

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

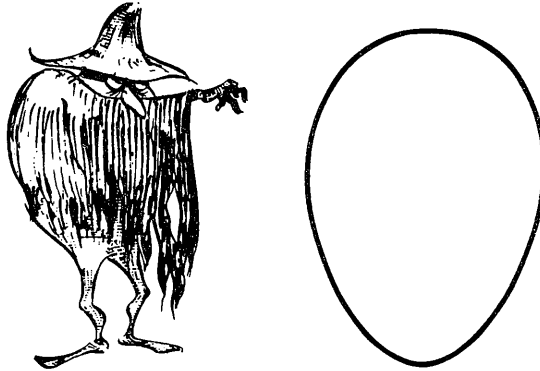
b) "false advertisement" means false advertisement as defined in the Federal Trade Commission Act.

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."

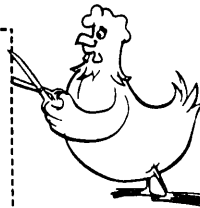
Dr. Michael DeBakey, the world famous heart surgeon in an article in *The Journal of the American Medical Association*, wrote, "An analysis of cholesterol values by usual hospital laboratory methods in 1,700 patients with atherosclerotic disease revealed no definite correlation between serum cholesterol 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.

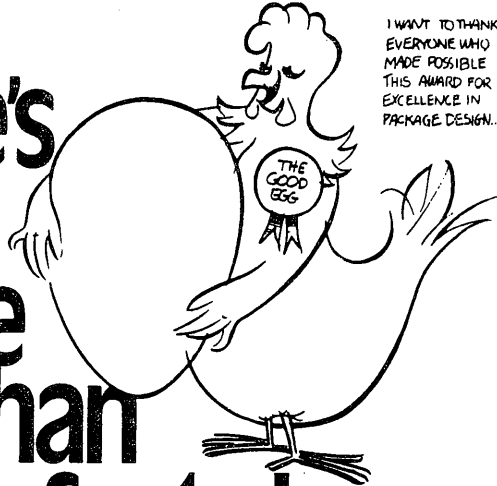
NATIONAL COMMISSION ON EGG NUTRITION

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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...

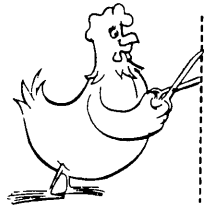


The case for eggs has never rested upon the universally acclaimed perfection of the egg's shape. Its beautiful, biodegradable container is the ultimate of excellence in package design. But the esthetics of the egg is only the beginning of the good things the egg has in store for you. The convenience 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

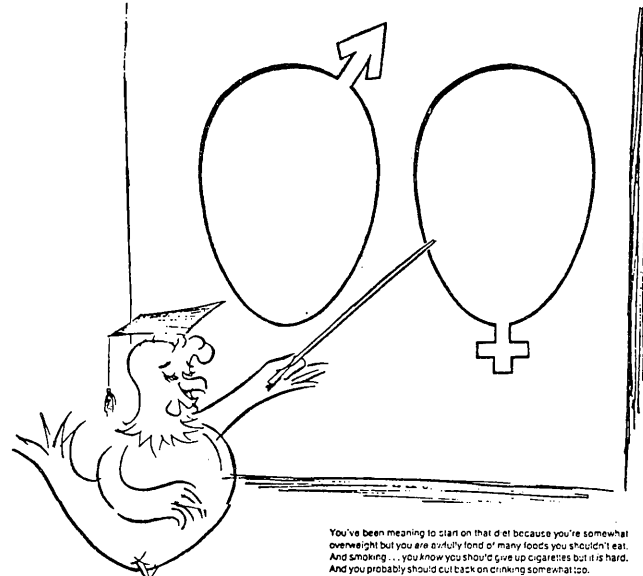
flavorings or artificial color. Perhaps you've heard that you should cut down on eating eggs because of their cholesterol content. There is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack. There is in fact preliminary evidence that the opposite 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. Berman, 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. 10028 <input type="checkbox"/> Please send me your booklet	Eggs 205 Tenth Avenue New York, N.Y. 10028 <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 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 profit — 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."

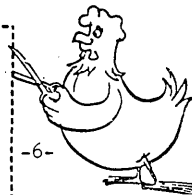
1. Cholesterol is the building block of sex hormones.
2. Cholesterol is needed for the nerves to transmit their impulses throughout the body.
3. Cholesterol is essential for life for every cell in the body.
4. The less cholesterol one eats, the more cholesterol the body produces because a person's system 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.

FINDINGS OF FACT

I. IDENTITY OF RESPONDENTS

A. *NCEN*

1. National Commission on Egg Nutrition is a corporation organized 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. NCEN is a not-for-profit corporation (Answer, p. 1; CX 123A).

2. In July 1971, the American Poultry Hatchery Federation (APHF) appropriated \$30,000 and authorized the executive committee of APHF to appoint a five-man group to look into the egg-heart disease controversy (Smith, 1503, 1521-22). Mr. Blanton Smith, a director of APHF, was appointed to the five-man group (Smith, 1522), who called themselves the National Commission on Egg Nutrition (CX 150A).

3. NCEN commenced operations on August 9, 1971 (CX 150A), and was incorporated under the laws of the State of Illinois on December 7, 1971 (CX 136A). The objective of NCEN was stated to be: "* * * To establish the true nutritional values of eggs, particularly in the light of the adverse publicity concerning cholesterol" (CX 150A). In the Articles of Incorporation, the purposes [6] of the corporation were stated to be: "To promote and establish the true nutritional values of eggs to consumers and to undertake, encourage and support research relating to the nutritional values of eggs and present said findings to consumers; and to promote the general interests of the egg industry" (CX 136B). Eggs come within the classification of "food," as used in Section 12 of the Federal Trade Commission Act (Answer, p. 1).

4. NCEN's five (5) members are appointed, respectively, by the following organizations: (1) American Egg Board (AEB); (2) Northeastern Poultry Producers Counsel (NEPPCO); (3) Pacific Egg and Poultry Association (PEPA); (4) Southeastern Poultry and Egg Association (SEPA); and (5) United Egg Producers (UEP) (Answer, Para. 2; CX 101B, 123B, 142B, 143B, 144B, 152, 154D, 198B, 199A, 200A; Smith, 1608-1610). For example, in 1973 Blanton Smith, Chairman of NCEN, represented UEP; and members Edward D. Murphy represented NEPPCO, Harry Trembath represented PEEA, Maurice Pickler represented SEPA, and Ted Wasden represented AEB (CX 97, 152; see also Smith, 1612).

5. Each of the five (5) member organizations of NCEN are made up of individuals and firms engaged in businesses relating to the egg industry, including associations of egg producers and distributors as well as individual egg producers (CX 177B, Ad. 4; CX 1, 2, 3). Blanton

Smith, Chairman of NCEN from its inception to January 1974 (CX 177B-C, Ad. 5) and who is still an NCEN Commissioner, testified that AEB, NEPPCO, PEPA, SEPA, and UEP "are commercial operators and they are trade associations and co-ops which, obviously, are in existence to help those in commercial operations" (Smith, 1664). The NCEN Commissioners have been, and are, individuals involved in commercial enterprises of, or relating to, the egg industry (Smith, 1613-18; Pickler, 1716; Hecht, 1704-1706; Wentink, 1735-37; CX 158A-B; RX 85, p. 17; Finding 13, *infra*).

6. In January 1975, NCEN appointed Robert Fisher of *Hyline* magazine, an egg industry publication, to be the sixth Commissioner (Smith, 1619-1620; CX 158A-B).

b. *Richard Weiner, Inc.*

7. Richard Weiner, Inc. (hereinafter "Weiner"), is a corporation organized, existing and doing business [7] under and by virtue of the laws of the State of New York with its principal office and place of business located at 888 Seventh Ave., New York, New York. (Answer, p. 1).

8. Weiner is a public relations firm and advertising agency (Answer, p. 1; CX 130A), which has been in the employment of NCEN from on or about May 25, 1973 (CX 151B) through the present time (CX 177-0, Ad. 64).

9. Weiner specializes in health and education projects (CX 120B), and performs public relations and advertising services for several health-related clients (CX 177U, 120C). Weiner has one other client, besides NCEN, who advertises and disseminates statements with respect to eggs or cholesterol (CX 177U, Ad. 84). Weiner, from 1971 through 1973, had average annual billings of about \$300,000 of which approximately \$110,000 represented fees from print advertising for 1973 (CX 130A).

10. Richard Weiner, the president and chief executive officer of Weiner (CX 130A), has a master's degree in genetics and has published in science-related magazines (CX 120B). He has been a consultant to the National Institutes of Health and other agencies (CX 120C).

11. In the course and conduct of its business, Weiner has been, and now is, in substantial competition in commerce with other public relations and advertising agencies (Answer, p. 4).

II. NCEN'S RELATIONSHIP TO THE EGG INDUSTRY

A. *Membership and Commissioners*

12. The member organizations of NCEN comprise a national

geographic distribution of the egg industry (Smith, 1610; CX 150A). More specifically, UEP is a national trade association composed of five regional co-ops which are each composed of egg producers from all parts of the United States (Smith, 1611-12). NEPPCO is an egg industry regional trade association (Smith, 1612). PEPA is likewise an egg industry trade association and is located on the West Coast (Smith, 1612). [8] SEPA is a major regional egg industry trade association located in the Southeast (Smith, 1612; RX 85, p. 17). NCEN member AEB (formerly Poultry and Egg National Board — PENB — Smith, 1578) is a national egg industry organization whose membership includes one or more regional, State and local organizations of egg producers, firms and individuals in or associated with the egg industry (CX 177E, Ad. 20). AEB is actively engaged in producing advertisements promoting the sale and consumption of eggs (Smith, 1623; CX 177E-F, Ad. 21). The AEB advertisements do not concern the relationship of eggs to coronary heart disease (Smith, 1623).

13. The Commission members, themselves, are engaged in the egg industry. Blanton Smith, Chairman of NCEN from its organization until early 1974 (Smith, 1607), has been engaged in the hatchery business all his life, a producer of day-old baby chicks and ready-to-lay pullets (Smith, 1502-1503, 1614). Hendrik Wentink, who succeeded Mr. Smith as Chairman of NCEN in January 1974 (Wentink, 1743), since 1958 has been an employee of Pennfield Corporation, a firm engaged in egg production and marketing, broiler production and processing, and the manufacture and marketing of feed products (Wentink, 1735-36; CX 116). Pennfield made Mr. Wentink's services available to NCEN on the basis that "if it's good for the egg industry, it's good for * * * Pennfield" (CX 158B). A Mr. Harry Trembath, an original NCEN Commissioner appointed by PEPA, was an employee of a cooperative of egg producers (Smith, 1613, 1616; CX 150A) and was later replaced by a Mr. Bookey from the same organization (Smith, 1617; CX 117). Mr. Cleland, an early NCEN Commissioner (CX 150A), was with a hatchery company located in Lincoln, Nebraska (Smith, 1615-16). Mr. Murphy, likewise an early NCEN Commissioner (CX 150A), was with a company engaged in the egg packaging business (Smith, 1616). Mr. Norman Hecht, an NCEN Commissioner since January 1974 (Hecht, 1679), has been in the egg business for many years, operates a hatchery, and has investments in an egg-producing farm (Hecht, 1670, 1705). Mr. Maurice Pickler, an NCEN Commissioner since 1972, is engaged in the production and marketing of eggs (Pickler, 1716, 1718).

14. As representatives for the five (5) member organizations (CX 96 — see printed description of Commissioners at bottom of page), the Commissioners [9] reported matters concerning NCEN to their

respective organizations (CX 150C, 199, 200, 165B), and the member organizations' determinations and instructions were followed by their respective representatives (CX 199A, 200A). NCEN Commissioners have had particularly close ties with the AEB. Seven of the eleven people who have served as NCEN Commissioners were, or are now, on the Board of Directors and/or the Executive Committee of the American Egg Board (Smith, 1615, 1618-19; CX 161A). More specifically, Blanton Smith, Malcolm Cleland and Edward Murphy served on both the AEB's Board of Directors and its Executive Committee (Smith, 1615, 1618-19; CX 161A), and Mr. Trembath and Mr. Pickler, Mr. Wasden and Mr. Bookey served on AEB's Board of Directors (Smith, 1619). Present NCEN Commissioner, Mr. Hecht, is a member of AEB (Hecht, 1710) and he and NCEN's present Chairman, Hendrik Wentink, as well as NCEN staff persons, L. A. Wilhelm and Florence Coates, attended AEB meetings (CX 160A, 161A, 165A). From 1973 to the present, NCEN's Chairman has made regular or frequent reports of NCEN's activities to the Board of Directors of AEB (CX 177G, Ad. 29; CX 158D).

B. *NCEN Is Funded by the Egg Industry*

15. Substantially all of NCEN's funding from 1971 to February 5, 1975 has been derived from organizations which have the objective of promoting increased sales of eggs and/or which are made up of individuals or firms engaged in businesses relating to the egg industry (CX 177D-E, Ad. 15). The great preponderance of NCEN's funding has come from AEB. Over half of NCEN's funds from August 24, 1971 through January 25, 1974, and substantially all of NCEN's 1974 and 1975 budgets were, and are being, provided by AEB (Wentink, 1789; CX 131A, 177E, Ad. 16; 198B). NCEN made itemized budget requests for a year's operating funds from AEB (CX 159A-B-C, 165B, 200B; Wentink, 1790). AEB, upon presentation by NCEN (CX 159A), reviewed such requests in detail and approved them as AEB deemed appropriate (CX 165, 156C, 159A-C). Apparently some of the AEB funds came through egg carton checkoffs (CX 97).

16. Since its inception, AEB has provided office space and assistance for NCEN (CX 177E, Ad. 18). AEB has provided all of NCEN's staff. From the inception of [10] NCEN until his death on November 15, 1974, approximately one-third of L. A. Wilhelm's working hours were spent on activities undertaken as Secretary-Treasurer of NCEN; the remainder of his working hours were spent on activities relating to his position as President or Vice-President of AEB (CX 177D, Ad. 13). His total salary was paid by AEB during this period (CX 177D, Ad. 14). From the inception of NCEN, Florence Coates, L. A. Wilhelm's secretary, spent

approximately one-third of her time on activities concerning NCEN and the remainder of her working hours were spent on AEB activities. During this period, her total salary was paid by AEB. AEB also paid for the travel and related expenses of L. A. Wilhelm and Florence Coates (Wentink, 1786; CX 124). An accurate accounting, for 1974, of AEB expenses for telephone and mail expenses devoted to NCEN's work and one-third of the total labor cost and related expenses of L. A. Wilhelm and Florence Coates is estimated to be in excess of \$20,000 (CX 124B).

17. AEB, on occasion, appropriated monies for specific NCEN activities. At such times in the past when NCEN was in need of funds in order to carry on its activities, it presented its proposed programs to the AEB Board of Directors and/or AEB's Executive Committee for their approval (Wentink, 1790-91; CX 152, 163A, 199B, 154B, 164). Pursuant to such presentations, monetary contributions by AEB were made (CX 151A, 152, 160B, 163, 198B). For example, AEB provided NCEN \$50,000 as supplemental funds for proposed advertisements which appeared in *The Wall Street Journal* and *The New York Times* (CX 151A, 152B, 96, 97, 160B). These advertisements are identified as CX 1-3 (CX 177G, Ad. 30). AEB also provided funds to NCEN for the specific purpose of placing CX 6, an advertisement entitled "The Sexy Egg," in the *Chicago Tribune* (CX 177F, Ad. 25; CX 155A-B; CX 6). AEB approved and provided funds to NCEN for reprinting 50,000 copies of the NCEN Booklet, "Eggs Your Diet and Your Health," identified as CX 7 (CX 163A-B; CX 177F, Ad. 25). Also, the initial printing and subsequent reprinting of NCEN's egg carton insert, identified as CX 9, were paid for by AEB (CX 177F, Ad. 27). AEB also provided funds to assist NCEN in the present litigation. AEB paid for the Gallup Survey prepared for NCEN by Dr. Irving Crespi, which was prepared in direct anticipation of this litigation (Wentink, 1790-91; Crespi, 2176-77; RX 170). [11]

C. Testimony by NCEN Commissioners

18. NCEN Commissioners who testified in this proceeding (Blanton Smith, Hendrik Wentink, Norman Hecht and Maurice Pickler) stated that they served on NCEN without pay and at a personal loss since they pay their own expenses. It appears, however, that expenses of NCEN Commissioners are borne by their respective commercial companies (Smith, 1582, 1609; Pickler, 1720-1721; Hecht, 1697-98; Wentink, 1772; CX 150A). Further, CX 174C indicates NCEN paid some travel expenses for Blanton Smith.

These officials also testified that NCEN Commissioners do not serve as representatives of any commercial groups, do not report to them, and are not advised or influenced by any commercial group (Smith,

1582-83, 1608-1609; Wentink, 1759, 1767-69, 1790-91; Hecht, 1708-1711). However, both Mr. Wentink and Mr. Hecht admitted that on at least one occasion, when an important matter was at issue, each sought advice from their respective industry organizations (Wentink, 1760; Hecht, 1708; CX 199, 200). Said officials further testified that they joined NCEN to find and disseminate the truth on the cholesterol question and in response to humanitarian, social and religious feelings (Hecht, 1686-87, 1698; Pickler, 1719-1720; Wentink, 1738-1740, 1773-74; Smith, 1530, 1665-66), their only acknowledged reasons for serving on NCEN.

This testimony must be viewed in light of each individual's long association with, and deep financial commitment to, commercial egg operations. Further, this testimony must be contrasted with other evidence of record, such as NCEN's detailed reporting to AEB on budget matters and AEB's funding of NCEN, Mr. Hecht's and Mr. Wentink's admissions in their testimony that they did consult their respective organizations, and evidence indicating NCEN is advocating the egg industry view (CX 117, 142). This objective evidence directly contradicts the testimony by these officials.

D. NCEN Is in Substantial

Competition in Commerce

19. In the course and conduct of its business, NCEN has been, and now is, in substantial competition in commerce with corporations, firms and individuals representing or engaged in the food industry. NCEN is [12] composed of member organizations who in turn are made up of individuals and firms engaged in businesses relating to the egg industry, including associations of egg producers and distributors as well as individual egg producers (Findings 5, 12, *supra*). NCEN Commissioners are individuals who are, and have been for many years, engaged in commercial egg operations (Findings 13, 18, *supra*). Eggs are sold in competition with other foods, including cholesterol-free egg substitutes and other breakfast foods (CX 1770, Ad. 70; CX 114, 144B, 153A, 156B, 157B).

III. RESPONDENTS' ADVERTISING AND PROMOTIONAL ACTIVITIES

A. Purpose of NCEN's Activities

20. Anti-cholesterol attacks on eggs have resulted in severe economic loss to the egg industry through a reduction in egg consumption (CX 101A, 102B; Schrader, 2227). The egg industry

created NCEN in response to this economic stress (CX 101, 102A, 150B, 154C) to combat the anti-cholesterol, anti-egg publicity (CX 198A, 114, 101B, 117B; Smith, 1503, 1521-22, 1636).

21. To combat and strike back at the adverse publicity concerning eggs, NCEN developed an advertising and public relations campaign to present the view of the egg industry (CX 142A, 114, 115, 117, 120A; Smith, 1636; RX 85Z-19). NCEN was primarily concerned with reaching the consuming public with its pro-egg statements (CX 98, 115, 147, 152B), and the advertisements provided potent incentives for the public to buy eggs (Smith, 1635-36). Most of NCEN's advertisements and promotional materials carried clear messages that eggs are an excellent food product; are highly nutritious; are completely safe even when eaten in quantity; are needed by the body for normal functioning; and that it may even be hazardous to avoid eggs (CX 2, 4, 5, 6, 7B-C, 8B-C). CX 2 and 5 state, for example:

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 [13] 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.

Generic advertising is quite common, and such advertisers expect to recoup advertising expenditures through a favorable impact on product demand (Schrader, 2279-2280).

B. Newspaper Advertisements

22. NCEN and Weiner developed a number of advertisements concerning the relationship of eggs to coronary heart disease (CHD) identified as CX 1-6, 171-173, and 175-176 (Tr. 42-43). CX 1-3 were disseminated as follows: *The Wall Street Journal*, November 19, November 26, December 3, 1973; and *The New York Times*, November 18, November 25, December 2, 1973 (CX 177G, Ad. 30).

23. CX 6 was disseminated in the *Chicago Tribune* on March 25, 1974 (CX 177G, Ad. 31); CX 171 in the *Chicago Daily News* on January 9, 1975; CX 172 in the *Chicago Sun-Times* on January 9, 1975; CX 173 in the *Washington Post* on January 7, 1975; CX 175 in the *Chicago Daily News* on April 8, 1975, and in the *Chicago Sun-Times* on April 9, 1975 (Tr. 43); and CX 176 in the *Chicago Daily News* on April 14, 1975, and in the *Chicago Sun-Times* on April 15, 1975 (Tr. 43).

24. CX 1-6 were disseminated in the following newspapers on the following dates:

- (a) Richmond (Va.) *Times Dispatch*, April 21, 24, 26, 1974
- (b) Norfolk (Va.) *Virginia Pilot*, April 21, 26, 1974

- (c) Norfolk (Va.) *Ledger Star*, April 24, 1974
- (d) Roanoke (Va.) *Times*, April 21, 28, May 5, 1974
- (e) Harrisburg (Va.) *News Record*, April 22, 25, 26, 1974
- (f) Winchester (Va.) *Star*, April 22, 24, 26, 1974
- (g) Charlottesville (Va.) *Progress*, April 21, 28, May 5, 1974
- (h) Newport News (Va.) *Newport News*, April 21, 28, May 5, 1974
- (i) *Globe Newspaper* (Nine weeklies in Northern Virginia — Alexandria, Annandale, Arlington, Fairfax, Falls Church, Herndon, McLean, Springfield, Vienna — June 6, 13, 30, 1974
- (j) Bluefield (W. Va.) *Telegraph*, April 28, May 5, 12, 1974
- (k) Alexandria (La.) *Talk*, June 6, 20, 27, 1974
- (l) Lafayette (La.) *Advertiser*, June 5, 16, 30, 1974
- (m) Monroe (La.) *World*, June 6, 16, 30, 1974 [14]
- (n) New Orleans (La.) *Picayune*, June 6, 16, 30, 1974
- (o) Shreveport (La.) *Times*, June 6, 20, 27, 1974
- (p) Baton Rouge (La.) *Advocate*, May 29, June 12, 26, 1974
- (q) Baton Rouge (La.) *Times*, May 30, June 16, 30, 1974
- (r) Lake Charles (La.) *Press*, June 5, 16, 30, 1974
- (s) Nashville *Banner*, December 13, 18, 1973; January 8, 1974
- (t) Nashville *Tennessean*, December 14, 19, 1973; January 9, 1974 (CX 177, Ad. 37, 38, 83; CX 126.)

The aforesaid newspapers were disseminated in interstate commerce and through the United States mail (CX 177J, Ad. 39).

25. The advertisements listed above appeared over NCEN's name and were apparently paid for by egg industry groups (CX 126A, 130B, 165B, 118B; CX 177T, Ad. 83; CX 177I, Ad. 37). NCEN and Weiner encouraged the dissemination of CX 1-6 in the newspapers listed above by providing advertisement preprints to, and granting prior approval and authorization to, local and regional egg industry organizations wishing to reproduce NCEN advertisements locally, and providing specific instructions concerning methods for, and costs of, locally disseminating NCEN ads (CX 94, 96, 97, 98, 153; 177H, Ad. 34, 35). Encouragement of local placement of NCEN advertisements was done for the purpose of stimulating coverage without using NCEN's funds (CX 95).

C. Other Forms of Promotion

26. NCEN and Weiner developed two booklets, identified as CX 7 and 8, which were disseminated through the United States mail (CX 177J-K, Ad. 40, 42-re). The booklets, entitled "Eggs Your Diet And Your Health," were offered to the public via a coupon appearing at the

bottom of CX 1-6. NCEN mailed out copies of CX 7 and 8 upon request, some of the copies to members of the public; NCEN also provided copies to egg industry firms, organizations and individuals for distribution by the latter persons to the public (Smith, 1627; CX 177K, Ad. 42, 43, 45; CX 96-98). In addition, CX 7 or 8 were offered to the public in the April 1974 *Changing Times* magazine (CX 106). Approximately 135,000 copies of CX 7 were disseminated between December 1973 and March 1974, and approximately 30,000 copies of CX 8, apparently a revised edition of CX 7, were disseminated [15] between May-June, 1974 to September 1974 (CX 177K, Ad. 42-43).

27. NCEN utilized an egg carton insert CX 9, prepared by L. A. Wilhelm, who was the Secretary-Treasurer of NCEN (CX 177C, Ad. 7, 47). The costs of printing and mailing CX 9 were paid for by NCEN (CX 177G, Ad. 28). Copies of CX 9 were sent by NCEN to egg packers upon their request (CX 177L, Ad. 50) for dissemination to the public by insertion in egg cartons (Smith, 1624-25). Approximately 2,000,000 copies of CX 9 were disseminated between February and June, 1974, except for approximately 200,000 which were destroyed (Smith, 1624-25; CX 123D).

28. NCEN and Weiner also developed CX 10, a portable exhibit, 4 X 8 feet in size, designed to be displayed on a tabletop (CX 103), which depicts reproductions of CX 4-6 and contains a pocket in which copies of the booklet, CX 8, can be placed. CX 10 has been disseminated by NCEN in interstate commerce (CX 177M, Ad. 53-54; CX 177Z-1, Ad. 53). CX 10, of which there are five (5) copies valued at \$900 apiece (Tr. 66-67; CX 103), has been loaned by NCEN to poultry and egg industry groups for use by those organizations (Wentink, 1792; CX 103, 105, 158C). CX 10 was first made available in May 1974 (CX 103), and the exhibit was widely circulated (CX 158C).

29. NCEN hired Dr. Kurt Oster in 1974 as a medical consultant to be an industry spokesman on behalf of NCEN (CX 107, 110, 116A). Dr. Oster, who testified in this proceeding (Oster, 1807-1922), is a practicing cardiologist, and is an experienced pharmacologist (Oster, 1807-1815). As industry spokesman, he was expected to "be able to defend the egg industries point of view when attacked by professionals with the opposite point of view" (CX 117A). Dr. Oster's program was designed "* * * to hit the consumer first and hopefully that part of the scientific community which watches TV and listens to radio programs" (CX 115). As a result, NCEN expected to receive considerable publicity which would have advantageous effects on the egg industry (CX 115). Dr. Oster's activities included a ten-city tour with appearances on local television and radio programs and interviews with local newspapers. The cities visited on the tour included Chicago, Boston, Philadelphia,

Dallas, Los Angeles and San Francisco (CX 111, 113, 114, 115). The two California [16] cities were chosen because the egg substitute, "Second Nature," was being promoted in that State (CX 114).

30. NCEN's promotional campaign, including the newspaper advertisements, booklets, egg carton inserts, portable exhibits and Dr. Oster's activities, involved substantial amounts of money. NCEN's expenditures include approximately \$83,000 for disseminating CX 1-3 in *The Wall Street Journal*, *The New York Times*, *Nashville Banner* and *Tennessean* (CX 130B); approximately \$7,000 for placing CX 6 in the *Chicago Tribune* (CX 132); approximately \$14,000 for printing, reprinting and mailing one of the booklets, CX 7 or CX 8, for the period January 1, 1974 to August 22, 1974 (CX 132); approximately \$5,000 for the exhibit, CX 10, for the first eight months of 1974 (CX 132); approximately \$1,600 for the egg carton insert, CX 9, for the first eight months of 1974 (CX 132). In addition, NCEN budgeted \$25,000 for the costs attributable to Dr. Oster's activities (CX 116A). The total of the expenditures listed is \$135,600. This understates to some extent the total costs of the promotional campaign for it does not include costs of disseminating CX 1-6 (in the newspapers listed in Finding 24, *supra*), CX 171-173 or CX 175-176. In addition, it covers expenditures relating to CX 7-10 for the period January 1, 1974 to August 22, 1974 only.

IV. REPRESENTATIONS MADE BY RESPONDENTS

31. The complaint alleges in Paragraph Five that respondents, directly or by implication, have made the following representations (subletters as appear in Paragraph Five of the complaint):

- 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, including that in eggs, decreases the risk of heart disease; [17]
- 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 level 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; and
- 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.

The above representations are alleged to be false, misleading or deceptive (Complaint, Par. Six).

Paragraph Seven of the complaint alleges that respondents, directly or by implication, have made the following representations:

- 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.

It is alleged that, at the time the above representations were made, there existed no reasonable bases for the said representations, and said representations therefore constitute unfair or deceptive practices (Complaint, Par. Eight).

[18] Complaint counsel rely on the administrative law judge's expertise, and the Commission's expertise, to interpret the representations in respondents' advertisements.

32. NCEN and Weiner have admitted that they have represented that "there is absolutely no scientific evidence that eating eggs, even in quantity, increases the risk of heart attacks or heart disease" (Answer, p. 2). The complaint in challenging this representation includes the adjectives "competent" and "reliable" to qualify "scientific evidence." These additional qualifying words make no essential difference in respondents' representation. The net impression conveyed by the term "no scientific evidence" is unequivocal; it means no scientific evidence whatsoever and includes within its literal meaning the lesser representation that there is no competent and reliable scientific evidence. Scientific evidence is generally understood to mean competent and reliable evidence.²

[19] 33. More specifically, CX 1-9, 171-173 and 175-176 convey this

² "Scientific" means, *inter alia*: "* * * (4) agreeing with or conducted or prepared strictly according to the principles and practice of or for the furtherance of exact science: skilled in the methods of exact science: characteristic or typical of a true scientist, esp., in perfect disinterestedness; (5) conducted or systematized after the manner of science or according to results of investigation by science: practicing thoroughness of systematic methods approximating those of scientists or devised by scientists: applying expert knowledge or technical skill (as in sports,

alleged representation, even though the advertisements do not expressly make the representation in the exact language alleged. The advertisements state both "there is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack" and "there is absolutely no scientific evidence that eating eggs in any way increases the risk of heart disease." The latter representation is in bold type. The representation is absolute in nature, with no qualifying language concerning numbers of eggs eaten. The failure to qualify the number of eggs conveys the impression that the statements apply to any reasonable number of eggs which might be consumed by a normal person. Thus, these direct statements are indistinguishable in meaning from the representation alleged in Paragraph Five a. of the complaint, even though they do not contain the words "even in quantity," as alleged in the complaint.

Furthermore, the reference to scientific evidence carries an implicit representation that such evidence is competent and reliable. The nature of the subject matter discussed in the advertisements, as well as the presence of references to scientific evidence, would lead a consumer to believe that the evidence referred to is of a competent and reliable nature (see Finding 32, *supra*).

34. CX 2 virtually states the claim as set forth in Paragraph Five a. of the complaint. The advertisement states, in bold-faced print, that "there is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack." CX 3 states that "there is absolutely no scientific evidence whatsoever that eating eggs in any way increases the risk of heart attack." Again, there is no qualifying language as to quantity of eggs eaten, and the implicit representation of the evidence being competent and reliable is made. The use of the word "whatsoever" has been added, which reinforces and makes more positive the representation that no evidence exists.

35. The first booklet, CX 7, states both "there is no scientific evidence whatsoever indicating that eating eggs will increase the risk of heart attack" and "there is absolutely no scientific evidence whatsoever that eating eggs in any way increases the risk of heart attack." The latter statement is set out on the back [20] page of the booklet for added reader visibility. As with CX 1-3, the statements are indistinguishable in substance from those alleged in Paragraph Five a. of the complaint.

warfare, management)."

"Scientific method" means, *inter alia*: "The principles and procedures used in the systematic pursuit of intersubjectively accessible knowledge and involving as necessary conditions the recognition and formulation of a problem, the collection of data through observation and if possible experiment, the formulation of hypotheses, and the testing and confirmation of the hypotheses formulated." *Webster's Third New International Dictionary* (1963).

36. CX 171-173, which are identical in wording but published in different newspapers, state in a banner headline that "a British study has found no evidence that eating eggs is related to a risk of heart attack." Further, in the body of CX 171-173, it is stated that the British study "* * * found no evidence which relates the numbers of eggs consumed to a risk of [CHD]." These statements are identical in substance to those alleged in Paragraph Five a. The fact that the claims are couched as the findings of a British study does not change the nature of the representations conveyed to consumers — the message is still that no evidence exists. The reference to "an official British Government report" can only heighten the reliability of the representation that no evidence exists.

CX 175 also cites the same British report and states that a "panel of renowned British doctors and scientists" said that they had "found no evidence which relates the number of eggs consumed to a risk of coronary heart disease." Further, the newspaper advertisement states in bolder type that "there is no scientific evidence that eating eggs increases the risk of a heart attack." As with CX 1-3, 7, and 171-173, the statements are identical in substance to the representation alleged in Paragraph Five a. of the complaint.

37. CX 4-6, 8, and 176 set forth essentially the representation alleged in Paragraph Five a. of the complaint, although they substitute the word "proof" for "evidence." This substitution does not alter the basic representation made, since any distinction between "proof" and "evidence" would not be generally recognized by the public in the context of respondents' advertisements. CX 4-6 and 8 stress the nutritional goodness of eggs by stating that eating eggs may be beneficial but that avoiding eggs may be hazardous in terms of courting heart disease. CX 176, which uses the term "no scientific proof," also represents that there is no evidence. "Proof" is used twice and "evidence" is mentioned three times — all in terms of describing the basic message that there is no evidence of a link between eggs and CHD. Consumers, [21] therefore, when viewing the entirety of these advertisements, will consider "proof" and "evidence" as interchangeable equivalents.

38. CX 9, an egg carton insert entitled "Why You Need Cholesterol Everyday," states "there is no proof that eating cholesterol-rich eggs, butter and meat will cause heart attacks." This statement is surrounded by representations which stress the need for cholesterol and indicate that avoiding cholesterol may be dangerous to your health. Thus, the total advertisement leaves the impression that eggs may be essential to one's physical well-being, and that there is no evidence supporting a

positive relationship between eggs and the risk of heart attacks, as alleged in Paragraph Five a. of the complaint.

39. CX 1, 2, and 7-8 represent that there is overwhelming competent and reliable scientific evidence that eating eggs does not increase the risk of heart attacks, the allegation in Paragraph Five b. of the complaint. Although the advertisements do not expressly state the aforementioned representation, certain words and phrases used in the context of the advertisement create the *net impression* alleged in Paragraph Five b. More specifically, CX 1 states "there is absolutely no scientific evidence that eating eggs in any way increases the risk of heart attack. [CX 2 makes a similar statement with "proof" substituted for "evidence."] 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 attacks?" The clear meaning of this portion of CX 1 is that there is overwhelming scientific evidence that eating eggs does not increase the risk of heart attack, since the word "contrary" means opposite or opposition. CX 2 states there is no scientific proof that eating eggs increases the risk of heart attack and follows this with the statement that "there is, in fact, preliminary evidence that the opposite is true * * *," which creates the net impression that there is evidence that eating eggs will prevent the risk of a heart attack. CX 5 makes the same representation as CX 2.

40. CX 7 states:

There is no scientific evidence whatsoever indicating that eating eggs [22] will increase the risk of heart attack. There is considerable evidence that the opposite is true.

* * * we can only assume that these statements [connecting diet to CHD] are still made, in the face of overwhelming evidence to the contrary, to keep research funds coming from commercial interests (CX 7C).

CX 7 thus communicates the representation that there is considerable scientific evidence that eating eggs does not increase the risk of heart attacks, and especially so since right after the statements quoted above, it proceeds to cite and describe studies which purport to be evidence that eggs and dietary cholesterol do not increase the risk of CHD .

41. The revised booklet, CX 8, also represents that there is substantial competent and reliable evidence that eating eggs does not increase the risk of heart attacks. While CX 8 does not make the claim in express terms as did the earlier booklet, CX 7, the net impression of the advertisement clearly conveys the alleged representation. First, CX 8 states that "there is no scientific proof * * *" (CX 8B), and "it has not been scientifically established that there is a relationship between blood cholesterol level and the possibility of having a heart attack" (CX 8C). The booklet then proceeds to list and describe purported scientific

