Order denying respondents' motion to dismiss complaint on grounds that the Chairman had prejudged the case and that complaint counsel was conducting post-complaint investigation.

OPINION OF THE COMMISSION

MARCH 18, 1968

This matter is before the Commission upon the hearing examiner's

certification of respondents' motion to dismiss the complaint filed pursuant to § 3.22 of the Commission's rules of practice.

The motion, filed February 1, 1968, is based upon two grounds:

1. The members of the Commission are disqualified from performing a judicial function in this case because of the prejudgment of the facts as set forth in their letter to the Chairman of the Committee on Commerce of the United States Senate under date of November 28, 1967 * * *.[1]

2. The incorrigible persistence of Complaint Counsel in conducting post-complaint investigations now in the form of a request for a subpoena *duces tecum* * * *.[2]

On February 14, 1968, the examiner certified this motion to the Commission with a recommendation that the motion to dismiss be denied. We adopt the examiner's recommendation.

The letter which allegedly is responsible for a prejudgment of the facts in this matter was a response, signed by Chairman Paul Rand Dixon, to Senator Warren G. Magnuson's letter of October 10, 1967, "requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field."

Respondents' complete argument on the disqualification issue is that:

Chairman Dixon, speaking for the Commission, stated on page 2 of the letter that "generally speaking, these firms [home improvement companies] operate through a program of offering phony bargains, easy credit and exaggerated performance claims." The letter goes on to set forth in great detail a restatement of the complaint issued in this matter. There can be no doubt that there has been a prejudgment of this case which destroys the ability of the Commissioners to perform the judicial function imposed upon them by law. The letter cited states on page 6 that two cases are "presently being litigated." This case must be one of those cases.

We have therefore both a general and a specific prejudgment.[3]

Respondents also cite the *Amos Treat & Co.*[4] and *Texaco, Inc.*[5] cases as authority for their position.

The entire context of the letter, which is the basis for this motion, provides the Senate Committee on Commerce with general information relative to problems with which the Committee had a legitimate and constitutional concern. The letter simply advises the Senate Committee that the Commission is aware that problems exist in some segments of the home improvement industry, outlines certain of the problems, and advises in generalized terms what the Commission is doing in this area.

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[1] Motion to dismiss, p. 1.
[2] *Id.*, at pp. 1–2.
[3] *Id.* at p. 2.
[4] *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 260 (D.C. Cir. 1962).
[5] *Texaco, Inc. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964).

In the fifth paragraph on page nine, the letter recognized that the great majority of firms in this industry are both honest and reliable. In quoting Chairman Dixon's letter, respondents inserted the words "home improvement companies" in brackets. The insertion of these words had the effect of altering the meaning of this sentence because it was taken out of the context of the third paragraph. The words "these firms" as utilized in the letter, do not refer to "home improvement companies" in general.

The first paragraph on page two contains an estimate that 50,000 firms are engaged in the sale and installation of residential siding and storm windows. The true meaning of the third paragraph on this page, when read in connection with the two preceding paragraphs, is simply that, of the estimated 50,000 home improvement dealers in this country, a substantial number (without specific identification of any company) operate through a program of offering nonexistent bargains, etc. This, obviously, is not a general prejudgment of home improvement contractors, but a simple recognition that there are many firms in this industry that are engaging in deceptive and unfair trade practices.

Chairman Dixon's letter enumerates 14 operational patterns of the unethical firms in the home improvement industry which have become almost standardized. Among others, the following are mentioned on pages two and three: bogus contracts (No. 5); scare tactics (No. 9); referral selling (No. 10); spiking the job (No. 12); and affirmative misrepresentations (No. 13). Not one of these practices is challenged in the complaint in this case.

Respondents further assert that on page six, the letter referred to two cases which are presently being litigated and that "this must be one of those cases." The Commission is aware that it issued the complaint in this case. This does not mean that the Commission has prejudged the matter. Whether or not respondents are engaged in the deceptive practices described in the complaint will, of course, depend on the facts, and the facts will be judged only after the record is complete. A similar complaint was issued in another home improvement case. After a full hearing before a hearing examiner, the Commission, on appeal, held for respondents and dismissed the complaint.[6]

In the *Amos Treat & Co.* case, the court held that a member of the Securities and Exchange Commission could not participate in a decision of the Commission when prior to the appeal he had engaged in the performance of specific investigative or prosecuting functions of the case on review. This is not even remotely the issue here. The *Texaco* case is likewise inapplicable. Nothing was involved there but the precise words of a particular speech. The speech was construed by the court as indicating a prejudgment because respondents were specifically referred to in a context which could be interpreted as convey-

[6] *House of Marbet, Inc.*, Docket No. 8578, order issued September 24, 1964 [66 F.T.C. 787].

ing a belief that they had violated the law. There is nothing in the letter in this matter to indicate that any member of this Commission had decided that the respondents, or any other specific home improvement firm, have violated Section 5 of the Federal Trade Commission Act.

An implication of respondents' motion is that administrators must be disqualified from hearing a case if there is some evidence that they have made some measure of adjudgment of the law prior to consideration of the particular case. This would have, if accepted, the singular disadvantage of disqualifying any administrator or judge the second time a particular legal question came before him. As the Supreme Court has said:

> Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact.[7]

And added the Court:

> . . . the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.[8]
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> If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first [specific industry] unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage * * *.[9]

Indeed, it is hornbook law that the kind of bias that disqualifies [10] refers to an "irrevocably closed" view of the particular parties or facts

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[7] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702–703 (1948).

[8] *Id.*, at 703.

[9] *Id.*, at 702.

[10] Thus, "[i]t has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." *Marquette Cement Mfg. Co.* v. *Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), *aff'd, Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948).

See *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), *removed from docket*, 338 U.S. 189 (1949), a case involving the charge that Judge Holtzoff, having investigated "aliens and Communists, including appellant," in his former post as Special Assistant to the Attorney General, was biased and prejudiced. The Court of Appeals for the District of Columbia Circuit held: "Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (170 F. 2d at 278); *Lumber Mut. Casualty Ins. Co. of New York* v. *Locke*, 60 F. 2d 35, 38 (2d Cir. 1932) (held that, while "tactless" for administrator to have written letter saying he had investigated matter to his satisfaction and hearing would be mere formality, the letter "fell short of a statement that nothing that might be sown at such a hearing would change his mind . . . ."); *O'Malley* v. *United States*, 128 F. 2d 676, 680 (8th Cir. 1942), *rev'd on other grounds*, 317

involved in a specific case, not to the adjudicator's preconceptions about the *law*. "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [11] Respondents have failed to demonstrate either a general or specific prejudgment by any member of this Commission of the facts and issues in this proceeding.

The respondents' second contention is likewise without merit. The examiner stated in his certification that he has made no rulings on complaint counsel's current attempts to obtain information from respondents. The examiner has signed no subpoenas nor directed the taking of any depositions at this juncture. Section 3.35 of the rules of practice does not grant respondents any right to appeal until such time as the examiner makes his rulings on complaint counsel's applications. Accordingly, the certified motion to dismiss the complaint will be denied. An appropriate order will be entered.

ORDER RULING ON EXAMINER'S CERTIFICATION OF RESPONDENTS' MOTION TO DISMISS THE COMPLAINT AND REMANDING TO HEARING EXAMINER

The hearing examiner herein pursuant to § 3.22 of the Commission's rules of practice, on February 14, 1968, certified to the Commission respondents' February 1, 1968, motion to dismiss the complaint; and

The Commission for the reasons set forth in the accompanying opinion, has determined that respondents' motion to dismiss the complaint should be denied and that the matter should be remanded for further proceedings. Accordingly,

It is ordered, That respondents' motion of February 1, 1968, to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings.

U.S. 412 (1943) (held district judge not disqualified to hear contempt case although he had directed U.S. District Attorney to commence it with observation that it was "apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others") ; *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956) (held Attorney General not disqualified to adjudicate whether Lawyers Guild should be designated a subversive organization although he had made a public speech declaring that it was "because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations").

[11] Davis, 2 *Administrative Law Treatise* 130, 131 (1958). "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Id.* at 138,, n. 28, quoting Jaffe. "The Reform of Administrative Procedure," 2 Pub. Ad. Rev. 131, 149 (1942).