

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION, ET AL.

Docket 9093. Interlocutory Order, May 8, 1978

Denial of supplemental motions of subpoenaed third parties to quash and/or limit subpoenas *duces tecum*.

ORDER DENYING MOTION TO QUASH AND/OR LIMIT SUBPOENAS
DUCES TECUM

This matter comes to the Commission upon supplemental motions to quash and/or limit subpoenas *duces tecum* filed on behalf of Henry L. Ernstthal and the California Dental Association ("CDA") and Kathie Boise and the Orange County Dental Society, Inc. ("OCDS"). Because of the unusual posture of this motion, it is necessary to chronicle the prior developments in some detail.

The Commission issued an administrative complaint in this proceeding on January 4, 1977. In the course of the administrative proceedings, the administrative law judge ("ALJ"), at the request of Commission complaint counsel, on November 16, 1977, issued subpoenas *duces tecum* to CDA and OCDS pursuant to Section 3.34(b) of the Commission's Rules of Practice and Procedures. CDA and OCDS filed a joint motion to quash the subpoenas on December 1, 1977, which motion was denied by the ALJ on December 15, 1977. CDA and OCDS then filed a joint motion on January 3, 1978, seeking extraordinary leave to appeal to the Commission the denial of their motion to quash. On January 6, 1978, this motion was denied by the ALJ, who established January 23, 1978, as the final date for compliance with the subpoenas. CDA and OCDS moved before the ALJ on January 18, 1978, for reconsideration of his denial of their motion to quash and their motion for appeal to the Commission, arguing for the first time that the Commission lacked jurisdiction over the parties. The ALJ denied this motion on January 23, 1978. Upon the parties' subsequent refusal to comply with the subpoenas, on February 17, 1978, the Commission granted complaint counsel's motion requesting court enforcement of the subpoenas and enforcement papers were filed on March 14, 1978.

In an order issued April 19, 1978, the District Court for the District of Columbia concluded that it was inappropriate to consider the parties' jurisdictional challenge to the Commission's pending adjudicative proceeding. However, the court found that the ALJ had not had an opportunity to consider some of the parties' non-jurisdictional challenges. Accordingly, the court's order permitted

present to the ALJ by April 21, 1978, any of the non-jurisdictional challenges which they raised in the enforcement proceedings but which were not initially presented to the ALJ. The court's order further provides that the ALJ shall rule on any such challenges no later than April 28, 1978, and that after the ALJ has so ruled (and the Commission, if requested, has reviewed the matter), CDA and OCDS may assert in the enforcement proceeding any non-jurisdictional challenges to the instant subpoenas *duces tecum*. The order specifically indicates that the court will retain jurisdiction over the Commission's present enforcement petition pending the ALJ's consideration (and the Commission's, if so requested) of non-jurisdictional challenges not previously presented by the parties to the ALJ.

Pursuant to this order, CDA and OCDS filed the instant supplemental motion to quash and/or limit the subpoenas *duces tecum* on April 21, 1978, arguing that the specifications of the subpoenas are overly broad, seek irrelevant information, and are too indefinite. Additionally, the parties contend that compliance with the subpoenas would be unduly burdensome and that they are entitled to a protective order for confidential documents. By orders of April 28, May 1, and May 2, 1978, the ALJ issued a protective order but otherwise denied the supplemental motion and certified the matter to the Commission for its consideration in view of the order of the district court.¹

Ordinarily, under the Commission's Rules of Practice and Procedure the supplemental motion would have been untimely since no good cause for a belated, piecemeal submission has been shown to justify an extension under Section 3.34(b). Moreover, even had it been timely, the ALJ's denial of that motion, like other pre-trial discovery rulings, would not be reviewed by the Commission absent a showing (not made here) of a clear abuse of discretion. *See, e.g., Exxon Corp.*, 85 F.T.C. 91 (1975). The opposition of CDA and OCDS to court enforcement of the subpoena did not focus on a supplemental motion to quash as a form of relief, and the status of such motion under the Commission's Rules was not addressed in the litigation papers. Accordingly, the court had no reason to know that the review apparently contemplated by the court's order would ordinarily be unavailable, and it is open to question whether the court intended to require the Commission to engage in extraordinary review in this matter.

¹ We understand that the May 31, 1978 compliance date established by the ALJ is contingent upon the district court's enforcement of the subpoenas.

Nevertheless, in a spirit of compliance with the court's order and to forestall further delay in enforcement of the subpoenas,² the Commission has reviewed the ALJ's denial of the supplemental motion. Our review convinces us that there is no showing sufficient to warrant reversal of the ALJ's well-considered ruling. Accordingly,

It is ordered, That the Supplemental Motion to Quash and/or Limit the Subpoenas *Duces Tecum* is denied.

² We assume that the court did not intend to endorse any generally-applicable departure from the usual principle requiring exhaustion of administrative remedies, under which legal or factual arguments not tendered in a timely motion to quash a subpoena would be deemed waived.

Modifying Order

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATIONS OF THE
FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON
ACTS

Docket 8843. Final Order, Dec. 26, 1972—Modifying Order, May 12, 1978

This order modifies a final order to cease and desist issued December 26, 1972, 38 FR 1581, 81 F.T.C. 984, by changing Paragraphs 6 and 7 to permit acquisitions of \$1,000,000 or less without prior Commission approval, and by substituting for Paragraph 10, one that limits reporting obligations to those corporate alterations that may have a significant affect on compliance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

By a petition filed March 31, 1978, and revised by a petition filed April 26, 1978, respondent Georgia-Pacific Corporation asked the Commission to reopen this proceeding to modify Paragraphs 6, 7, and 10 of the consent order issued by the Commission on December 26, 1972.

Paragraph 7 of the consent order requires, *inter alia*, that Georgia-Pacific obtain Commission approval before purchasing non-softwood plywood assets when the seller is engaged in softwood plywood manufacturing. Georgia-Pacific contends that this reporting requirement is overbroad because the consent order was aimed at preventing Georgia-Pacific from increasing its market power in the softwood plywood industry, and it is unlikely that its ability to control price or entry in the relevant market would be affected when the acquisition is of non-softwood plywood assets.

Respondent also requests modification of Paragraphs 6 and 7 of the order so that it need not obtain approval of acquisitions of softwood plywood assets where the purchase price is less than 1 million dollars. Respondent believes that purchases of this size are *de minimis* and "would not undercut the effectiveness of the consent order, but it would reduce needless administrative burdens arising from compliance with the consent order. . . ." More precisely, respondent contends that it is unable to bid at auctions for softwood plywood equipment owned by softwood plywood firms, as these auctions often take place upon relatively short notice which precludes the soliciting and receiving of prior approval from the Commission. Because of their *de minimis* nature, these asset acquisitions, respondent believes, would likely be approved by the Commission.