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Memorandum of Commissioner Collier

IN THE MATTER OF

AMERICAN GENERAL INSURANCE CO.

Docket 8847. Interlocutory Order, June 14, 1977

Denial of respondent's motion to disqualify Commissioner Collier.

ORDER DENYING MOTION TO DISQUALIFY

Respondent has moved to disqualify Commissioner Collier from participation in the Commission's decision of the instant appeal. Respondent contends that Commissioner Collier's participation in this matter would, by virtue of his participation in prior court litigation, violate the Administrative Procedure Act¹ and the Due Process Clause.

In response to the motion, Commissioner Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth his reasons therefor. Upon consideration of respondent's motion, complaint counsel's answer and Commissioner Collier's memorandum, the Commission has determined that no grounds exist for granting the requested disqualification. The Commission does not believe that Commissioner Collier, as General Counsel, performed any investigative or prosecuting functions in this matter or that his prior participation raises a question about his ability to render a dispassionate judgment. Therefore,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

Commissioner Collier did not participate in the Commission's determination of this matter.

MEMORANDUM OF CALVIN J. COLLIER, COMMISSIONER, IN
RESPONSE TO MOTION THAT HE BE DISQUALIFIED FROM
PARTICIPATION IN THIS PROCEEDING

MAY 25, 1977

On July 19, 1976, American General and Fidelity & Deposit (hereafter "American General") moved that I be disqualified from participating in this proceeding because, during my tenure as the Commission's General Counsel,¹ I was "of counsel" on a brief filed on behalf of the

¹ An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this title • • • 5 U.S.C. 554(d).

¹ From July 1973, through April 1975.

Commission in a collateral action American General brought to enjoin this proceeding.²

In an initial decision of March 7, 1972, which is not the subject of this appeal, an administrative law judge recommended that the complaint be dismissed because the Commission lacked subject matter jurisdiction under the McCarran-Ferguson Insurance Regulation Act ("McCarran Act"), 15 U.S.C. 1011. The Commission reversed the law judge, concluding that the McCarran Act would be no defense to this proceeding, 81 F.T.C. 1052 (1972). American General then filed its collateral action seeking to enjoin the proceeding, contending that the Commission had erred. The collateral action was dismissed, *American General Insurance Co. v. FTC*, 359 F.Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

American General's argument is that "the appearance of [my] name on the Fifth Circuit brief indicates that [I] have been an advocate of the Commission's position in this case and thus calls into question [my] ability now to render a dispassionate judgment therein."³

The brief American General mentions was filed on behalf of the Commission itself and not on behalf of Commission staff supporting the administrative complaint, and therefore presents no "mixture of functions" question under Section 5(c) of the Administrative Procedure Act.⁴ The brief simply presented the conclusion already reached by the Commission; that the McCarran Act does not bar this proceeding. American General does not suggest that the Commission is somehow similarly disqualified for rejecting American General's McCarran Act defense. The brief did not offer an opinion as to whether, as the complaint alleges, American General has violated Section 7 of the Clayton Act, stating at one point that:

[I]t is certainly possible that the result of the Commission proceedings against American General and F&D will be the dismissal of the Commission's complaint.

[Brief for the Appellees, at 16.]

My "of counsel" role on the Fifth Circuit brief indicates, at most, agreement with the Commission's prior decision on an issue of law and

² "Memorandum of Points and Authorities in Support of Respondent's Motion to Disqualify Chairman Collier" ("Memorandum") at 1.

³ "Memorandum," *id.*, at 2.

⁴ As I have previously noted, the General Counsel neither possesses nor exercises prosecutorial responsibility in the Commission's administrative actions, which is the exclusive responsibility of the Bureaus of Competition and Consumer Protection and the Regional Offices. The General Counsel does not have the kind of stake in an administrative proceeding which would inhibit a fair decision, and his participation in an adjudication therefore does not offend Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 544(d). See the Commission's orders and my memoranda in *National Commission on Egg Nutrition*, Dkt. 8987 (July 16, 1976) ["Order Denying Request to Disqualify"] 88 F.T.C. 84; and *Jim Walter Corp.*, Dkt. 8986 (November 23, 1976) ["Order Denying Motion to Disqualify"] 88 F.T.C. 865, and the authorities there cited.

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policy, *i.e.*, the application of the McCarran Act to this matter. American General would not, as a result, be denied a fair hearing in violation of Section 7(a) of the Administrative Procedure Act, 5 U.S.C. 556(b), as American General suggests. A fair hearing does not require the trier of fact to approach each new matter without any idea as to what the law or public policy requires.⁵

I conclude that there is no reason for me to decline to carry out my statutory duty to participate in this proceeding.

⁵ *FTC v. Cement Institute*, 333 U.S. 683, 702-703 (1948); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 764-765 (6th Cir. 1966); 2 Davis, Administrative Law §12.01.

Complaint

89 F.T.C.

IN THE MATTER OF

MENS' WEAR INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2894. Complaint, June 21, 1977 — Decision, June 21, 1977

This consent order requires a New York City importer and distributor of clothing to cease misrepresenting the wool and other fiber content of its wool blend clothing. Further, the order requires the respondent to notify all purchasers of its misbranded products that the clothing purchased had been misbranded.

Appearances

For the Commission: *John Varounis* and *Martin Gorman*.

For the respondents: *Pro se*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mens' Wear International, Inc., a corporation, and Leon Rich and Frank Heineman, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, 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. Respondent Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents are engaged in the importation of clothing products, including but not limited to men's and boys' CPO jackets, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and

sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain men's and boys' CPO jackets stamped, tagged, labeled, or otherwise identified by respondents as "30% reprocessed wool, 22% chief value linen, and 48% unknown reclaimed fibers" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely items of clothing with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were further misbranded by the respondents in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the rules and regulations promulgated under said Act in the following respect:

Non-required information was set forth in such manner as to be false, deceptive or misleading in violation of Rule 10(b) of said rules and regulations. Among such non-required false, deceptive or misleading information was the term "chief value" used in connection with the disclosure of linen content on labels affixed to said wool products.

PAR. 6. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Mens' Wear International, Inc., a corporation, its successors and assigns, and its officers, and Leon Rich and Frank Heineman, individually and as officers of said corporation,

and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.
3. Placing non-required information on stamps, tags, labels or other identification affixed to such products that is in any way false, deceptive or misleading.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that government tests have shown that such products were misbranded.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

FRITO-LAY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
2 OF THE CLAYTON ACT

Docket 9066. Complaint, Jan. 6, 1976 — Decision, June 24, 1977

This consent order, among other things, requires a Dallas, Texas ready-to-eat snack food producer and distributor to cease engaging in discriminatory pricing practices by selling its products to certain retailers at prices higher than those paid by a competitive establishment. Further, the order stipulates that in any enforcement action, respondent must assume the burden of proving all defenses raised.

Appearances

For the Commission: *Gordon Youngwood and Robert W. Rosen.*

For the respondent: *John Kirby, Mudge, Rose, Guthrie & Alexander,* New York City, *Miles J. Alexander, Emmet J. Bondurant and Susan A. Cahoon, Kilpatrick, Cody, Rogers, McClatchey & Regenstein,* Atlanta, Ga. and *Ronald R. Kranzow,* Dallas, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Frito-Lay, Inc., a wholly-owned division of PepsiCo, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

PAR. 2. Respondent has approximately 49 plants in 25 states which produce a varied line of snack food products, including corn chips, potato chips, tortilla chips, pretzels and several more lines.

Respondent sells its corn chips and other snack food items of like grade and quality to a large number of purchasers located throughout the States of the United States who purchase such products for use and resale therein.

PAR. 3. Respondent is now, and has been, transporting corn chips and other snack food products from the state or states where such products are manufactured or stored in anticipation of sale to purchasers located