

ITT CONTINENTAL BAKING COMPANY, INC., ET AL.

Docket 8860. Order, April 11, 1973.

Order denying respondents' motion to disqualify Commissioner Jones from participation with separate statement by Commissioner Jones in response to the motion.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE
MOTION OF RESPONDENTS THAT SHE BE DISQUALIFIED FROM
FURTHER PARTICIPATION IN THE PROCEEDING

Memorandum

82 F.T.C.

Respondents ITT Continental Baking Company, Inc., and Ted Bates & Company, Inc., by motion dated March 8, 1973, have moved that the Commission disqualify Commissioner Jones from further participation in the above-captioned proceeding.

In view of the fact that such a motion would be moot in the event that I should voluntarily decide not to participate in this case based on the grounds urged in the motion for my disqualification, this memorandum sets forth my views as to whether I feel myself to have prejudged any issue in this proceeding which would lead me to refrain from participating in this case.

In support of their motion, respondents rely on my recent dissent to the Commission's denial of the motion of three organizations to intervene in the instant proceeding. They also rely on several sentences contained in my April 29, 1971 speech before the Consumer Protection Conference as indicating my prejudgment or appearance of prejudgment concerning the issues in the instant proceeding. Copies of my dissent and speech are attached.

Respondents rely essentially on one phrase in a single sentence in my nine-page dissent which they claim constitutes a conclusion on my part as to the legality of respondents' advertisements which are in issue in this proceeding. This single sentence is part of my factual recitation of the intervenors' claims made in support of their motion. Intervenors in their motion argued they were within the zone of interests sought to be protected by the statute and that they were adversely affected or aggrieved persons. They assume throughout their brief that the advertisements are false in order to argue that they had the requisite interest in the case. My dissent, therefore, dealt with their arguments as they were presented and generally compared these arguments with the position of the SOUP intervenors in the Commission's proceeding involving Firestone.¹ The sentence on which respondents rely and the paragraph in which it is contained reads as follows:

Like the SOUP intervenors, the three intervenors here claim that the individuals whom they represent are exposed to, react to and are motivated by advertising for which respondents are responsible. Their members include both parents who are concerned with physical and mental growth,

¹ See *In the Matter of Firestone Tire and Rubber Co.*, Dkt. 8818, Amended Motion of Soup to Intervene and for Other Purposes, September 1, 1970. The SOUP intervenors were granted a limited right to intervene in the Firestone proceedings.

development and health of their children as well as consumer of respondents' advertised products who like the SOUP intervenors, have a special interest in the truthfulness of respondents' advertisements and who *would be aggrieved by a failure to adequately correct the false, misleading and deceptive impressions created by the challenged advertisements.* Thus these petitioners contend they represent the very persons who have personally experienced the injury which respondents' challenged advertisements are alleged in this complaint to have visited on members of the consuming public. (Respondents' emphasis) pp. 3-4 of my dissent.

Respondents claim that the phrase they emphasized constitutes a conclusion on my part as to the legality of their advertisements which are in issue in the instant proceeding. A careful reading of this phrase in the context of the dissent clearly indicates that I am discussing the intervenors' claims made in support of their motion. It in no sense can be read as a conclusion on my part as to the validity of these challenged advertisements since in the very next sentence I refer to the impact which these advertisements are alleged by the complaint to have on the public. It is also equally clear from a reading of my entire dissent that my discussion deals essentially with the arguments which the intervenors presented in support of their petition and with which I generally agreed.

The critical issues in reaching a conclusion as to the propriety of a request for intervention rests on an examination of the type of interest, if any, which the particular intervenors may have in the challenged activities and the impact of any order which the Commission might issue. The determination of these issues are essential factors in deciding whether the particular intervenor would be aggrieved or adversely affected by Commission action in the case. In order to argue that they have the requisite interest in a case, intervenors assumed that the advertisements involved are false. My summation of their argument in the phrase challenged by respondents obviously paraphrased the same assumption.

It is difficult for me to conceive how anyone could misconstrue the challenged phrase as indicating a conclusion on my part as to the legality of respondents' advertisements. Neither the particular sentence singled out by respondents nor the dissent read as a whole constitutes a prejudgment of any issue in this case nor do I believe it creates the appearance of prejudgment. *U.S. v. Grinnell Corp.*, 384 U.S. 563, 580-583 (1966). Indeed it could not since I have not prejudged any issue in this case.

Respondents' second basis for their motion for my disqualification rests on a speech which I gave at a Consumer Protection Conference in Madison, Wisconsin, on April 29, 1971, entitled

"The Responsibilities of Consumer Protection Efforts in the Field of Advertising." One section of the speech was devoted to a documented summary of recent expressions of public concern with the impact of advertising on children and suggested several steps which the advertising industry through its proposed public review board, and members of the public might voluntarily take to respond to these public concerns. A second, much briefer, section of my speech dealt with a summary of the action of the Federal Trade Commission and the Federal Communications Commission with respect to some of these areas of public concern and criticism as a prelude to my urging of my audience to act on their own to respond to these problems of public concern. I specifically prefaced my remarks on this subject by stating that I was not dealing with issues of the FTC's legal power or statutory authority to deal with these issues.² What I was concerned with, and what was the clear thrust of my speech, was that industry should act on its own voluntarily to deal with the public comment and concerns about advertising to children.

Respondents have seized on two isolated excerpts from this speech as examples of statements which they claim express conclusions involving issues raised in the instant proceeding. The full paragraph in which the first challenged statement appeared reads as follows:

It seems to me that one of the first problems which such an industry board could do would be to explore the feasibility of establishing special advertising standards for children's advertising. Given the greater impressionability of children, *their inability to distinguish fact from opinion, persuasion from teaching, or reality from fantasy or puffing*, and their greatly enhanced memorization capability, surely the advertiser must assume a high degree of responsibility for the representations which he beams to this audience. Simple factual statements of the actual performance or function of the product such as would be found in a children's text book would seem to be the ultimate [sic] goal.

² Address by Commissioner Jones before the Consumer Protection Conference, April 29, 1971, p. 11:

"I do not want to address myself here to the questions of legal power and statutory authority to create special guidelines or standards regulating the use of advertising on children's programs. Rather, I would like to focus on the steps which I believe those most directly concerned with the problem - the industry and the public - should take in order to eliminate the basis for the increasing criticism."

Moreover, I also pointed out that while the Commissioner would take action to the extent these problems engaged its jurisdiction, we could not act as respects those matters which were simply regarded as offensive. (Id., pp. 11 and 14)

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Memorandum

It would be difficult to justify for children the type of puffery, hyperbole or persuasion-by-association commonly found in the typical themes in today's television commercials directed to adults. Certainly hard-sell techniques should have no place in these commercials. If the industry can adopt special guidelines to limit the advertising of cigarettes to young people, it should have no difficulty in devising special advertising standards for the promotion of products addressed to children. (Respondents' emphasis) p. 12 of my speech.

Respondents apparently believe that my use of the word "given," for which I might have substituted the words "taken as a premise" or "assuming" indicates that prejudgment.

In order to bolster that argument, respondents attempt to link these remarks to a later footnote in my speech in which I was documenting for my audience the public actions which FTC has taken which involved children's advertising. This footnote, which appeared on page 13 of my speech, reads as follows:

⁷ The FTC has also recently proposed and filed several complaints either involving advertising of children's products or making special claims about the products' value to children's health.

The footnote relates to the sentence in the text which states: In December 1970, the FTC announced its intention to work closely with the Federal Communications Commission in exploring the possibility of conducting joint FTC-FCC hearings on TV advertising beamed to children.⁷

This footnote does not refer to the textual passage on page 12 of my speech which respondents' have challenged. It was supplied solely for informational purposes in the portion of my speech which generally outlined the public actions of regulatory agencies relating to children's advertising.

The entire speech makes it patently clear that I was in no way dealing with or discussing the truth or falsity of any particular advertising claims, much less of any claims in this case, and that the speech was in no way designed or offered as taking any position involving the merits or lack of merit of any allegations in the instant complaint. It is difficult for me to see, therefore, that the particular excerpts relied upon by respondents could possibly be construed now or were at the time construed by the audience as a prejudgment of issues in this case.

I affirm without any equivocation that I have not prejudged any issue in this case. Therefore, I decline to disqualify myself from further participation in this proceeding.

I shall not be present and shall not participate in any deliberation or decision of the Commission concerning respondents' motion that the Commission disqualify me from further participation in this proceeding.

March 16, 1973

This matter is before the Commission upon respondents' motion filed March 8, 1973, to disqualify Commissioner Jones from further participation in the captioned proceeding on the ground that Commissioner Jones has prejudged, or at least given the appearance of having prejudged, factual issues in this case.

In response to that motion, Commissioner Jones on March 16, 1973, filed for the record a memorandum stating that she declined to disqualify herself, setting forth her reasons and stating she had not prejudged any issue in this case. She also stated that she will neither be present nor participate in any deliberation or decision by the Commission concerning her disqualification. On March 27, 1973, petitioners filed with the Commission a response to Commissioner Jones' answer to the motion.

The Commission has carefully considered the documents submitted by ITT Continental Baking Company, Inc., and Ted Bates & Company, Inc., and Commissioner Jones' response to their motion, along with her speeches and dissenting opinion, alleged by them to support the motion to disqualify. Upon such consideration, the Commission has determined that there is no basis in law or fact for the relief requested. Accordingly,

It is ordered, That the motion to disqualify Commissioner Jones be, and it hereby is, denied. Commissioner Jones did not participate in the Commission's consideration and decision on this matter.

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY, INC., ET AL.