

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Nov. 30, 1978

ORDER DENYING MOTION TO DISQUALIFY

Respondents Kellogg Company and General Mills, Inc., have moved that Chairman Pertschuk disqualify himself, or alternatively, that the Commission determine that he is disqualified from participating in any proceeding in this matter. In response, Chairman Pertschuk has filed a memorandum declining to disqualify himself from the proceedings and setting forth the reasons therefor.

Upon consideration of respondents' motions and the Chairman's memorandum, the Commission has determined that no grounds exist for granting the requested relief. Accordingly,

It is ordered, That respondents' motions to disqualify be, and the same hereby are, denied.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

MEMORANDUM OF CHAIRMAN PERTSCHUK IN RESPONSE TO
MOTION TO DISQUALIFY HIM FROM PARTICIPATION IN THIS
PROCEEDING

Respondents Kellogg Company ("Kellogg") and General Mills, Inc. ("General Mills") have filed motions asking that I disqualify myself, or that the Commission determine that I am disqualified, from further participation in this proceeding. For the reasons stated below I believe my participation in this case is proper, and decline to disqualify myself.

In support of their contention that I have made statements creating the appearance of partiality and prejudgment in this matter, Kellogg and General Mills rely on a quote from the Battle Creek Enquirer and News, June 24, 1977, at B1, col.1 (Connelly Aff. ¶2; Savarese Aff. ¶3). There, in an article published under the byline of the Gannett News Service, I am reported to have said:

[W]inning the cereal case would "be an enormous help. . . It just depends how you win it, what you win, what kind of remedy you fashion."

The references to "winning the cereal case" appear outside the quotation marks,¹ which squares with my recollection of the interview which gave rise to the article. My recollection of the substance of the quote is that I was referring to the "big case" generically.² I recall no use of the term "winning" and was solely concerned with structuring cases to see that they were shaped for trial with a carefully fashioned remedy in mind.

Taken as a whole, the article reflects my own general attitude toward the "big case" approach to antitrust problems. My recollection is that the more accurate form of the above quote would have been "appropriately crafted structural cases can be an enormous help. . . ." I did not then, and do not now, have any opinion as to the outcome of the *Kellogg, et al.*, litigation.

In each instance in which a court has disqualified agency decisionmakers, that action has been based on comments showing what would appear to a disinterested observer as a viewpoint or prejudice concerning specific controverted factual issues, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966), or the ultimate issue of liability, e.g., *Texaco Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964); *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970), in a pending adjudicative matter. My comments reflect no such commitment with respect to this case. See *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972). They can at most be read as reflecting an underlying philosophy or policy favoring effective enforcement of the antitrust laws, which would not be ground for disqualification. Cf. *American Cyanamid Co. v. FTC, supra*, 363 F.2d at 764.

The motions also cite numerous other statements that allegedly reflect hostility toward respondents or bias as to issues involved in this proceeding. See Connelly Aff. ¶¶3-6; Savarese Aff. ¶¶4-7. The cited statements concern the content of television commercials, their effect on children, and the effects of advertising that stimulates brand name identity and product differentiation. These remarks reflect my views on issues of law, policy, or legislative fact, which are not grounds for disqualification. See, e.g., *Laird v. Tatum*, 409 U.S. 924, 839 (1972)(memorandum of Rehnquist, J.); *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *United States v. Morgan*, 313 U.S. 409, 421 (1941); 2 K. Davis, *Administrative Law*, §12.01, at 144.

¹ General Mills' motion erroneously creates the impression that those words were part of my quotation. Savarese Aff. ¶3. I have referred to the actual Enquirer and News article to verify the quote as it appears in this memorandum.

² In fact, the same article states that I declined to comment on specific aspects of the "cereal case."

They do not touch upon specific factual issues raised in the pleadings or the ultimate issue of liability.³

A third category of statements relied on in the motions to disqualify concern my professed irritation with the requirement that I not prejudge matters on which I must sit as judge. See Connelly Aff. ¶8; Savarese Aff. ¶8. Those statements bear no relation to this case. Moreover, I believe the statements, read in context, reflect my fidelity to the rule that I refrain from passing judgment on pending matters, no matter how frustrating I may find that rule to be.

Finally, Kellogg cites (Connelly Aff. ¶7) a statement of mine in which I described a meeting with Kellogg's President as "a frank and open exchange of views — in the words of cold war diplomacy. . . ." It should be clear to any reader of that statement that the words were used facetiously and do not reflect a personal animus toward Kellogg.

I reiterate that I have not arrived at any conclusions regarding the issues in this case, and will not do so until it is properly before me. Accordingly, I decline to disqualify myself from further participation in the proceeding.

³ See also my letter to Gilbert H. Weil, Esq., dated July 13, 1978, responding to a petition to disqualify me in the Children's Advertising Rulemaking proceeding, which discusses these issues in greater detail.

IN THE MATTER OF
VITAL-E T/A MAIL ORDER SERVICES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9082. Complaint, May 11, 1976 — Decision, Nov. 30, 1978

This consent order, among other things, requires a Tarzana, Calif. mail order company and its advertising agency to cease disseminating advertisements which misrepresent that any dietary drug, plan or device will cause weight loss without exercise or caloric restriction; or that any vitamin supplement, food or drug will eliminate adverse skin conditions, stop or reverse the aging process, or enhance sexual potency. The firms are further required to disclose health or cosmetic risks posed by products; offer refunds for products that pose such risks; and furnish substantiation for all claims regarding product performance, safety and efficacy. Additionally, the order prohibits the firms from misrepresenting product sources, or government association.

Appearances

For the Commission: *Kendall H. MacVey* and *Robert J. Enders*.
For the respondents: *Richard M. Crane* and *Milton Linder*,
Beverly Hills, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; Milton Kalman, individually and as an officer of corporate respondent Vital-E; Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc., with all the aforementioned having done and doing business under various fictitious trade names, hereinafter referred to as respondents, have violated the provisions of said Act, 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:

PAR. 1. Respondent Vital-E is a corporation organized, existing, and doing business under and by virtue of the laws of the State of