposition of the proceeding is specifically reserved." However, we are satisfied that in all probability public disclosure of the details of the subpoenaed sales data in later written opinions will not be necessary. In view of the fact that expedited hearings have been called for in this case, we will accept such a provision, not withstanding possible conflict with Rule 3.45. However, our willingness to do so in this case should not be deemed a precedent for future cases.

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would conflict with what he deemed to be appropriate in this case. Indeed, it is clear that he believed *Mississippi River* treatment (which would have barred even *outside* counsel and consultants of respondent from seeing the subpoenaed data) was appropriate but that under prior Commission case law he had no discretion to apply *Mississippi River* treatment with respect to sales data in merger cases. (Tr. 12-37, pre-trial conference of June 6, 1973 and Order of June 7, 1973) In his order of June 19, 1973, denying the application of the Coca-Cola Company for an interlocutory appeal from denial of *Mississippi River* treatment, the law judge indicated that in the last analysis this was a judgment the Commission could properly make:

In any event, should Coca-Cola refuse to comply with the subpoena, the undersigned would at that time, on motion of complaint counsel, certify the matter to the Commission for enforcement in the courts, at which time the Commission would have the opportunity to consider and review the rulings of the undersigned and weigh the propriety of extending *Mississippi River* treatment to sales data. The undersigned believes this would be more expeditious in light of the August 15, 1973 deadline for commencement of hearings than to permit an interlocutory appeal.

It is clear from the foregoing that by accepting this proposed settlement we would not be imposing a type of protective order that was clearly rejected by the law judge or that would be inconsistent with his rulings. Also, by granting respondent opportunity to comment on the terms of the proposed settlement we have provided it with the same right to be heard had the matter come before the Commission on an interlocutory appeal under Rule 3.23(b).<sup>5</sup>

Turning now to PepsiCo's substantive objection, it argues that the proposed settlement would prevent its counsel from disclosing the subpoenaed data to four designated PepsiCo employees, "experts in the soft drink concentrate industry," for assistance in preparing *voir dire* and cross-examination.<sup>6</sup> Respondent's counsel claims they received assistance from these PepsiCo officials in uncovering deficiencies in other subpoena returns.

We are not persuaded that such assistance is so clearly necessary as to require rejection of this settlement. The information sought is

<sup>5</sup> For reasons that will be made clear later, respondent's argument that the subpoena enforcement action is moot, by virtue of the administrative law judge's closing of the record as to complaint counsel's case-in-chief, is unavailing.

<sup>6</sup> As previously noted, the four PepsiCo employees are PepsiCo's senior vice president, director of market research, manager of information analysis and chairman of the board of respondent's Rheingold Corporation subsidiary. The subpoenaed parties have strongly resisted disclosure to these officials of what they claim are highly confidential sales data.

relatively simple sales totals,<sup>7</sup> not highly technical data of the type which requires analysis on the part of experts. Either the data submitted comply with the specifications of the subpoena or they do not. We are satisfied that if any deficiencies are to be uncovered, counsel should be able to do this on *voir dire* or cross-examination without the need of disclosure to PepsiCo officials.

On a similar issue in another case where the subpoenaed data of a competitor was considerably more complex and technical, the enforcing court upheld a Commission protective order that barred disclosure to the respondent company. The court went even one step further by also barring disclosure to one of the counsel of record for the respondent company on the ground that he was also secretary to the company and disclosure should not be made to a corporate officer. *Federal Trade Commission v. United States Pipe and Foundry*, 304 F.Supp. 1254, 1261 (1969). See also *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (1965) and *United States v. R. J. Reynolds Tobacco Co.*, 1969 Trade Cases ¶ 72,848 (D. N.J.).<sup>8</sup>

We have carefully studied all of respondent's objections and are satisfied that the proposed settlement adequately protects its rights and is in the public interest. Accordingly, the General Counsel has been directed to submit the proposed order to the district court for approval. We are informed that if the settlement order is approved by the court, the subpoenaed parties will turn over the information forthwith.

<sup>7</sup> The data called for are:

"Documents (or in lieu thereof a true statement) sufficient to show for 1958, 1963, 1967, 1971 and 1972:

"(a) Total sales in dollars, including internal sales, of soft drink concentrate by your company.

"(b) The number of ounces of finished soft drink which can be produced from such sales of your company's concentrate.

"(c) Total sales of soft drink concentrate by your company to all bottlers owned wholly or partly by your company.

"(d) Total purchases, of soft drink concentrate from companies other than your company by bottlers owned wholly or partly by your company, in dollars; and

"(e) The number of ounces of finished soft drink which can be produced from such concentrate so purchased from companies other than your company, by brand.

"The various terms above shall have the meanings set forth in the subpoena duces tecum dated August 16, 1973.

"Any statement setting forth such total figure shall identify the brands included in such totals and the method of calculating total ounces of finished soft drinks."

<sup>8</sup> As previously mentioned, a provision in the proposed protective order would require that before any counsel or their witnesses could see the data called for they would have to "signify their assent to the terms of this Order by executing a written statement indicating that they have read this Order and agree to be bound thereby." It is clear that this does *not* mean, as counsel for respondent imply, that if they assented to such terms for the purpose of gaining access to the data at the hearing, they would be waiving on behalf of their client its objections to this protective order. We can assure counsel that no such waiver would result.

## II. COMPLAINT COUNSEL'S INTERLOCUTORY APPEALS

Notwithstanding that in his July 5 certification to the Commission he indicated the need for enforcement of the third-party subpoenas, it now appears that in an order dated August 10, 1973, the administrative law judge ruled that he would not permit any of the data to be received into the record even if produced.

It should be noted in passing that until this appeal was filed the Commission was totally unaware of the law judge's ruling. That ruling, if left standing, would obviously moot the court enforcement actions which the law judge had one month earlier asked the Commission to undertake. We ask that in the future, if an administrative law judge has certified a motion for enforcement of a subpoena but later rules that the information is not needed or will not be allowed into evidence, that the Commission be promptly notified by the law judge of that determination.

In this case it appears from the order of the law judge denying complaint counsel's request for permission to offer the subpoenaed data when received, that he was primarily motivated by his belief that "subpoena enforcement proceedings take months, and not infrequently years before they are ultimately resolved" (Order of August 10, 1973, p. 6). He recites the fact that complaint counsel had consistently urged that the proceeding be expedited and that the Commission had issued an order requiring hearings to commence on August 15, 1973. Yet, he points out, complaint counsel requested issuance of seven subpoenas and "as anticipated by the Administrative Law Judge" four of the companies refused to comply. He states that although "the Administrative Law Judge has acted with extraordinary expedition" in the matter, "in strange contrast, complaint counsel's request for certification was not filed until \* \* \* two weeks after the last application for interlocutory appeal had been denied."<sup>9</sup> He also observed that while the Commission had authorized enforcement, no papers had yet been prepared on the matter by the General Counsel, and no contact had yet been initiated with appropriate personnel of the Department of Justice. The law judge ruled that to grant complaint counsel's request would amount to an indefinite open-ended delay and would be unfair and prejudicial to respondent.<sup>10</sup>

<sup>9</sup> We note, however, that the parties were not yet in default and complaint counsel requested certification in a timely fashion after they were in default.

<sup>10</sup> The law judge also based his denial on the view that if he allowed new exhibits to be introduced this would violate our April 18 Order that required complaint counsel to have designated their witnesses and exhibits by May 1, 1973. However, respondent was put on notice on May 1 by complaint counsel's list of witnesses and their proposed testimony. In

On September 7, 1973, the administrative law judge again ruled that complaint counsel would not be permitted to call additional witnesses to offer the subpoenaed data. After the last witness was called by complaint counsel, on September 14, 1973, the hearings were adjourned and scheduled for resumption on October 2 for presentation of evidence by respondent.

In view of the fact that, contrary to the law judge's expectations, the information called for by the subpoenas will now undoubtedly be forthcoming in a matter of days as a result of our acceptance of the proposed settlement, we will vacate his ruling and direct him to afford complaint counsel an opportunity to offer the data and compilations thereof into the record. Some time should be allotted, of course, to provide respondent with an opportunity to study the data and prepare for cross-examination of the witnesses through which the data will be offered. Whether commencement of respondent's case should be delayed a reasonable period of time if respondent so desires as a result of the offer, we leave to the law judge to decide.

Since complaint counsel's case-in-chief will be reopened for introduction of newly obtained data, there would be no point in denying complaint counsel the opportunity to offer corrected figures of Crush International—the subject of the second interlocutory appeal before us. It appears that through no fault of complaint counsel, Crush provided incomplete sales figures in their subpoena return. This was not learned until Crush's representative was examined on *voir dire* by respondent's counsel. The law judge criticized complaint counsel for forcing respondent's counsel to do his "homework" and ruled that he could not recall the witness or offer corrected exhibits.

The purpose of the hearing is to ascertain the correct facts, not to try the abilities of counsel. At most, counsel for respondent would have been put to the task of checking new corrected exhibits. This would not have constituted "prejudice" to respondent and it would not appear that substantial delay in the proceeding would have resulted.

Since the sales data from Crush is being offered by complaint counsel in conjunction with sales data from the other subpoenaed firms to establish market shares and concentration ratios for what appear to be the eight largest soft drink concentrate suppliers in the United

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any event, as the law judge himself correctly recognized on other occasions (Tr. 88-91, 1262-65), the April 18 Order set the broad outline of the trial and did not remove the law judge's authority to allow additional data to be offered.

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States, it is in the public interest that complaint counsel be allowed to offer corrected sales figures for Crush so as to give a complete picture of market shares.

The matter is remanded for further proceedings in accordance with this opinion.

*It is so ordered.*

Complaint

IN THE MATTER OF

COMPACT ELECTRA CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-2461. Complaint, Oct. 1, 1973—Decision, Oct. 1, 1973.*

Consent order requiring a Bellerose, New York, five-corporation business engaged in the selling of vacuum cleaners and accessories to consumers, among other things to cease using deceptive and misleading selling and debt collection tactics.

*Appearances*

For the Commission: *James Manos.*

For the respondents: *Norman S. Langer, Brooklyn, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp., Compact Associates, Inc., corporations and Hyman Sindelman, also known as Hy Delman individually and as an officer and Theodore Decker, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Compact Electra Corp., Compact Bellerose, Inc., Compact Discount, Inc., Northeast Discount Corp. and Compact Associates, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. All of the above-named corporate respondents have their principal offices and places of business at 264-16 Jericho Turnpike, Bellerose, New York.

PAR. 2. Respondent Hyman Sindelman, also known as Hy Delman, is sole stockholder and an officer of each of the corporate respondents herein named, and he formulates, directs and controls the policies, acts and practices of said corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of said corporations.