

B248472

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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

CERTIFICATION TO COMMISSION

At the request of complaint counsel and pursuant to Section 3.22(a) of the Rules of Practice, I certify to the Commission the attached Motion to Dismiss, along with a Memorandum of Points and Authorities in support of the motion, which correctly states that this motion is addressed to the administrative capacity of the Commission.



James P. Timony  
Administrative Law Judge

Dated: December 2, 1998

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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

To: The Honorable James P. Timony  
Administrative Law Judge

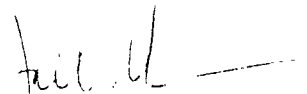
COMPLAINT COUNSEL'S MOTION TO DISMISS

Pursuant to Commission Rule of Practice 3.22(a), Complaint Counsel hereby ask that Your Honor certify to the Commission this motion to dismiss this matter in its entirety.

Complaint Counsel make this request because all the relief Complaint Counsel have sought, and would have sought, in this proceeding has been obtained through the recent settlement between state attorneys general and the major tobacco manufacturers, including respondent R.J. Reynolds Tobacco Co. The Commission's interests in bringing this case have therefore been achieved, and it would not be in the public interest to continue litigating this matter.

Complaint Counsel respectfully refer Your Honor to the accompanying Memorandum of Points and Authorities in support of this motion.

Respectfully submitted this 24th day of November, 1998.



David C. Shonka  
Theodore H. Hoppock  
Shira D. Modell  
David P. Frankel  
Peder Magee  
Jill Samuels  
L. Mark Eichorn  
Joel Winston

Counsel Supporting the Complaint

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
 )  
 )  
R.J. REYNOLDS TOBACCO COMPANY, )  
 )  
a corporation. )  
 )  
 )  
\_\_\_\_\_ )

DOCKET NO. 9285

To: The Honorable James P. Timony  
Administrative Law Judge

COMPLAINT COUNSEL'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS

Complaint Counsel submit this memorandum in support of our request that the ALJ certify to the Commission a motion to dismiss this matter in its entirety. Because the relief sought by the complaint in this matter has now been achieved through a settlement between R.J. Reynolds Tobacco Co. ("RJR") and forty-six state attorneys general, the public interest would not be served by proceeding with this case.

**I. Legal Background**

It is well-settled that the Commission must consider the public interest in issuing a complaint, or in proceeding with an action based on the complaint. *FTC v. Klesner*, 280 U.S. 19, 30 (1929). As the Commission explained in *Drug Research Corp*:

In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and personnel, the Commission must consider -- as a matter of administrative judgment and discretion -- which of the various courses of action open to it should be followed.

63 F.T.C. 998, 1014 (1963) (order dismissing complaint). Thus, the Commission can -- and should -- dismiss a matter at any time during the course of the proceedings when it appears that the public interest would not be served by continuing to prosecute the matter. *FTC v. Klesner*, 280 U.S. at 30. Indeed, the Commission has dismissed cases on public interest grounds on a number of previous occasions. *See, e.g., Dillard Department Stores, Inc.*, Docket No. 9269, 1996 FTC LEXIS 49 (finding that it would not be in public interest to continue to prosecute complaint involving claims of unauthorized use under truth-in-lending law where Federal Reserve Board had issued new staff commentary adopting different standard for investigating such claims than was reflected in Commission's complaint); *Exxon Corporation*, 100 F.T.C. 434 (1982) (dismissal of case challenging Exxon's acquisition of electronics company where discovery revealed, because product Exxon had been developing was not commercially viable, Exxon was not in fact likely potential entrant into electronic company's market); *First Buckingham*, 73 F.T.C. 938 (1968) (decision by Commission to dismiss complaint alleging that operators of apartment complexes had deceptively represented that their apartments were available to the general public without restriction as to race, color or national origin after enactment of Civil Rights Act of 1968, as Act would ensure that respondents would not resume their policy of racial discrimination); *Drug Research Co., supra* (dismissing complaint on public interest grounds over objection of respondent).

The decision to dismiss a case on public interest grounds, however, is a decision that can only be made by the Commission. The ALJ does not have authority to rule on this issue and must certify it to the Commission for its determination. *Drug Research Corp.*, 63 F.T.C. at 1014; *Century 21 Commodore Plaza, Inc.*, 95 F.T.C. 808, 816 (1980); *First Buckingham*

*Community, Inc.*, 73 F.T.C. at 944; *see also Dillard Department Stores, Inc.*, 1996 FTC LEXIS 18 (ALJ order certifying to the Commission a motion to dismiss), 1996 FTC LEXIS 49 (Commission order dismissing the matter).

## **II. Facts**

The complaint issued by the Commission on May 28, 1997, charged that RJR's "Joe Camel" advertising campaign was an unfair practice under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The complaint was accompanied by a proposed order setting out the relief the Commission had reason to believe would be appropriate should the complaint allegations be proven. This relief -- the same relief that Complaint Counsel indicated in our trial brief that we would seek in this proceeding -- consists of three components: 1) RJR must cease and desist advertising to children its Camel brand cigarettes through the use of themes or images relating to "Joe Camel" or associated figures; 2) RJR must collect and make available to the FTC data concerning each of its cigarette brands' sales to persons under the age of 18 and share of smokers under the age of 18; and 3) RJR must, for a period of 10 years, disseminate public education messages discouraging persons under the age of 18 from smoking.

On November 23, 1998, forty-six states<sup>1</sup> and five U.S. territories, through their attorneys general, entered into an agreement with the United States' four largest tobacco companies -- RJR, Philip Morris, Inc., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. -- to

---

<sup>1</sup> The four remaining states had previously settled their actions against the tobacco companies in separate consent agreements.

settle the states' litigation against the tobacco industry.<sup>2</sup> The broad-ranging settlement agreement provides the injunctive and consumer education relief sought by Complaint Counsel in this matter.<sup>3</sup>

Specifically, the states' agreement prohibits RJR from using "any Cartoon" in its advertising of tobacco products (Master Settlement Agreement, Section III.(b))<sup>4</sup>; "cartoon" is defined specifically to include the "Joe Camel" character (*Id.*, Section II(1)).<sup>5</sup> RJR's agreement to abide by this provision clearly satisfies the first component of the relief Complaint Counsel has sought -- that RJR cease advertising Camel cigarettes to children through the use of "Joe Camel" images and themes.

In addition, as part of the states' settlement, the tobacco companies (including RJR in proportion to its relative market share) will finance a \$1.45 billion public education fund, the purposes of which include "carrying out a nationwide sustained advertising and education

---

<sup>2</sup> The agreement must be filed in each state court, but that appears to be a mere formality.

<sup>3</sup> In addition, on June 22, 1998, President Clinton directed the Department of Health and Human Services ("HHS") to undertake an annual survey documenting cigarette brand preferences among teenage smokers. Statement by the President Upon Departure for Nashville, Tennessee, 34 WEEKLY COMP. PRES. DOC. 1182 (June 22, 1998). By ensuring that there will be competent and reliable data as to underage use of RJR's cigarettes brands (as well as other brands), the HHS survey satisfies the interests underlying the second component of the relief Complaint Counsel has sought.

<sup>4</sup> The complete text of the Master Settlement Agreement between the state attorneys general and the tobacco companies is attached as an appendix to this memorandum.

<sup>5</sup> More broadly, the states' settlement agreement would prohibit RJR (or any other tobacco company) from taking any action, directly or indirectly "to target youth . . . in the advertising, promotion or marketing of Tobacco Products, or tak[ing] any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking." (Master Settlement Agreement, Section III(a)). The agreement would also require additional actions to reduce youth smoking, including additional advertising restrictions.

program to [ ] counter the use by Youth of Tobacco Products." (*Id.*, Sections VI(c) & (f)). Such action addresses the third component of the relief sought by Complaint Counsel: that RJR sponsor a substantial consumer education campaign aimed at discouraging young people from smoking.

Thus, all of the relief sought by Complaint Counsel in this matter has now been obtained in other forums and the Commission's interests have been fully achieved. Under these circumstances, it would not be in the public interest to continue to litigate this matter.

### III. Conclusion

For the foregoing reasons, Complaint Counsel request that Your Honor certify to the Commission this Motion to Dismiss.

Respectfully submitted,



David C. Shonka  
Theodore H. Hoppock  
Shira D. Modell  
David P. Frankel  
Peder Magee  
Jill Samuels  
L. Mark Eichorn  
Joel Winston

Division of Advertising Practices  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Hand Delivery: Room S4002  
(202) 326-3538  
Counsel Supporting the Complaint

Dated: November 24, 1998.