

Order

88 F.T.C.

IN THE MATTER OF
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.

Docket 8987. Order, July 16, 1976

Order denying respondents' request that Chairman Collier not participate in the decision of this case.

MEMORANDUM OF CHAIRMAN COLLIER IN RESPONSE TO
THE REQUEST OF RESPONDENT NATIONAL COMMISSION
ON EGG NUTRITION THAT HE WITHDRAW FROM THIS
PROCEEDING

On April 28, 1976, at oral argument before the Commission, respondents requested that I recuse myself from further participation in this proceeding because, during my tenure as the Commission's General Counsel,¹ I represented the Commission in Federal court proceedings collateral to this proceeding. Respondents were allowed 30 days after oral argument within which to submit a brief on the question of my disqualification.²

In a letter addressed to me on May 24, 1976, respondent National Commission on Egg Nutrition (NCEN) suggested that:

recusal is required in such circumstances by Canon 9 of the Code of Professional Responsibility of the American Bar Association: "A lawyer should avoid even the appearance of professional impropriety." Cf. Canon 2 of the Code of Judicial Conduct: "A judge should avoid impropriety and the appearance of impropriety in all his activities."

By this memorandum, I deny respondent's request for recusal.

Respondent has not made the more familiar allegation of "prejudgment" or "bias" sometimes raised in other contexts.³ Such an allegation would have no factual basis. No statements or representations made by or attributable to me have been cited by NCEN, nor do I know of any, which would demonstrate prejudgment or bias.

The collateral litigation mentioned by NCEN consisted of two actions which I supervised for a time. In the first, *Federal Trade Commission v. L. A. Wilhelm and National Commission on Egg Nutrition*, Misc. No. 74-73 (D.D.C.), the Office of the General Counsel, at the Commission's request and on its behalf, requested the Attorney

¹ From July 1973, through April 1975.

² Transcript of oral argument, April 28, 1976, at 3.

³ See, e.g., Davis, *Administrative Law Treatise*, Secs. 12.01-12.03 (1970); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763-768 (6th Cir. 1966); *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79-80 (10th Cir. 1972); *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24, 28 (6th Cir. 1965); *Safeway Stores v. FTC*, 366 F.2d 795, 802 (9th Cir. 1966); *Texaco v. FTC*, 336 F.2d 754, 759-760 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965).

General to file an action against NCEN and its Secretary-Treasurer to require compliance with a pre-complaint investigational subpoena issued by the Commission's Bureau of Consumer Protection in April 1974. The action was initiated on July 18, 1974, and the District Court for the District of Columbia entered an order to show cause against the respondents on the same day. The matter was settled by agreement on September 12, 1974.

It is clear that the Commission would not be disqualified from ruling on the merits of a proceeding simply because it became necessary to seek court enforcement of a pre-complaint investigational subpoena. No one would contend that a court displayed bias against a litigant merely because it ordered the litigant to produce documents in the course of a proceeding. The petition filed in the action did not allege that NCEN had violated the law, but only that NCEN had failed to appear and produce documents in response to a Commission subpoena which had been filed in the course of an investigation to determine whether NCEN had violated the Federal Trade Commission Act.

The other proceeding was an action for a temporary injunction which was filed in the United States District Court for the Northern District of Illinois on August 1, 1974. The proceeding was commenced at the direction of the Commission and was initiated after the administrative complaint had been issued on July 23, 1974. The action was brought pursuant to Section 13(a) of the Federal Trade Commission Act, 15 U.S.C. §53(a). The Commission did not assert that respondents had violated the Federal Trade Commission Act, but only that the Commission "had reason to believe" that the respondents had done so, and that the injunction would be in the public interest. Such a finding is required by Section 13(a). The same standard of knowledge controls the issuance of an administrative complaint in the first instance, 15 U.S.C. §45(b).

The District Court dismissed the Commission's action and the Office of the General Counsel, again at the Commission's request and on its behalf, lodged an appeal with the United States Court of Appeals for the Seventh Circuit. The Commission again argued that an injunction should issue because the Commission had reason to believe that the respondents' advertisements violated the Federal Trade Commission Act.

There can be no question that the Commission was entitled to conclude that there was "reason to believe" that NCEN's advertisements violated Sections 5 and 12 of the Federal Trade Commission Act,

and to issue a complaint and request an injunction against the advertisements *pendente lite* on that basis.⁴ Indeed, the United States Court of Appeals for the Seventh Circuit held that the Commission was entitled to, and entered, such an injunction, *Federal Trade Commission v. National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S.— (No. 75-405, June 7, 1976).

It is also clear that the Commission does not prejudice a matter, foreclosing the possibility of a fair and impartial hearing on the merits, by first seeking injunctive relief, notwithstanding the fact that every petitioner for injunctive relief must contend that he has a reasonable probability of success on the merits, or, in this instance, that there is a reasonable probability that a respondent has violated Section 12 of the Federal Trade Commission Act, 15 U.S.C. §52. In such circumstances, the Commission is in the position of a judge who is sufficiently impressed with a litigant's case to issue a preliminary injunction. No one would suggest that such a judge is thereby disqualified from ruling on the merits, *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24, 28 (6th Cir. 1965). The Supreme Court has implicitly rejected that argument, which was advanced by the dissent in *Federal Trade Commission v. Dean Foods Co., et al.*, 384 U.S. 597 (1966), and left unmentioned in the majority's opinion. *Accord, PepsiCo, Inc.*, 83 F.T.C. 26 (1973).

Indeed, at no point in the briefs or moving papers filed in the ancillary injunctive proceedings in this matter during my service as General Counsel is there any statement which creates even the appearance of prejudgment of the ultimate merits of the case. In both the Commission's "Memorandum of Points and Authorities in Support of Application for Temporary Injunction," filed in the Northern District of Illinois, and its brief on appeal to the United States Court of Appeals for the Seventh Circuit, the Commission never went beyond the allegation, which must be made in every action brought under Section 13 of the Federal Trade Commission Act, that, based on the record then available to it, the Commission had "reason to believe" that the respondents' advertising violated Sections 5 and 12 of the Federal Trade Commission Act. The Commission, in both actions, noted that "[t]he determination whether respondent has actually violated the law is to be made only at the conclusion of the administrative proceeding after respondent has been given a full opportunity to be heard."⁵

Therefore, the ancillary subpoena enforcement and injunctive proceedings, and the memoranda filed in each, to which the Commission was entitled under Secs. 9 and 13 of the Federal Trade Commission Act, 15 U.S.C. §§49 and 53, neither constituted prejudgment nor the

⁴ See *F.T.C. v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968).

⁵ "Memorandum," *supra*, at 14; Brief, *supra*, at 24.

appearance of prejudgment and would not disqualify the Commission from ruling on the merits in this proceeding. And if the Commission is not disqualified by reason of the ancillary proceedings or the arguments my former office presented in those proceedings on the Commission's behalf, then I perceive no justification for concluding that I should be disqualified.

Nor have respondents contended that my participation in the decision of this matter would constitute a prohibited mixture of prosecutorial and adjudicative functions.⁶ As the Commission's General Counsel, I neither possessed nor exercised prosecutorial responsibility. On the contrary, the Commission's General Counsel is freed of such duties so that he may advise the Commission or individual Commissioners in all matters of law and policy in adjudicative or nonadjudicative settings.⁷

To protect against the intermingling of prosecutorial and adjudicative functions, the Commission has assigned exclusive responsibility for advocacy of administrative complaints to the Bureaus of Competition and Consumer Protection and its Regional Offices. Counsel supporting a complaint are organizationally independent of the General Counsel and are not subject to his supervision or control.⁸

In seeking the assistance of the courts through collateral actions for injunctions or discovery, the General Counsel is not an advocate for the administrative complaint. He is, instead, an advocate for the Commission itself. The positions he takes are those of the Commission. The arguments he presents to the court simply reflect the Commission's own reason to believe that the law may have been violated, based on the limited record before it. I therefore cannot agree that my participation in this proceeding creates even an "appearance of impropriety" within the meaning of the canons of ethical conduct cited by respondents.⁹

In my view, recusal is a course that should not be lightly taken. Each member of the Commission has been appointed by the President and

⁶ This is not an instance in which an agency adjudication has been tainted by an official in a prosecutorial role later becoming involved in agency decision-making, as, for example, in *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). There a former Director of the Division of Corporation Finance, which was responsible for the prosecution of agency adjudications, including the one at issue, later became a member of the Commission and participated in quasi-judicial decisions concerning the same matter, 306 F.2d at 262. A former advocate in an adjudication was placed in a position to pass judgment in the same proceeding. Here, by contrast, the General Counsel is not an advocate in agency adjudications.

⁷ See 35 Fed. Reg. 10627 (1970), amended 36 Fed. Reg. 2943 (1971).

⁸ See 35 Fed. Reg. 10627 (1970).

⁹ In passing I would note that although there can be little question that "justice requires the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955), I question whether that principle, as applied to an official of a government body, should be derived from the ethical norms of private professional associations such as those invoked by respondents. Happily, this case presents no conflict between the professional ethical norms relied upon by respondents and a valid Congressional mandate. Were such a conflict presented, the latter would surely take precedence over the former. Moreover, the controlling statutes require neither that a Commissioner be an attorney nor that he perform only those duties which are consistent with his chosen profession.

confirmed by the Senate to exercise the statutory duties of his office. Each member takes an oath of office to do so faithfully. Deciding cases is one of the gravest of these duties. The refusal to perform that duty should be attended with commensurate reluctance. No facts presented here, or known to me, convince me that recusal is appropriate.

July 13, 1976.

ORDER DENYING REQUEST TO DISQUALIFY

During oral argument before the Commission on respondents' appeal from the decision of the administrative law judge in this matter, respondents' counsel requested that Chairman Collier recuse himself from participation in the Commission's decision of the case. Subsequently, on May 24, 1976, respondents addressed a letter to the Chairman repeating their request, and citing as grounds therefor the Chairman's prior participation as General Counsel of the Commission in Federal court litigation collateral to this proceeding. Respondents appear to contend that the Chairman's participation in this matter would, by virtue of his participation in the prior court litigation, contravene the dictates of Canons 9 and 2 of the Code of Professional Responsibility of the American Bar Association, and that such conflict requires recusal.

In response to that request, Chairman Collier filed a memorandum dated July 13, 1976, stating that he declined to disqualify himself from participation and setting forth at length his reasons therefor.

It is unclear from respondents' request at oral argument before the Commission and subsequent letter to the Chairman whether they desire that their request be considered solely by the Chairman or by the Commission as well. The Commission has previously entertained motions to disqualify individual Commissioners, *e.g. ITT Continental Baking Company, Inc., et al.*, 82 F.T.C. 1183, 1188 (1973), and to eliminate any ambiguity, the Commission will treat respondents' oral argument request as such a motion.

The Commission has carefully reviewed respondents' letter and the memorandum of Chairman Collier in response thereto. In light of such consideration, the Commission has determined that no grounds exist for granting the requested disqualification. Therefore,

It is ordered, That the request by respondents that Chairman Collier not participate in the decision of this case be, and it hereby is, denied.

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

Complaint

IN THE MATTER OF
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.
ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8987. Complaint, July 23, 1974—Final Order, July 20, 1976

Order requiring a Park Ridge, Ill., egg industry trade association and a New York City public relations firm, among other things to cease misrepresenting the physiological effects of consuming dietary cholesterol or eggs and to cease using a misleading trade name.

Appearances

For the Commission: *Lynne C. McCoy, Bret S. Smart, Stewart A. Block, and Mark A. Heller.*

For the respondents: *James Fox, Moses, Gibbons, Abramson & Fox, Chicago, Ill.*

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 the National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, 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:¹

PARAGRAPH 1. Respondent National Commission on Egg Nutrition is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 205 Touhy Ave., Park Ridge, Illinois.

Respondent Richard Weiner, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 888 7th Ave., New York, New York.

PAR. 2. Respondent National Commission on Egg Nutrition (hereinafter, NCEN) is a trade association which was organized and is maintained for the purpose of promoting, fostering and advancing the interests of its members, who consist of individuals and firms engaged in businesses relating to the egg industry, including associations of egg

¹ For purposes of this complaint, the following definitions shall apply:

a) "commerce" means commerce as defined in the Federal Trade Commission Act, and

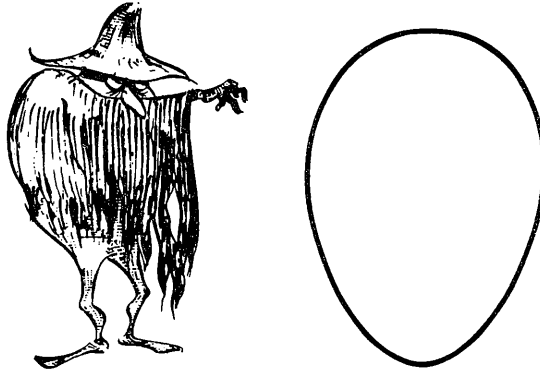
b) "false advertisement" means false advertisement as defined in the Federal Trade Commission Act.

producers and distributors as well as individual egg producers. NCEN has been and now is engaged in a wide range of activities of mutual interest to its members, including but not limited to the dissemination, publishing and distribution of advertisements and promotional material for the purpose of promoting the sale of poultry eggs for human consumption, which come within the classification of "food" as defined in the Federal Trade Commission Act.

Respondent Richard Weiner, Inc. is now and for some time last past has been a public relations and advertising agency for NCEN and now and for some time last past has prepared and placed for publication and has caused the dissemination of advertising and promotional material, including but not limited to the advertising referred to herein, to promote the sale of said eggs.

PAR. 3. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning said eggs by the United States mail and by various means in commerce, including, but not limited to, advertisements inserted in newspapers and an advertisement in the form of a booklet, entitled "Eggs Your Diet and Your Health" and sent through the United States mail, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said eggs; and have disseminated, and caused the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in commerce.

PAR. 4. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not necessarily inclusive thereof, are the following:



Cholesterol and the Egg: A Mystery.



There is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack. Yet the cholesterol bugaboo persists. The mystery is why. Why in the face of overwhelming evidence to the contrary do some people fear eggs cholesterol heart attack?

Millions of dollars have been spent over the years in research and studies by physicians and nutritionists and the mystery persists. There is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack. We follow these studies very closely because we're America's egg producers and are vitally concerned with the findings. What are the facts?

Eggs contain cholesterol—as do all foods of animal origin—but eating eggs does not increase the blood cholesterol in a normal person. If you fret about deliberately to avoid all the cholesterol you could in your diet, your body would still manufacture cholesterol. The less cholesterol you eat, the more your body would manufacture because you need cholesterol. Every cell in your body requires cholesterol for life and cholesterol is the building block of sex hormones.

The late Dr. Paul Dudley White, whom many considered to be America's leading heart specialist, stated, "The amount of cholesterol in the blood—we call it serum cholesterol—is not necessarily related to cholesterol found in food."

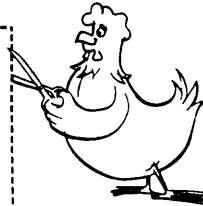
Dr. Michael DeBakey, the world famous heart surgeon in an article in *The Journal of the American Medical Association*, wrote, "An analysis of cholesterol values by usual hospital laboratory methods in 1,700 patients with atherosclerotic disease revealed no definite correlation between serum cholesterol levels and the nature and extent of atherosclerotic disease. Eight out of ten patients had cholesterol values below 300 mg/100 ml, the upper limits of normal for the procedure employed. Associated diseases such as diabetes mellitus and arteriosclerotic heart disease, age, and anatomical location and extent of atherosclerotic disease did not significantly alter the distribution of cholesterol values."

There is absolutely no scientific evidence that eating eggs in any way increases the risk of heart disease is what we've been saying. We'd like to share the facts with you in the form of a new booklet we've prepared which is yours, free, for the asking. The booklet will give you facts on cholesterol, medical studies, nutritional information. We've even prepared two coupons for your use. Fill in one for yourself and one for someone else to whom you'd like a booklet sent—a friend, relative, your physician, or your child's teacher.

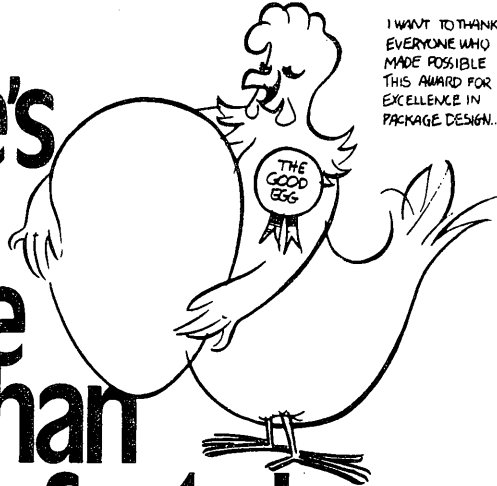
NATIONAL COMMISSION ON EGG NUTRITION

00
NO POSTAGE
 NECESSARY
 IF MAILED
 IN THE U.S.A.

FOR YOU	FOR SOMEBODY ELSE
Eggs 205 Touhy Avenue Park Ridge Ill. 60068 <input type="checkbox"/> Please send me your booklet!	Eggs 205 Touhy Avenue Park Ridge Illinois 60068 <input type="checkbox"/> Please also send a booklet to
Name _____	Name _____
Address _____	Address _____
City _____	City _____
State _____ Zip _____	State _____ Zip _____



There's more to the egg than its perfect shape.



I WANT TO THANK EVERYONE WHO MADE POSSIBLE THIS AWARD FOR EXCELLENCE IN PACKAGE DESIGN...

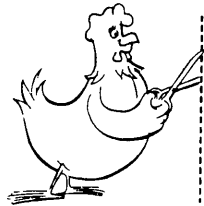


The case for eggs has never rested upon the universally acclaimed perfection of the egg's shape. Its beautiful, biodegradable container is the ultimate of excellence in package design. But the esthetics of the egg is only the beginning of the good things the egg has in store for you. The convenience the egg offers, and the chemical additives the egg does NOT contain. It is a fact that eggs are the best source of protein in human nutrition. Further, eggs have fewer calories per gram of protein than any other natural food. Pound for pound, compared with ALL other foods, eggs contain the most concentrated nourishment and are one of the best value buys in your supermarket. Eggs are an important source of vitamins A, B, D, and E and are a preferred source of iron in any of their many, and varied uses, eggs do NOT require freezer storage, defrosting, shaking or measuring. Eggs do not have extra calories and certainly do not contain chemical additives. There are NO emulsifiers (vegetable lecithin, mono and diglycerides and propylene glycol monostearate), cellulose, xanthan gums, trisodium and trimethyl citrate, aluminum sulfate or iron phosphate. And eggs do not need artificial

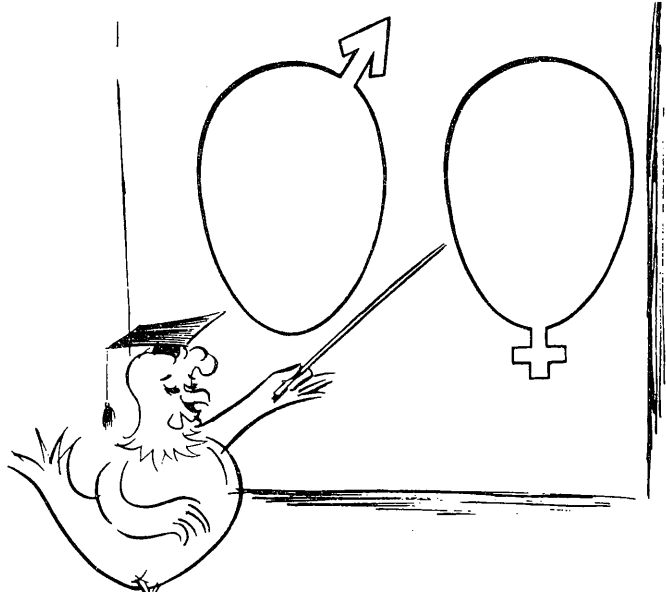
flavorings or artificial color. Perhaps you've heard that you should cut down on eating eggs because of their cholesterol content. There is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack. There is in fact preliminary evidence that the opposite is true, which has led Dr. Roger Williams to write, "Anyone who deliberately avoids cholesterol in his diet may inadvertently be causing heart disease." In one recent study, four hundred obese, mostly middle-aged, policemen were placed on a diet that included two or more eggs each day, by Dr. Sam S. Bertram, a Boston physician. After eight years, there has not been a single heart attack reported in the group. We're egg people—America's egg producers—and admittedly, we're committed to the case for eggs, but we hold for good, wholesome natural nutrition. We'd be glad to share the facts with you in the form of a new booklet which you can obtain simply by filling out the coupon on the left and sending it to us. If you'd like us to send a booklet to your physician, your child's teacher, or anyone else, please fill out the coupon on the right. Left or right, you're in good shape with eggs.



The National Commission on Egg Nutrition



FOR YOU	FOR SOMEBODY ELSE
Eggs 205 Tenth Avenue New York, N.Y. 10008 <input type="checkbox"/> Please send me your booklet	Eggs 205 Tenth Avenue New York, N.Y. 10008 <input type="checkbox"/> Please also send a booklet to:
Name _____	Name _____
Address _____	Address _____
City _____	City _____
State _____	State _____
Zip _____	Zip _____



The 'Sexy' Egg

You've been meaning to start on that diet because you're somewhat overweight but you are awfully fond of many foods you shouldn't eat and smoking — you know you should give up cigarettes but it's hard. And you probably should cut back on drinking somewhat too. It sort of reminds you of the old saw, "Everything I like is either illegal, immoral or fattening" — and makes you wonder what's next! What's next? — in fact, it's now! — is that there are those who impudently advocate cutting down on eggs because of their cholesterol content. So we thought we'd offer a few facts in evidence about what you're being asked to give up "now":

1. Cholesterol is the building block of sex hormones.
2. Cholesterol is needed for your nerves to transmit their impulses throughout your body.
3. Cholesterol is essential for life for every cell in your body.
4. The less cholesterol you eat, the more cholesterol your body produces because you need cholesterol.
5. The average person's body will eliminate just about the same amount of cholesterol as that eaten.
6. Eggs contain cholesterol — as do all foods of animal origin — and are the richest source of protein in human nutrition.

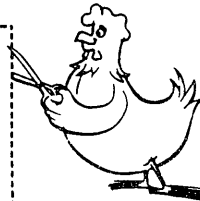
There is absolutely no scientific evidence whatsoever that eating eggs in any way increases the risk of heart attack. We follow these matters very closely because we're America's egg producers. Yes, we're committed to eggs but medical and nutritional authorities are with us in advocating good, wholesome, natural nutrition.

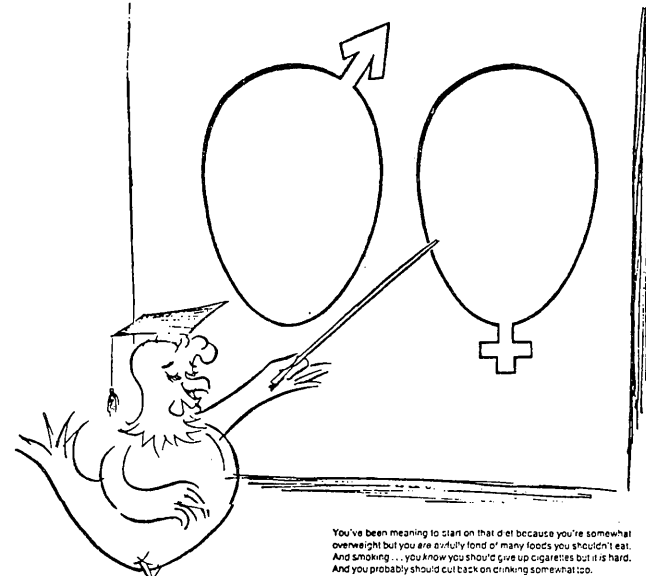
We'll be pleased to share the facts with you in the form of a new booklet. Just fill out the coupon on the left and send it to us. If you'd like us to send a booklet to someone else — a friend, relative, your physician, your child's teacher — fill out the coupon on the right. As we've said before, left or right you're in good shape with eggs.

NATIONAL COMMISSION ON EGG NUTRITION

0017
 NUMBER 1
 IN SERIES
 1980-1981
 NATIONAL COMMISSION ON EGG NUTRITION

FOR YOU	FOR SOMEBODY ELSE
Eggs 200 Touhy Avenue Park Ridge, Illinois 60068	Eggs 200 Touhy Avenue Park Ridge, Illinois 60068
<input type="checkbox"/> Please send me your booklet!	<input type="checkbox"/> Please also send a booklet to
Name _____	Name _____
Address _____	Address _____
City _____	City _____
State _____ Zip _____	State _____ Zip _____





The 'Sexy' Egg

You've been meaning to start on that diet because you're somewhat overweight but you are awfully fond of many foods you shouldn't eat. And smoking . . . you know you should give up cigarettes but it is hard. And you probably should cut back on drinking somewhat too.

If sort of reminds one of the old saw, "Everything I like is either illegal, immoral or fattening" — and makes one wonder what's next? What's "next" — in fact, it's "now" — is that there are those who may advocate — some even for girls! — cutting down on eggs because of their cholesterol content. So we thought we'd offer a few facts about what people are being stalling you up "now."

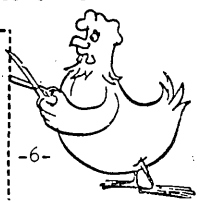
1. Cholesterol is the building block of sex hormones.
2. Cholesterol is needed for the nerves to transmit their impulses throughout the body.
3. Cholesterol is essential for life for every cell in the body.
4. The less cholesterol one eats, the more cholesterol the body produces because a person's system needs cholesterol.
5. The normal per. cit's body will eliminate just about the same amount of cholesterol as that eaten.
6. Eggs contain cholesterol — as do all foods of animal origin — and are the richest source of protein in human nutrition.

There is absolutely no scientific proof that eating good, wholesome, fresh eggs — nature's miracle in a shell — increases the risk of heart attack, the "killer," "killer," exactly because we're vitally concerned with health and good, natural nutrition.

We'll be pleased to share the facts with you in the form of a new booklet. Just fill out the coupon on the left and send it to us. If you'd like us to send a booklet to someone else — a friend, relative, your physician, your child's teacher — fill out the coupon on the right. As we've said before, left or right, you're in good shape with eggs.

NATIONAL COMMISSION ON EGG NUTRITION

FOR YOU		FOR SOMEBODY ELSE	
NCEN 205 Touhy Avenue Park Ridge, Illinois 60068		NCEN 205 Touhy Avenue Park Ridge, Illinois 60068	
<input type="checkbox"/> Please send me your booklet.		<input type="checkbox"/> Please also send a booklet to	
Name _____		Name _____	
Address _____		Address _____	
City _____		City _____	
Eyes _____ Zip _____		City _____ Zip _____	



PAR. 5. Through the use of said advertisements and others referred to in Paragraphs Three and Four, respondents represented, and are now representing, directly or by implication that:

a. There is absolutely no competent and reliable scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease;

b. There is overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks;

c. There is competent and reliable scientific evidence that dietary cholesterol,² including that in eggs, decreases the risk of heart disease;

d. There is competent and reliable scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease;

e. Eating eggs does not increase the blood cholesterol level³ in a normal person;

f. A person's blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake because

1) The human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake and

2) The human body eliminates the same amount of cholesterol as that eaten;

g. Dietary cholesterol including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells.

PAR. 6. In truth and in fact,

a. There is competent and reliable scientific evidence that eating eggs does increase the risk of heart attacks and heart disease;

b. There is not overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks;

c. There is no competent and reliable scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart disease;

d. There is no competent and reliable scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease;

e. Eating eggs does increase the blood cholesterol level in most people;

f. A person's body mechanisms do not prevent the blood cholesterol

² Dietary cholesterol is that cholesterol contained in food.

³ Blood cholesterol level is the amount of cholesterol contained in a person's blood stream.

level from being raised or lowered by the level of dietary cholesterol intake;

g. Dietary cholesterol, including that in eggs, is not needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells.

Therefore, the advertisements referred to in Paragraphs Three and Four were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraph Five were, and are, false, misleading or deceptive.

PAR. 7. Furthermore, through the use of the advertisements referred to in Paragraphs Three and Four, respondents represented, and are now representing, directly or by implication,

a) That eating eggs does not increase the risk of heart attacks and heart disease,

b) That dietary cholesterol, including that in eggs, decreases the risk of heart attacks and heart disease, and

c) That avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease.

PAR. 8. There existed at the time of said representations in Paragraph Seven no reasonable basis for making the above representations. Therefore, the making and dissemination of said representations as alleged constituted, and now constitute, unfair or deceptive acts or practices in commerce.

PAR. 9. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent NCEN as an agent or representative of its membership constituency, has been, and now is, in substantial competition in commerce with corporations, firms and individuals representing or engaged in the food industry.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Richard Weiner, Inc. has been, and now is, in substantial competition in commerce with other public relations and advertising agencies.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of

respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE
LAW JUDGE

NOVEMBER 24, 1975

PRELIMINARY STATEMENT

[1] Respondents National Commission on Egg Nutrition (hereinafter "NCEN") and Richard Weiner, Inc. (hereinafter "Weiner"), corporations, are charged with unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

[2] The Commission issued its complaint in this proceeding on July 23, 1974, charging that respondents, in the course and conduct of their businesses, have disseminated and caused the dissemination of certain advertisements concerning poultry eggs for human consumption, by the United States mail and by various means in commerce, including, but not limited to, advertisements inserted in newspapers and an advertisement in the form of a booklet, entitled "Eggs Your Diet and Your Health," for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said eggs in commerce.

The complaint sets forth *in toto* four advertisements, and alleges that respondents, through statements and representations in said advertisements, and other advertisements, have falsely represented, directly or by implication, that (1) there is absolutely no competent and reliable scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease; (2) there is overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks; (3) there is competent and reliable scientific evidence that dietary cholesterol (cholesterol contained in food), including that in eggs, decreases the risk of heart disease; (4) there is competent and reliable scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease; (5) eating eggs does not increase the blood cholesterol level (cholesterol contained in a person's blood stream) in a normal person; (6) a person's blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake because (a) the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake and (b) the human body eliminates the same amount

of cholesterol as that eaten; and (7) dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells.

In truth and in fact, the complaint alleges, (1) there is competent and reliable scientific evidence that eating eggs does increase the risk of heart attacks and heart disease; (2) there is not overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks; (3) there is no competent and reliable scientific evidence that dietary cholesterol, including that in eggs, decreases the risk [3] of heart disease; (4) there is no competent and reliable scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease; (5) eating eggs does increase the blood cholesterol level in most people; (6) a person's body mechanisms do not prevent the blood cholesterol level from being raised or lowered by the level of dietary cholesterol intake; and (7) dietary cholesterol, including that in eggs, is not needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells.

The complaint further alleges that, through the use of statements and representations in the aforesaid advertisements, respondents have represented, directly or by implication, that (a) eating eggs does not increase the risk of heart attacks and heart disease; (b) dietary cholesterol, including that in eggs, decreases the risk of heart attacks and heart disease, and (c) avoiding dietary cholesterol, including that in eggs, increases the risk of heart disease. The complaint alleges that, at the time these representations were made, no reasonable bases for making such representations existed.

The complaint was served on the respondents on August 5, 1974. A prehearing conference was held on September 11, 1974 and thereafter, on September 16, 1974, respondents filed their answer, admitting in part and denying in part the allegations of the complaint. On May 5, 1975, respondents filed a motion to amend their answer by adding the affirmative defenses that NCEN is not a corporation within the meaning of Section 4 of the Federal Trade Commission Act, and that the Federal Trade Commission lacks jurisdiction over NCEN. Respondents' said motion was granted by the administrative law judge on the record at the hearing held on May 13, 1975.

After various pretrial proceedings, hearings for the case-in-chief were held in Washington, D.C., during the period May 12, 1975 through May 30, 1975; and defense hearings were held during the period June 9, 1975 through June 18, 1975. In a total of 16 hearing days, complaint counsel called five witnesses, all experts, and respondents called as witnesses four NCEN officials and six experts. The official record

contains 2,389 pages of transcript (including 51 pages of prehearing conference transcript) and several hundred exhibits, including many medical treatises.

[4] In collateral litigation, the Commission, pursuant to Section 13 of the Federal Trade Commission Act, sought an order granting a temporary injunction against respondent NCEN to restrain dissemination of certain publications pending a determination of the administrative proceeding. The District Court declined to grant the injunctive relief sought. *Federal Trade Commission v. National Commission On Egg Nutrition*, 1975-1 Trade Cases ¶60,246 [9 S&D 1109]. On appeal, the United States Court of Appeals for the Seventh Circuit reversed the lower court and entered an injunction pending completion of this administrative proceeding. *Federal Trade Commission v. National Commission On Egg Nutrition*, 5 CCH Trade Reg. Rep., ¶60,320 [517 F.2d 485 (1975)] [9 S&D —]. This collateral litigation has not been considered by the administrative law judge in ruling on this proceeding.

This matter is now before the undersigned upon the complaint, answers, pretrial proceedings, testimony and other evidence of record, proposed findings of fact, conclusions and briefs filed by complaint counsel and counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon consideration of the demeanor of the witnesses who gave testimony in this proceeding. The findings of fact include references to the principal supporting evidentiary items in the record.¹ Such references are intended to [5] serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

¹ References to the record are set forth in parentheses, and contain certain abbreviations, as follows:

CPF — Complaint Counsel's Proposed Findings of Fact, Conclusions, and Proposed Order.

CM — Complaint Counsel's Memorandum.

CRB — Complaint Counsel's Reply Brief.

RPF — Respondents' Proposed Findings of Fact, Conclusions, and Proposed Order.

RM — Respondents' Memorandum.

RRB — Respondents' Reply Brief.

Ad. — Response by Respondents to Complaint Counsel's Requests for Admissions, followed by the number of the request.

A witness' name followed by a number is the reference to the transcript page of the witness' testimony being cited.

