

from participation in this proceeding be, and it hereby is, denied.
Commissioners Dixon and MacIntyre not participating.

IN THE MATTER OF
CARVEL CORPORATION ET AL.

Docket 8574. Order and Memorandum, Nov. 18, 1964

Order dismissing respondents' motion that chairman be disqualified because the chairman *sua sponte* had disqualified himself.

MEMORANDUM OF CHAIRMAN DIXON

NOVEMBER 17, 1964

Respondents have moved that I withdraw from participation in this proceeding, alleging that I have displayed "bias" and "prejudice" against them in two particulars. First, they quote from an October 1964 deposition of a New York attorney engaged in private practice, a Mr. Louis G. Greenfield, in which he purports to relate a conversation he says he had with me in 1960 when I was Counsel and Staff Director of the Senate Antitrust and Monopoly Subcommittee. In this deposition, Mr. Greenfield says that, as counsel for certain of respondents' franchised dealers, he visited the Subcommittee in 1960 to complain of Carvel's business practices. He says he showed me certain documents and that, after reading them, I expressed the view that Carvel's practices were unlawful under the antitrust laws.

Respondents' second contention is somewhat difficult to follow. As I read their moving papers, they are contending that the investigation by the Federal Trade Commission that culminated in the instant

proceeding had been abandoned prior to my taking office as Chairman in March of 1961, and that I caused it to be revived, presumably out of the same bias and prejudice I am alleged to have expressed in the 1960 conversation referred to above. Reference is also made to the fact that the Commission, including myself, rejected a proffered consent settlement in this proceeding, against the recommendation of the staff, in March 1963. I gather I am supposed to have caused this rejection, again out of bias and prejudice. Finally, respondents' affidavit recites that the private attorney who has made all these complaints against them, and who is now representing a number of Carvel's franchised dealers in an antitrust, treble damage action now pending in the United States Supreme Court,¹ is a former employee of the Federal Trade Commission, having worked as an attorney investigator in the Commission's New York Field Office from 1948 to 1956; that this attorney conferred with the Commission's attorneys that conducted the investigation of this matter in our New York office; and that our trial attorney, in replying to Mr. Greenfield's various letters of complaint to me and the Commission, thanked him for his "cooperation." Respondents also think it "interesting" that the Commission "chose," as the day on which to notify respondents of its intention to issue the complaint in this proceeding, "the first trial day" in the treble damage action against respondents mentioned above. Further, respondents recite that, at the hearing in the instant matter, they requested that certain of their documents received in evidence by our hearing examiner be held *in camera* lest it "become available" to Mr. Greenfield and his associates; that "it was respondents' belief that Messrs. Greenfield and Rothstein had participated in a conspiracy the purpose of which was to destroy respondents' business; and that there was a danger that information in the material produced by respondents would be utilized in furtherance of said conspiracy."² Respondents add that they have sued Mr. Greenfield and others in the New York Supreme Court³ for this alleged "conspiracy."

The inference sought from all this, I gather, is that I am in some way connected with this alleged effort to oppress respondents. If so, it is preposterous. As respondents' own moving papers make quite clear, the letters of complaint Mr. Greenfield wrote to me received no special attention; instead, they were referred to the staff and answered in routine fashion. The phrase in the staff's letters that respondents found particularly sinister—"thank you for your cooperation"—

¹ *Susser v. Carvel Corp.*, 206 F. Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F. 2d 505 (2d Cir. 1964), *cert. granted* October 28, 1964.

² Affidavit in Support of Motion 16-17 (November 10, 1964).

³ *Franchised Stores of New York, Inc. et al. v. Louis G. Greenfield et al.*, N.Y. Sup. Ct., Westchester County.

is routine in our correspondence with complaining parties and members of the public in general. Any citizen has a right to complain about what he conceives to be a violation of the laws administered by this agency. "A person who deems himself aggrieved by the use of an unfair method of competition . . . may of course bring the matter to the Commission's attention and request it to file a complaint." *Federal Trade Commission v. Klesner*, 280 U.S. 19, 25 (1929).⁴ The fact that a complaining party has also filed a private antitrust action in the federal courts has no bearing on our proceedings. The private action is available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." It has been granted by Congress for the vindication of private rights. The Federal Trade Commission, on the other hand, may bring an action "only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public' Public interest may exist although the practice deemed unfair does not violate any private right." *Klesner*, *supra* at 27.

Such private actions, however, because they incidentally serve the public interest in promoting observance of the law, have been given every encouragement by Congress. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955), the Supreme Court expressly noted "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." This was reaffirmed even more recently in *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F. 2d 725, 727-728 (3d Cir. 1962), where the court observed: "Private actions are an important means of enforcing the antitrust laws of the United States. Such actions are a vehicle for serving not only the immediate interests of the litigants, but the continuing interest of the public in a smoothly functioning and unobstructed system of commerce. Congress voiced its recognition of the importance of private actions by enacting special provisions for treble damages and attorneys' fees." See also Loevinger, "Private Action—The Strongest Pillar of Antitrust," 3 *Antitrust Bulletin* 167, 168 (March-April 1958), noting that the "private action automatically puts a host of interested and well informed persons in the enforcement force. It would take a vast bureaucratic army of government agents to begin to equal the effectiveness of interested private parties in policing the antitrust laws."

⁴ Section 1.12 of our Rules of Practice provide that: "(a) Any individual, partnership, corporation, association or organization may request the Commission to institute a proceeding in respect to any matter over which the Commission has jurisdiction. (b) Such request should be in the form of a signed statement setting forth the alleged violation of law and the name and address of the person or persons complained of. No forms or formal procedures are required."

Like all other citizens, treble damage litigants have a right to examine the public records, including the testimony and exhibits received in publicly held adjudicative proceedings, of the Federal Trade Commission.⁶ For us to hold such materials *in camera* for the purpose of concealing them from actual or potential private litigants would thus be squarely contrary to the expressed will of Congress. As we said in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, "we firmly believe the best interests of the public are served when all interested persons may, if they so desire, familiarize themselves with all aspects of an adjudicative proceeding. And it matters not whether that person's interest is motivated by an intention to intervene in the matter, to prepare for other litigation, to write an article or by mere curiosity. . . . Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute 'good cause' for secreting this evidence. Placing documents '*in camera*' for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. . . . Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. . . . Our efforts should be directed to aiding, not hindering, private enforcement of the antitrust laws." 58 F.T.C. at 1186-1187, 1189-1190.

Respondents' charge here that the Commission's staff was aided in its investigation of this matter by persons who later brought a private antitrust action, and that those persons, in turn, have attempted to avail themselves of the adjudicative record amassed by the Commission's staff attorneys in this proceeding, is merely an assertion that the Commission's attorneys have been performing their duty.

As for respondents' implied argument that I have been personally directing the staff's investigation and prosecution of this matter, suffice it to say that, while I was a member of the Commission when the complaint issued in 1962, I was unable to recall even the nature of the charges in that complaint when the instant motion was brought to my attention. It was only after refreshing my recollection that I was able to remember a visit to my office at the Federal Trade Commission by the complainants' attorney, Mr. Greenfield. As I recall the matter now, his complaint was referred to the staff like all other complaints that come to my office. I know nothing about the subsequent progress of the case, except that I joined with the other members of the Commission in voting for the issuance of the complaint more than a year ago, and that it is now on my calendar for oral argument before the full Commission in the next few days. I have not contacted

⁶ Rules of Practice, § 1.132(5).

our investigative or trial attorneys about the case or otherwise intervened in its routine handling in any shape, form, or fashion.

I am even more in the dark about the conversation I am supposed to have had with Mr. Greenfield in the Senate Subcommittee's offices in 1960. As mentioned above, Mr. Greenfield has stated under oath that he did talk to me then, that he showed me certain documents he considered proof of Carvel's unlawful business practices, and that, after reading them, I expressed the view that they did in fact evidence a violation of law. While I have no independent recollection that the conversation took place, much less of what was said—and thus have no recollection of the charges he might have made or the materials he might have shown me to support them—I have no reason to doubt that it did in fact occur or that I did express a view as to whether the practices he described amounted to a violation of the antitrust laws. As counsel for the Subcommittee, it was my duty to receive such complaints from aggrieved members of the public and evaluate their relevance to the Subcommittee's studies of the effectiveness of existing antitrust laws and the possible need for additional legislation.

Such a conversation, however, would not disqualify me to hear the instant case. As I mentioned above, I don't remember the conversation, and I certainly don't remember any "prejudices" or "prejudgments" I might have entertained then. If I was shown something by Mr. Greenfield in 1960 that led me to believe then that Carvel had violated the antitrust laws, the intervening four years have erased it from my mind. Hence I hold no present "prejudgments" about the instant case.

But even if I had total recall both of the materials Mr. Greenfield is said to have shown me in 1960 and the conviction I am supposed to have expressed then, this would not, as a matter of law, disqualify me here. In *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), the court passed on this issue squarely. The Federal Trade Commission had conducted a thorough investigation of the "basing point system" as it was used in the cement industry. Then, pursuant to statute, the Commission "reported" its findings and conclusions to Congress and to the President. Its principal conclusion was that the industry's basing point system was a price fixing device and thus unlawful under the Sherman and Federal Trade Commission Acts. Thereafter the Commission filed a formal complaint against virtually all of the country's cement producers, basing its charges on the earlier "basing point" investigation. Marquette, alleging that the Commission as a body had "prejudged" the issues in its reports to Congress and the President, demanded disqualification of the entire Commission. The court of appeals said: "It has been held that

the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." 147 F. 2d at 592. The Supreme Court affirmed, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703 (1948), declaring that the test in such cases is whether "the minds of its [the Federal Trade Commission's] members were *irrevocably closed* on the subject of the respondent's basing point practices." 333 U.S. at 701 (emphasis added). The Court pointed out that, while the members of the Commission had thus started the formal adjudication with a provisional belief that the charges in the complaint were in fact true, the parties charged had had every opportunity to change the Commissioners' minds: "Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Ibid.* See also *Lumber Mut. Casualty Ins. Co. of New York v. Locke*, 60 F. 2d 35, 38 (2d Cir. 1932), where the court held that certain statements made by an administrator did not require disqualification because "they fell short of a statement that nothing that might be shown at such a hearing would change his mind. . . . They did not indicate that his mind was not open to any proof. . . ."

In fact, as I pointed out only a few days ago in *Pure Oil Co. et al.*, Dkt. 6640 et al. (Memorandum of Chairman Dixon, October 29, 1964), 3 CCH Trade Reg. Rep. Par. 17,113 [p. 1552 herein], every member of this agency, being required by statute to have "reason to believe" the law has been violated prior to joining in the issuance of a formal complaint, Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), "can never come to his adjudicative task with a mind wholly devoid of factual information about the subject before him. The statutory scheme . . . positively *requires* him to entertain a provisional conviction on the subject before the charges are even lodged." See also my memoranda in *Campbell Taggart Associated Bakeries*, Dkt. 7938 (May 2, 1963), Trade Reg. Rep. Par. 16,399 (1961-1963 Transfer Binder) [62 F.T.C. 1494, 1498]; *Lloyd A. Fry Roofing Co.*, Dkt. 7908 (June 30, 1964), 3 CCH Trade Reg. Rep. Par. 16,968 [65 F.T.C. 1317]; and *Bakers of Washington*, Dkt. 8309 (November 4, 1964) [p. 1562 herein]. Since I have no personal recollection of the 1960 conversation referred to above, know virtually nothing about the instant case, and thus know for a fact that I have no convictions of any sort as to whether respondents have violated the law—much less an "irrevocably closed" mind on the subject—I am plainly not required to disqualify myself here. *Cement Institute, supra.*

However, as I have pointed out in the *Campbell Taggart and Fry* proceedings, *supra*, one of the factors to be weighed by the adjudicator whose fairness has been challenged is the matter of "appearances." It is indeed important not only that justice should be done, but that it should "manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices*, 93 L.J.K.B. 129, 131 (1924). It seems to me that, in the unique circumstances of this case, particularly the fact that I cannot recall the conversation in question and hence am powerless to explain or deny the statements attributed to me, the only way I can completely and conclusively prove the baselessness of these "bias" and "conspiracy" charges against both myself and the staff is to withdraw.

I shall not participate in the Commission's deliberations or decision in this proceeding.

ORDER DISMISSING MOTION TO DISQUALIFY

Respondents having filed on November 12, 1964, a motion that the Commission disqualify Chairman Paul Rand Dixon from participation in the adjudication of this proceeding; and

Chairman Dixon having determined *sua sponte* to disqualify himself therefrom:

It is ordered, That respondents' motion be, and it hereby is, dismissed as moot.

Commissioner Dixon not participating.

IN THE MATTER OF
KNOLL ASSOCIATES, INC.