

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

Mar 10, 1998

B235300

In the Matter of	)	)
R.J. REYNOLDS TOBACCO COMPANY,	)	DOCKET NO. 9285
a corporation.	)	)

**NUNC PRO TUNC ORDER re INTERROGATORY NUMBER 1**

Upon sua sponte reflection, the reasoning, but not the mandate, of the orders dated February 25, 1998, and March 9, 1998, is replaced as follows:

These orders were, in part, based on a misstatement by counsel that "Reynolds' interrogatory answers are incomplete because they have not been answered 'under oath.'" Motion to Compel Answer to Complaint Counsel's Second Set of Interrogatories p. 10 n.3. Mistake of counsel, however, in absence of prejudice to opponent, should not affect the merits of the issue. TK-7 Corp., Docket 9224, Order Granting Motion to Amend, May 24, 1990; P. Lorillard v. FTC, 186 F.2d 52, 55 (4th Cir. 1950).

Complaint counsel moved to compel an answer to interrogatory number 1 of their second set, asking for dollars spent for each year from 1980 in each of 50 states and the District of Columbia, for 16 categories of advertising and promotion.

Only Reynolds knows the specific geographic divisions of its Joe Camel advertising and promotion expenditures. To the extent Reynolds has no easily comprehensible documents that readily supply the information sought by the interrogatory, Reynolds is likely to have a reduced burden, compared to complaint counsel, in obtaining answers to the interrogatory since Reynolds has ready access to people who know its advertising programs and sales divisions.

Reynolds' documents show that it keeps records of expenditures broken down by types of media and geographic regions. Complaint counsel's motion of Feb. 12, 1998, at n.6. Where

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Reynolds has not set forth in detail its efforts made to obtain the information requested in re Barnholdt, 74 B.R. 760, 764 (N.D.N.Y. 1987) (Judicial construction of analogous federal rule useful in interpreting the Commission rule, Crush Intl. Ltd., 80 F.T.C. 1023, 1028-29 (1972)).

specific records do not exist. Reynolds is capable of providing an estimate, by geographic divisions, of the details of expenditures for newspaper and outdoor advertising, for example, for years within the specified time period. (Martin Decl. at ¶ 7.)

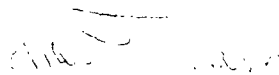
As to the argument that complaint counsel has exceeded the limit of 25 interrogatories, the advisory committee notes relating to the analogous Federal Rules 33(a) state: "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and content be stated separately for each communication." And, "interrogatory subparts are to be counted as part of one interrogatory for the purpose of [the local rule] if they are logically or factually subsumed within and necessarily related to the primary question." Ginn v. Gemini Inc., 137 F.R.D. 320, 322 (D. Nev. 1991); Myers v. U.S. Paint Co., 116 F.R.D. 165, 165-66 (D. Mass. 1987).

Respondent argues that the limit of 25 interrogatories has been exceeded, referring to two interrogatories from Complaint Counsel's first set, viz: interrogatory 8, a leading question supplying the names of 42 firms each one of which may be one of the firms described in the interrogatory, and interrogatory 7, a leading question supplying the names of 51 names of individuals who may be described in the interrogatory. Each interrogatory could have been drafted as a direct question, not supplying possible answers, which presumably would have met respondent's suggested procedure albeit using a more diffuse format.

Those two interrogatories, and their related subcategories, counted as a total of two, for purposes of the limitation.

The interrogatory at issue on this motion is broad, asking for each year since 1980, the dollars spent for all filtered Camel cigarettes in each of fifty states and the District of Columbia for each of sixteen categories of advertising and promotion. I believe these subcategories are sufficiently distinct as to be separate interrogatories, resulting in sixteen interrogatories in number 1 of the second set, with the two sets now amounting to 25 interrogatories.

So Ordered.

  
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James P. Timony  
Administrative Law Judge

Date: March 10, 1998