IN THE MATTER OF

JS&A GROUP, INC., ET AL.

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

Docket C-3248. Complaint, Feb. 24, 1989—Decision, Feb. 24, 1989

This consent order prohibits, among other things, the Northbrook, Ill. corporation from falsely claiming that any product has been independently investigated or evaluated. Respondent is also prohibited from misrepresenting that a paid advertisement is an independent consumer or news program.

Appearances

For the Commission: *Toby M. Levin.*

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that JS&A Group, Inc., a corporation, and Joseph Sugarman, individually and as an officer of said corporation, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1.

(a) JS&A Group, Inc., is an Illinois corporation.

(b) JS&A Group, Inc. has its principal office and place of business at One JS&A Plaza, Northbrook, Illinois.

(c) Joseph Sugarman is President of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporation.

(d) The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed sunglasses and other products to the public.

PAR. 3. Respondents have disseminated or caused to be disseminated advertisements and promotional materials for their sunglasses. These advertisements have been published in magazines and broadcasted on television across state lines in or affecting commerce, for the purpose of inducing purchases of such sunglasses by members of the public.

PAR. 4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Typical of respondents' advertisements, but not necessarily inclusive thereof, is the advertisement attached hereto as Exhibit A and the "Consumer Challenge" program. Specifically, the aforesaid advertisements contain the following statements:

(a) "Consumer Challenge" TV show picks BluBlocker sunglasses as target for investigative report and ends up with surprise." (Exhibit A)

(b) "We were upset. Our advertisement for BluBlocker high resolution sunglasses was selected to be exposed by the new commercial TV production, Consumer Challenge. Is this advertisement about a major new product breakthrough or a real rip-off?' asked the show's host Jonathan Goldsmith. 'We're going to find out.' If you've ever watched 60 Minutes or 20/20 you could understand our fear. We were running the risk of Consumer Challenge taking a great product and ruining it on the air. Sales could plummet and our product could be destroyed by some clever editor or a jealous producer. But we were totally wrong." (Exhibit A)

(c) "Obviously we are very proud of our achievement with the Consumer Challenge TV show. Whenever you can convey a very positive image of your product on a commercial TV production, it is very encouraging." (Exhibit A)

(d) "Welcome to 'Consumer Challenge', hosted by Jonathan Goldsmith, the show that examines popular new products for you, the consumer, with investigative reporters Don Hale and Catherine Grant. Here's your host, Jonathan Goldsmith.

On today's 'Consumer Challenge' we investigate BluBlockers—a new product innovation or consumer rip-off? (Consumer Challenge)

(e) "We interrupt this program for a special announcement. This program is unable to handle the number of calls requesting the sunglasses featured in this program. If you are interested in obtaining the BluBlocker sunglasses, you may call the manufacturer directly at the number shown here." (Consumer Challenge)

(f) "Thanks for such a thorough job on your investigation of this topic. Remember, if you didn't get the ordering information, please stay tuned and it will be shown on the screen at the end of the show.... Look for our next "Consumer Challenge", the show that challenges the products of our time to make you a better, more informed consumer in the future." (Consumer Challenge)

PAR. 6. Through the use of the statements referred to in paragraph five, and other statements in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) "Consumer Challenge" is an independent consumer program such as "60 Minutes" or "20/20", that conducts independent and objective investigations of consumer products like BluBlockers.

(b) The producers and investigative reporters of "Consumer Challenge" conducted an independent and objective investigation of BluBlockers without receiving any reimbursement or other financial benefit, directly or indirectly, from its marketers, JS&A Group, Inc., or its agents.

PAR. 7. In truth and in fact:

(a) "Consumer Challenge" is not an independent consumer program such as "60 Minutes" or "20/20," that conducts independent and objective investigations of consumer products like BluBlockers. It was created by Joseph Sugarman and produced at the request of JS&A Group, Inc., and Joseph Sugarman for the sole purpose of selling BluBlockers.

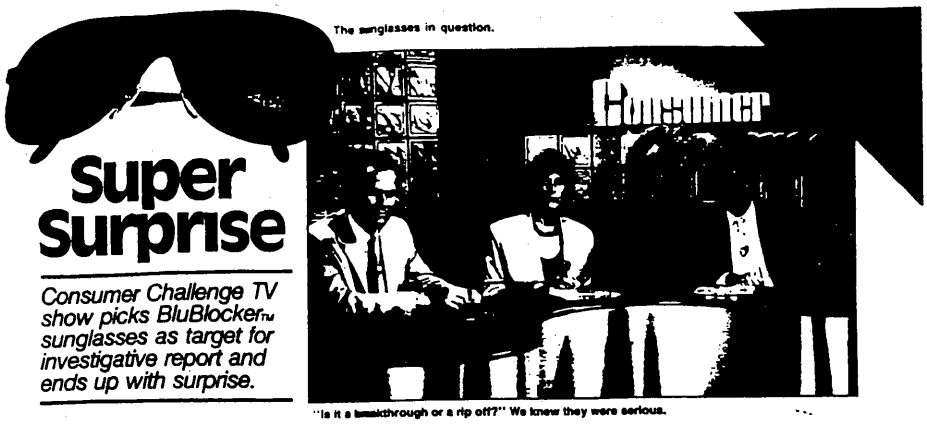
(b) The producers and investigative reporters of "Consumer Challenge" did not conduct an independent and objective investigation of BluBlockers without receiving any reimbursement or other financial benefit, directly or indirectly, from its marketers, JS&A Group, Inc., or its agents. They were paid by Marketing Resources Network, the production company, on behalf of JS&A Group, Inc. and Joseph Sugarman for producing and acting in the advertisement.

Therefore, the representations set forth in paragraph six were, and are, false and misleading.

PAR. 8. The dissemination of the aforesaid false and misleading representations by respondents, as alleged in this complaint, constitutes unfair and deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Machol not participating.

EXHIBIT A



"Is it a breakthrough or a rip off?" We knew they were serious.

Super Surprise

Consumer Challenge TV show picks BluBlocker™ sunglasses as target for investigative report and ends up with surprise.

By Joseph Sugarman

We were upset. Our advertisement for BluBlocker high resolution sunglasses was selected to be exposed by the new commercial TV production, Consumer Challenge.

"Is this advertisement about a major new product breakthrough or a real rip off?" asked the show's host, Jonathan Goldsmith. "We're going to find out."

If you've ever watched 60 Minutes or 20/20 you could understand our fear. We were running the risk of Consumer Challenge taking a great product and ruining it on the air. Sales could plummet and our product could be destroyed by some clever editor or a jealous producer. But we were totally wrong.

TOTAL PRAISE

By the end of the show, the entire staff praised the product in one of the best commercial endorsements any product could ever receive. Said one of the reporters, Don Hale, "We had a difficult time finding anybody who would even consider knocking the product. Everybody liked it. Our entire staff wears them now."

This praise is only the beginning of what has been an outpouring of endorsements for the product. During the show, the reporters interviewed Keith Hernandez, star first baseman of the New York Mets who reported that it was his favorite pair.

"We interviewed movie stars, famous football players, baseball players and hundreds of customers. I have never found a product that had such universal appeal," said Kathy Graf, another reporter on the show.

BluBlocker sunglasses are one of the best selling new concepts in sunglass technology. The lenses on BluBlockers filter out both blue and UV light to produce one of the most pleasing visual effects ever created for any pair of sunglasses. And for good reason.

Ozone is slowly being depleted from our atmosphere by pollution. Without sufficient ozone to fully protect us, ultra violet or UV light is causing a dramatic increase in both skin cancer and eye diseases such as cataracts. "This is not a case of a small increase. It's very dramatic," stated one of the interviews.

Sunglasses are not the answer either. In fact, it was concluded that some sunglasses could be dangerous because they caused your pupils to open wider and allow more of the UV light to enter your eyes.

FILTERS OUT BLUE

BluBlockers not only block out the dangerous UV light from the atmosphere but filter out the blue light as well. Blue focuses slightly in front of the retina which is the focusing screen in your eye. By eliminating the blue, everything appears to be in sharper focus, clearer and creates almost an enhanced 3-dimensional appearance. The results are impressive.

You see better, clearer and with greater resolution. Tom Brakefield, a famous wildlife photographer was sitting on the front steps of his cabin when he noticed a mountain in the background that he hadn't observed before. "Because of BluBlocker's high resolution, I've been able to see objects, I never even knew existed."

Dave Johnson, the number 2 ranked USA decathlon champion wears BluBlockers when he performs all 10 of his events including the high jump, the pole vault and the javelin throw. "BluBlockers make me feel more relaxed and give me a definite edge over my competition. I actually experience the optical perfection in the lenses."

GREATEST ASSET

The optical perfection is the greatest asset in BluBlocker sunglasses. Each lens is made of Malenium-99™—one of the strongest yet finest lens materials possible for high resolution and clarity. Anybody can produce a lens that approaches the BluBlocker quality, but nobody takes the care that the BluBlocker organization takes in their lenses.

JS&A offers three models of BluBlockers. One is an anodized high-tech aluminum pair with a flexible spring hinge. The second is a polarized version using the aluminum frame and hinge and the third is our precision plastic pair without the spring hinge. All three models utilize the same quality, high resolution BluBlocker lenses and come complete with padded carrying case and a one year no-nonsense limited warranty. All three are designed to fit both men and women with almost any sized face and all models look identical. There is also a high quality clip-on model that fits over prescription lenses.

EXPERIENCE THE MIRACLE

I urge you to order a pair during our 30-day trial period. When you receive them see how light they are. Then experience the miracle of BluBlockers. Put them on. Everything will suddenly appear clearer, sharper and with an enhanced 3-dimensional look. You will notice a dramatic difference immediately—especially in sunlight.

If, for any reason, you are not pleased in any way with your pair, no problem. I give you up to 30-days to return them in the reusable carton that comes with each pair for a prompt and courteous refund.

If anything happens to your pair during the first year of use, return it to me for a prompt replacement. You won't find that type of warranty on any other pair of sunglasses.

Obviously we are very proud of our achievement with the Consumer Challenge TV show. Whenever you can convey a very positive image of your product on a commercial TV production, it is very encouraging. If you have a chance, catch Consumer Challenge in your area. Check local time and listings. But don't let any more time go by before you buy your first pair of BluBlockers. Order a pair, at no obligation, today.

To order, credit card holders call toll free and ask for product by number shown below or send a check plus $3 for delivery.

Polarized Deluxe (0032YY9) $99.95
Aluminum Deluxe (0029YY9) 69.95
Clip-On Model (0028YY9) 29.95
Precision Plastic (0031YY9) 39.95

JS&A
ORDER TOLL-FREE.
24 HRS. EVERY DAY.
800 356-6000
IN NEBRASKA & ALASKA 800-331-1000
TOLL-FREE ORDERING BY CREDIT CARD ONLY

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent JS&A Corporation 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 One JS&A Plaza, in the City of Northbrook, State of Illinois.

Respondent Joseph Sugarman is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents JS&A Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, and Joseph Sugarman, individually and as officer of the said corporation, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any sunglass or any other product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting, directly or indirectly, that such product has been independently investigated or evaluated.

B. Misrepresenting, directly or indirectly, that an advertisement is an independent consumer or news program and not a paid advertisement.

C. For a period of ten (10) years from the date of service of this order, failing to disclose clearly and prominently in any program length advertisement that the program is an advertisement or commercial. Such fact shall be disclosed at the beginning of the program. In addition, such fact shall be disclosed each time during the program that ordering instructions are given, or at the end of the program if no ordering instructions are given, provided however, that such additional disclosures need not appear more than twice during any half hour period of the program. For purposes of this order, "*program length advertisement*" shall mean any video advertisement that ends fifteen minutes or more after it begins.

II.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

III.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

IV.

It is further ordered, That respondents shall, within sixty (60) days after service of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Machol not participating.

IN THE MATTER OF

CLEVELAND AUTOMOBILE DEALERS' ASSOCIATION

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

Docket C-3247. Complaint, Mar. 2, 1989—Decision, Mar. 2, 1989

This consent order prohibits, among other things, the Cleveland Automobile Dealers' Association (CADA) from limiting its members' hours, from maintaining any policy concerning hours of operation, and from encouraging members to influence each other as to their hours. The consent order requires respondent to advertise in the newspaper that dealers' hours are no longer restricted and also change its Articles of Incorporation or other policy statements to reflect the consent order.

Appearances

For the Commission: *Mark D. Kindt* and *Steven W. Balster.*

For the respondent: *Paul P. Eyre, Baker & Hostetler,* Cleveland, Oh.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Cleveland Automobile Dealers' Association, a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cleveland Automobile Dealers' Association is a corporation formed pursuant to the laws of the State of Ohio, with its office and principal place of business located at Suite 300, The Lincoln Building, 1367 East 6th Street, Cleveland, Ohio.

PAR. 2. For purposes of this complaint, (a) a "dealer" is any natural person, corporate entity, partnership, association, joint venture, trust, or any other organization or entity that receives on consignment or purchases new motor vehicles for sale to the public; (b) a "member" or

"member dealer" is any dealer who is a member of respondent; (c) a "policy" is any policy, guideline, statute, rule, regulation, provision, or any statement governing or purporting to govern the conduct of respondent or its members; (d) "showroom hour" means any period (whether that period be stated as specific hours, specific days, or otherwise) that any dealer holds itself open to sell automobiles; and (e) "and" and "or" have both conjunctive and disjunctive meanings.

PAR. 3. Respondent is an association organized in substantial part to represent the interests of, and for the benefit of, dealers located in the Greater Cleveland area (including the Ohio County of Cuyahoga, and portions of the Ohio Counties of Lorain, Medina, Summit, Portage, Geauga, and Lake). Respondent has approximately one hundred twenty-seven (127) members. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purpose and activities, respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

PAR. 4. In the conduct of their business, and at all times relevant hereto, respondent's members have engaged in activities that are in or affect "commerce" within the meaning of Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C. 45(a)(1)].

PAR. 5. Respondent's members are engaged in the business of selling new motor vehicles at retail. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves.

PAR. 6. Respondent has restrained competition in the sale of new motor vehicles in the Greater Cleveland area by acting as a combination or conspiracy of at least some of its members by adopting and promoting adherence to a schedule limiting showroom hours in the Greater Cleveland area. Specifically, respondent has engaged in some or more of the following acts or practices:

(a) At all times relevant to this complaint, respondent has maintained a policy discouraging member dealers from conducting showroom hours on Sundays.

(b) At all times relevant to this complaint, respondent has maintained a policy discouraging member showroom hours past 9:00 p.m. on Mondays and Thursdays and past 6:00 p.m. all other nights.

(c) On April 21, 1981, at a membership meeting, the membership granted respondent's president a vote of confidence to carry out procedures in the Code of Regulations that call for suspension or

expulsion of members who violate any of respondent's policies respecting showroom hours.

PAR. 7. Respondent has restrained competition in the sale of new motor vehicles in the Greater Cleveland area by acting as a combination or conspiracy of at least some of its members by, among other things, persuading or attempting to persuade dealers in the Greater Cleveland area to adopt or adhere to a schedule limiting showroom hours, including limiting weekday evening showroom hours to Mondays and Thursdays and maintaining no showroom hours on Sundays. Specifically, respondent has engaged in some or more of the following acts or practices:

(a) In 1976, a member dealer complained to respondent that a second member dealer had showroom hours for three successive weeknights past 6:00 p.m. Respondent then directed that the second member dealer be notified of the complaint.

(b) In 1981, a member dealer complained to respondent that a second member dealer was open until 9:00 p.m. on a Friday. Respondent, at a Board of Trustees meeting on or about June 8, 1981, directed that the second member dealer be notified that respondent had received a written complaint regarding its showroom hours.

(c) In 1981, a member dealer complained to respondent that a second member dealer was open on a Sunday. By letter dated May 19, 1981, respondent notified the second member dealer that it had received a written complaint. On June 23, 1981, the owner of the second member dealer appeared at a special meeting of respondent's Board of Trustees and promised that his dealership would comply with respondent's policies relating to showroom hours.

(d) In 1981, a line group complained to respondent that a member dealer was open until 10:00 p.m. on a Wednesday. By letter dated May 6, 1981, respondent notified the member dealer that it had received a written complaint regarding its showroom hours. By letter dated June 4, 1981, the member dealer promised to comply with respondent's policies relating to showroom hours.

(e) In 1982, a member dealer complained to respondent that a second member dealer was open on a Sunday. By certified letter dated March 29, 1982, respondent notified the second member dealer that it had received a written complaint regarding its showroom hours.

(f) In 1983, a member dealer complained to respondent that a second member dealer was open on a Sunday. By certified letter dated November 18, 1983, respondent notified the second member dealer

that it had received a written complaint regarding its showroom hours. By letter dated November 21, 1983, the second member dealer promised to comply with respondent's policies relating to showroom hours.

(g) In 1983, two member dealers complained to respondent that a third member dealer was open on a Sunday. By letter dated November 2, 1983, respondent notified the third member dealer that it had received a written complaint regarding its showroom hours. By letter dated November 11, 1983, the third member dealer promised to comply with respondent's policies relating to showroom hours.

(h) In 1983, a member dealer complained to respondent that a second member dealer was open on a Sunday. By letter dated March 23, 1983, respondent notified the second member dealer that it had received a written complaint regarding its showroom hours.

(i) Before 1975, respondent notified its members of respondent's policies regarding showroom hours by sending them copies of its Code of Regulations. Since 1975, respondent has notified new members of respondent's policies regarding showroom hours by having a representative personally inform them of those policies.

PAR. 8. The combination or conspiracy and the acts and practices alleged herein have had and are now having the purpose and effect of foreclosing, reducing, and restraining competition among dealers in the Greater Cleveland area in the sale of new motor vehicles, and thus are to the prejudice and injury of the public. Specifically, automobile dealers in the Greater Cleveland area observe nearly uniform showroom hours limiting opportunities for comparative shopping.

PAR. 9. Ohio laws prohibiting automobile sales on Sunday were repealed in 1973. Since that time, Ohio laws have not restricted showroom hours.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act. The unfair methods of competition and unfair acts and practices of respondent, as alleged herein, are continuing.

Commissioner Machol not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Suite 300, The Lincoln Building, 1367 East 6th Street, Cleveland, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for purposes of this order, the following definitions shall apply:

(A) "*Respondent*" means the Cleveland Automobile Dealers' Association, its directors, trustees, councils, committees, officers, represen-

tatives, delegates, agents, employees, successors, and assigns, or any other person acting for or on behalf of the Cleveland Automobile Dealers' Association in any capacity;

(B) "*Dealer*" means any person who receives on consignment or purchases new motor vehicles for sale to the public, and any director, officer, employee, representative, or agent thereof;

(C) "*Member*" means any dealer who is a member of the Cleveland Automobile Dealers' Association;

(D) "*Person*" includes any natural person, corporate entity, partnership, association, joint venture, trust, or any other organization or entity, but does not include any government entity; and

(E) "*Hours of operation*" means any period of time (whether that period be stated as specific hours, specific days, or otherwise) that any dealer holds itself out to the public as open to sell new cars. For purposes of this order, "hours of operation" shall not include any period of time that a dealer conducts the operation of parts or service departments or aspects of its operation other than new car sales.

II.

It is further ordered, That respondent, directly, indirectly, or through any corporate or other device, shall forthwith cease and desist from:

(A) Entering into, continuing or carrying out any agreement, contract, combination, or conspiracy with any dealer or any other person regarding hours of operation;

(B) Adopting, implementing, or maintaining any article, bylaw, regulation, code of conduct, or other policy, whether formal or informal, regarding hours of operation;

(C) Exchanging information or communicating with any dealer or any other person concerning hours of operation, directly or by implication, except to the extent necessary to comply with any order of the Federal Trade Commission;

(D) Requesting, coercing, influencing, encouraging, persuading, or attempting to request, coerce, influence, encourage, or persuade any dealer to adopt, agree to, or adhere to any hours of operation, or taking any other action intended to or likely to influence any dealer to adopt, agree to, or adhere to any hours of operation; and

(E) Encouraging any person to, or suggesting that any person,

engage in any of the acts or practices set forth in Part II(A), (B), (C), or (D), above.

III.

It is further ordered, That:

(A) With respect to respondent's Articles of Incorporation, Code of Regulations, Code of Bylaws, Statement of Policies, or any other policy statements, within sixty (60) days after this order becomes final, respondent shall explicitly and formally remove any provision, rule, standard, interpretation, policy statement, or guideline that is inconsistent with Part II of this order, by amendment, revision, or in such other manner as to eliminate the inconsistency, including, but not limited to, formal rescission of any existing Resolution of the Board of Trustees addressing hours of operation, including the Resolution adopted in August 1954 and the Resolution adopted in September 1964 and amended in September 1976;

(B) Within sixty (60) days after this order becomes final, and until February 28, 1999, respondent shall incorporate in its Code of Regulations:

(1) A provision that requires members to report to respondent in writing any agreement, contract, combination or conspiracy between members regarding hours of operation. For a period of five (5) years after receipt, respondent shall maintain, and upon request make available to the Federal Trade Commission, all reports filed pursuant to this part.

(2) A provision that prohibits its trustees, members, officers, employees, and agents from discussing, directly or by implication, hours of operation at any of respondent's membership, Board of Trustees, or committee meetings, formal or informal, except to the extent necessary to comply with any order of the Federal Trade Commission;

(3) A provision that requires members to destroy any decals or signs previously provided to them by respondent that referred in any way to hours of operation; and

(4) A provision that requires expulsion from membership in respondent of any member, discharge from employment, or the termination of its relationship with any member, employee or agent

who fails to comply with the provision required by Part III(B)(1), (B)(2), or (B)(3), above.

(C) Within ten (10) days after the amendment, revision, or any other change of its Articles of Incorporation, Code of Regulations, Code of Bylaws, Statement of Policies, or any other policy statement of respondent pursuant to this order, respondent shall send by first-class mail a copy of such amended Articles of Incorporation, Code of Regulations, Code of Bylaws, Statement of Policies, or any other policy statement to all members, accompanied by a cover letter clearly and conspicuously drawing the members' attention to the amendment, revision, or other change and briefly summarizing its nature and purpose;

(D) Promptly, and in no case in excess of ninety (90) days after acquiring reason to believe that a member violated Part III(B)(1), (B)(2), or (B)(3) of this order, respondent shall, in accordance with its Code of Regulations relating to expulsion of members, make a determination whether a violation has occurred and shall expel any member it so determines to have violated Part III(B)(1), (B)(2), or (B)(3) of this order;

(E) Within thirty (30) days after this order becomes final, respondent shall provide each member, officer, agent, and employee with a copy of this order and attached complaint and the notice set out in Appendix A;

(F) For a period of two (2) years after this order becomes final, respondent shall provide each new member who joins respondent, and each new officer, new agent, or new employee employed by respondent, with a copy of this order and attached complaint and the notice set out in Appendix A; and

(G) Within sixty (60) days after this order becomes final, respondent shall provide each member with replacement decals and signs for any decals or signs previously provided by respondent that referred in any way to hours of operation, along with a cover letter explaining that members must destroy the original decals and signs and urging them to substitute the replacement decals and signs for the original ones. Replacement decals and signs either shall have no reference to hours of operation or shall be designed so the individual member may insert any hours of operation it wishes.

IV.

It is further ordered, That:

(A) Beginning thirty (30) days after this order becomes final, and for a period of not less than eight (8) weeks thereafter, respondent shall place and cause to be disseminated each week at least two (2) advertisements, including one in the Thursday edition and one in the Saturday edition of *The Plain Dealer.* The advertisements must contain a principal message devoted to explaining that dealers who are members of respondent are free to offer expanded shopping hours as required in Part IV(B) of this order. The advertisements shall be a minimum of one-eighth (1/8) of a page and shall be placed in the same location in *The Plain Dealer* at which advertisements for the sale of new automobiles ordinarily appear; and

(B) Prior to placement of the first such advertisement, respondent shall conduct, or cause to be conducted, copy testing of such advertisement. The copy testing shall be based on monadic interviews (such as the "mall intercept" procedure) of not fewer than thirty (30) subjects screened and selected to have purchased a new automobile within the last three (3) years, and shall be conducted by a reputable advertising or research organization using techniques commonly accepted in the advertising profession. Such organization shall provide a written report to respondent explaining the results of such copy testing, and respondent may use such advertisement to satisfy its obligations under Part IV(A), above, only if the report establishes that the advertisement effectively communicates (1) that until [date of order], most Cleveland-area automobile dealers have not been open for business on Sundays and most weekday evenings; and (2) that Cleveland-area automobile dealers are free to choose their own hours of operation so that dealers may now have shopping hours on Sundays, weeknights, or any other times they choose. In the event any subsequent advertisement prepared pursuant to this paragraph differs significantly from the first advertisement disseminated in accordance with this paragraph, respondent shall conduct or cause to be conducted copy testing of such advertisement in the same manner and for the same purpose as described above.

V.

It is further ordered, That respondent shall file with the Federal

Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied and is complying with this order, within ninety (90) days after this order becomes final, and on the first anniversary of the date this order becomes final.

VI.

It is further ordered, That for a period of ten (10) years after this order becomes final, respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change that may affect compliance obligations out of this order.

Commissioner Machol not participating.

APPENDIX A

Please Read This.
It Is Very Important.

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and the Cleveland Automobile Dealers' Association ("CADA"). In the Order, CADA has agreed that we will not have any part in suggesting or setting the hours during which any automobile dealer can be open.

YOU ARE FREE TO BE OPEN TO SELL NEW CARS AT ANY HOURS YOU WISH. CADA HAS NO POLICY OR GUIDELINES ABOUT HOURS REGARDING NEW CAR SALES. THE HOURS YOU ARE OPEN ARE YOUR BUSINESS.

If you have any questions about this, please feel free to contact CADA.

# # # # #

IN THE MATTER OF

R. J. REYNOLDS TOBACCO COMPANY

Docket 9206. Interlocutory Order, March 4, 1988[1]

ORDER

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and remand the matter for further proceedings. Therefore,

It is ordered, That the initial decision of the Administrative Law Judge is reversed and the matter remanded for further proceedings in accordance with this order and accompanying opinion.

Chairman Oliver dissenting.

OPINION OF THE COMMISSION

BY STRENIO, *Commissioner:*

The issue presented here is whether the Administrative Law Judge ("ALJ") erred when he granted respondent R. J. Reynolds Tobacco Company, Inc.'s ("Reynolds") motion to dismiss on the ground that "Of Cigarettes and Science" was not commercial speech and, thus, not subject to the Commission's jurisdiction. We find that the ALJ erred when he granted the motion to dismiss. We also find that the ALJ erred when he ruled that further opportunity to discover and present facts relating to jurisdiction was not permitted. His order is reversed and the matter remanded for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

This case involves an advertisement, entitled "Of Cigarettes and Science," allegedly disseminated by Reynolds in the course of its business of manufacturing, advertising and selling cigarettes. Complaint, ¶¶2–4. The advertisement discusses, among other things, the procedures that scientists use to test scientific hypotheses and sets

[1] This document was inadvertently omitted from the Federal Trade Commission Decisions—Volume 110.

forth information about a scientific study known as the Multiple Risk Factor Intervention Trial ("MR FIT"). Complaint, Attachment A. **[2]**

On June 16, 1986, the Federal Trade Commission ("Commission" or "FTC") issued a complaint alleging that the Reynolds advertisement falsely and misleadingly represents: that the purpose of the MR FIT study was to determine whether heart disease is caused by cigarette smoking; that the MR FIT study provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe; and that the MR FIT study tends to refute the theory that smoking causes coronary heart disease. Complaint, ¶¶5–6. In addition, the complaint alleges that the advertisement fails to disclose certain material facts about the MR FIT study. Complaint, ¶7.

Respondent filed a motion to dismiss the complaint on June 26, 1986. The motion sought dismissal on the ground that the Commission had no subject matter jurisdiction over the "Of Cigarettes and Science" advertisement because "the acts and practices complained of are expressions of opinion on issues of social and political importance which cannot be regulated by the Federal Trade Commission consistent with the First Amendment."[1] Motion To Dismiss, ¶1. According to Reynolds, the ALJ was required to determine the jurisdictional issue on the basis of **[3]** the pleadings alone; consideration of extrinsic evidence was both irrelevant and itself violative of the First Amendment.[2]

Complaint counsel opposed the motion to dismiss, arguing alternatively that the motion should be denied because the challenged advertisement was properly classified as commercial speech and, thus, properly subject to the Commission's jurisdiction or because the motion raised issues that required further factual development.[3]

After hearing argument on the motion, the ALJ concluded that the advertisement was not commercial speech but rather speech fully protected by the First Amendment. The ALJ thus ruled that the advertisement was outside the jurisdiction of the Commission. Order, dated August 4, 1986. In his decision, the ALJ rejected the argument

[1] The motion also sought to stay further proceedings until after the motion was decided and to dismiss on the ground that Section 5 of the FTC Act violated the constitutional requirements of separation of powers. Motion to Dismiss, ¶¶2, 3. The ALJ denied respondent's motion on the separation of powers ground (Order, dated August 4, 1986), and the issue was not appealed. In light of the ALJ's order, which the Commission has found to be sufficient to constitute an initial decision, an order staying the proceeding was unnecessary and beyond the authority of the ALJ to grant or deny. Commission Order, dated August 8, 1986.

[2] Reply Memorandum of Law of R. J. Reynolds Tobacco Co. in Support of its Motion to Dismiss Complaint and to Stay Proceedings Pending Dismissal at 2–10, 22–25 (July 21, 1986).

[3] Memorandum of Law in Opposition to Respondent's Motion to Dismiss Complaint and to Stay Proceedings at 5–13 (July 17, 1986).

that complaint counsel should be granted further opportunity to discover and present facts relating to jurisdiction. *Id.* at 14–15. He concluded that further discovery was "contrary to law and unacceptable" because categorization of speech as either commercial or noncommercial has been "customarily resolved by the courts on the basis of what is contained in the ads" and, in any event, he had already granted complaint counsel "ample time" for discovery. *Id.* **[4]**

Counsel supporting the complaint appealed the ALJ's initial decision to the Commission.

II. FTC JURISDICTION.

We agree with the parties and the ALJ that unless the Reynolds advertisement can be classified as commercial speech, it is not subject to the Commission's jurisdiction. Thus, consideration of whether the ALJ erred when he concluded, at this stage of the proceeding, that the complaint should be dismissed necessarily begins with an analysis of the legal standards applicable to classification of speech as commercial or noncommercial.

Following that analysis, the facts of this case will be applied to the legal framework. When making this analysis, the procedural standards applicable to motions to dismiss apply. Under those standards, the complaint must allege facts sufficient to confer jurisdiction. For purposes of this analysis, all of the factual allegations of the complaint concerning jurisdiction are presumed true. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). *See also* 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice,* ¶12.07[2.–1] at 12–46 to 12–47 (2d ed. 1987). If the complaint does not allege sufficient facts to confer jurisdiction, it must be dismissed.

If, on the other hand, the complaint does allege facts which—if true—would be sufficient to establish jurisdiction, then **[5]** another inquiry is required. Specifically, the question then becomes whether the facts alleged are supported by the evidence. In making this determination, there is no presumption that the allegations are true, and the burden is on complaint counsel to prove jurisdiction by a preponderance of the evidence. *See, e.g., Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.), *cert. denied,* 449 U.S. 953 (1980); *Mortensen v. First Federal Savings & Loan Ass'n,* 549 F.2d 884 (3d Cir. 1977).

Finally, we also address whether, and to what extent, consideration of extrinsic evidence is permitted to resolve the jurisdictional issue.

A. *The First Amendment Guarantee of Freedom of Speech.*

The protections afforded by the First Amendment guarantee against laws "abridging the freedom of speech" are of fundamental importance to a democratic society. Justice Cardozo once characterized the First Amendment as "the matrix, the indispensible condition of nearly every other form of freedom."[4] The reach of the First Amendment extends to individuals as well as to corporations and other entities. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

The Constitution, however, accords different degrees of protection based upon the type of speech at issue. The core examples of speech entitled to the highest level of protection **[6]** are political discourse and expressions about philosophical, religious, artistic, literary or ethical matters. In light of its high societal value, regulation of such "fully protected" speech generally is limited to reasonable time, place and manner restrictions.

Commercial speech, by contrast, is accorded less constitutional protection, but protection that is "nonetheless substantial." *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 68 (1983).[5] Unlike fully protected speech, commercial speech can be regulated on the basis of its content.

The more limited protection accorded commercial speech permits the FTC to act when necessary to challenge false or deceptive advertising.[6] *See, e.g., Thompson Medical Co. v. FTC,* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied,* 107 S. Ct. 1289 (1987); *Sears, Roebuck & Co. v. FTC,* 676 F.2d 385 **[7]** (9th Cir. 1982); *Warner-Lambert Co. v. FTC,* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978); *Beneficial Corp. v. FTC,* 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). Commission action to prevent false or deceptive advertising, in turn, serves the important public interest in informed commercial decision-making.

[4] *Palko v. Connecticut,* 302 U.S. 319, 327 (1937).

[5] Until fairly recently, commercial speech was thought to be unprotected by the First Amendment. *See Valentine v. Chrestensen,* 316 U.S. 52 (1942). Beginning in the mid-1970's, the Court indicated that commercial speech was entitled to some constitutional protection. *See Bigelow v. Virginia,* 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973). In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Court expressly held that commercial speech was entitled to First Amendment protection.

[6] One permitted category of content-based restriction consists of regulations that prohibit false or misleading commercial advertising. Because of its hardier nature, requiring truthfulness and accuracy for commercial speech runs less risk of self-censorship and, thus, there is "little need to sanction some falsehood in order to protect speech that matters." *Virginia State Board of Pharmacy,* 425 U.S. at 777–78 (Stewart, J., concurring) (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974)).

B. *Commercial Speech.*

The Supreme Court has referred to the "core notion" of commercial speech as speech proposing a commercial transaction. *Bolger v. Youngs Drug Products,* 463 U.S. at 66 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976) and *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 385 (1973)). *See also Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562 (1980); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). In *Central Hudson,* the court also discussed commercial speech as speech solely related to the economic interests of both the speaker and the speaker's audience. 447 U.S. at 561.

The court also has made it clear that commercial speech may include speech that links a product to important public issues or matters subject to current public debate. *Central Hudson,* 447 U.S. at 562 n.5; *Bolger v. Youngs Drug Products Corp.,* 463 U.S. at 67–68; **[8]** *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 637 n.7 (1985). Indeed, in *Central Hudson,* the court majority found that the New York State Public Service Commission order banning all advertising intended to promote the sale of utility services or electricity involved "only commercial speech." 447 U.S. at 561. The majority expressly rejected Justice Stevens' suggestion that the category "promotional advertising" would also include fully protected speech if, for example, the speech touted the environmental benefits of electricity, noting:

> [Justice Stevens' approach] would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety.

Id. at 562 n.5. The court observed that companies have full constitutional protection for their direct comments on public issues and thus, there did not appear to be a need for similar protection "when such statements are made only in the context of commercial transactions. In that context, the State retains the power to 'ensur[e] that the stream of commercial information flow[s] cleanly as well as freely.'" *Id.* (citing *Virginia State Board of Pharmacy,* 425 U.S. at 772). **[9]**

The Supreme court has not established a bright line test for

ascertaining the boundary between commercial speech that may also include information about matters of important public interest and speech that constitutes direct comments on public issues. Indeed, the court has noted the complexities of delineating the boundary. *See Zauderer v. Office of Disciplinary Counsel,* 471 U.S. at 637 (the "precise bounds" of commercial speech are "subject to doubt"); *In re Primus,* 436 U.S. 412, 438 n.32 (1978) (line between commercial and noncommercial speech "will not always be easy to draw"). Moreover, the court has recognized that "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow v. Virginia,* 421 U.S. 809, 826 (1975).

The court, however, has offered guidance for determining what constitutes commercial speech by mentioning a number of characteristics of commercial speech. The Commission considers it premature, particularly in the absence of a full record, to say which characteristics will be determinative in deciding whether the Reynolds advertisement constitutes commercial speech. It is appropriate, however, to start with those characteristics that the Court has considered in its relatively few commercial **[10]** speech decisions.[7]

We begin with the content of the speech in question. *See Bates v. State Bar of Arizona,* 433 U.S. 350, 363 (1977). The court in *Central Hudson* identified speech containing a message promoting the demand for a product or service as speech that can be classified as commercial. *See* 447 U.S. at 559–62.

In addition, commercial speech typically refers to a specific product or service. *Bolger v. Youngs Drug Products,* 463 U.S. at 66. In many cases, the product reference includes the brand name of a product offered for sale. However, the *Bolger* court stated that a generic reference to a product would not necessarily remove it from the category of commercial speech: "For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand name. Or, a trade association may make statements about a product, without reference to specific brand names." 463 U.S. at 66–67 n.13 (citing with

[7] *Bolger v. Youngs Drug Products* illustrates how the Supreme Court has relied upon the factors discussed *infra* when the speech at issue does more than merely propose a commercial transaction, and in fact, discusses matters of important public interest. 463 U.S. at 66–67. In analyzing the "Plain Facts About Venereal Disease" pamphlet, the Court indicated that the combined presence of three characteristics led it to characterize the pamphlet as commercial: (1) the speech was a paid-for advertisement; (2) it referred to a specific product; and (3) the advertisement was motivated by economic gain. *Id.* The Court stated, however, that it was not holding that each characteristic must be present in order to classify speech as commercial. *Id.*

approval *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, **[11]** 439 U.S. 821 (1978)).[8]

In *Friedman v. Rogers*, 440 U.S. 1, 11 (1979), the court noted that information about attributes of a product or service offered for sale, such as type, price, or quality, is also indicative of commercial speech.[9] Likewise, the court has indicated that information about health effects associated with the use of a product can properly be classified as commercial speech.[10] *See Bolger v. Youngs Drug Products*, 463 U.S. at 66–67 (claims discussing the benefits of condoms for the prevention of venereal disease). *See also National Commission on Egg Nutrition*, 570 F.2d at 163 (deceptive claims to the effect that no scientific evidence supported the claim that eating eggs increases the risk of heart disease). **[12]**

In addition to content, the court has found that the means used to publish speech is relevant to the classification issue. For example, the court has recognized that commercial speech frequently takes the form of paid-for advertising. *See Bolger v. Youngs Drug Products*, 463 U.S. at 66 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964)). *See also Bates v. State Bar of Arizona*, 433 U.S. at 363–64; *Virginia State Board of Pharmacy*, 425 U.S. at 761.

The court also has indicated that the speaker's economic or commercial motivation is germane to the issue of whether speech is commercial. *In re Primus*, 436 U.S. at 438 n.32 (line between commercial and noncommercial speech is "based in part on the motive of the speaker"); *Bolger v. Youngs Drug Products*, 463 U.S. at 67. *See also National Commission on Egg Nutrition*, where the Seventh Circuit held that commercial speech should not "be narrowly limited to the mere proposal of a particular commercial transaction but [should] extend to false claims as to the harmlessness of the advertiser's

[8] The *Bolger* Court expressed "no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." 463 U.S. at 67 n.14.

[9] The Supreme Court found in *Friedman* that a trade name is a form of advertising because after the name has been used for some period of time, it conveys information about a certain quality of goods and services. 440 U.S. at 11.

[10] Respondent contends that commercial speech includes only information about positive product characteristics and, thus, does not encompass speech that, for example, claims that a product is less dangerous than another product or is useful for the prevention of disease. *See, e.g.*, Respondent's Answering Brief on Appeal at 25–26, 28–29; Abrams Tr. at 83–85. We disagree. Claims that a product or service is less dangerous than consumers perceive it to be are likely to be potent selling messages. Under respondent's standard, for example, any comparative cigarette tar and nicotine claim would constitute fully protected speech because it does not relate to any positive attribute of the advertised cigarette, but only to its (comparative) lack of harm. *Compare FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985) (regulating deceptive tar claims as commercial speech).

product asserted for the purpose of persuading members of the reading public to buy the product." 570 F.2d at 163.

It would appear for purposes of this analysis that an important consideration will be whether the speech is promotional in nature. Does the speech benefit or seek to benefit the economic interests of the speaker by promoting sales of its products? And, does the speech affect or seek to affect purchasing decisions by the receivers of the information? **[13]**

This type of speech can be contrasted with speech that does not benefit the economic interests of the speaker by influencing the reader or listener in the role of consumer, but instead provides, for example, information relevant to individual political decisions, or to artistic or cultural choices. Such speech may not further the informational function of commercial decision-making. *See, e.g., Consolidated Edison Co. of N.Y., Inc. v. Public Service Comm'n,* 447 U.S. 530 (1980) (billing insert was not addressed to informed decision-making about the purchase of a specific product, *i.e.,* nuclear-generated electricity, but concerned the human and environmental risks that could result from a malfunction or accident at a nuclear power plant); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) (speech in question was limited to expression directed to the reader or listener as a voter).[11]

Although it may be difficult in some cases, the Commission thinks that it is possible to determine whether a specific advertisement that includes information connected to public issues nonetheless addresses the concerns of a purchaser of the advertiser's product or service. To conclude otherwise would **[14]** allow sellers of certain products to avoid the proscription against false and misleading advertising merely by linking their product to a public issue. Indeed, in *National Commission on Egg Nutrition,* the product—eggs—was inextricably linked to the cholesterol-and-heart-disease issue.. Despite the connection, the Seventh Circuit ruled that the advertisements, including "Cholesterol and the Egg: A Mystery," were commercial speech.

C. *The ALJ's Decision to Grant Respondent's Motion.*

The question remains, of course, whether the ALJ erred when he

[11] The insurance industry advertisements at issue in *Rutledge v. Liability Insurance Industry,* 487 F. Supp. 5 (W.D. La. 1979) and *Quinn v. Aetna Life & Casualty Co.,* 616 F.2d 38 (2d Cir. 1980) similarly can be distinguished. Those advertisements urged the public to support limits on jury awards in tort liability actions. The advertisements did have a commercial aspect because insurance companies would benefit economically from reduced jury awards. However, the advertisements did not attempt to sell insurance nor did they contain factual information addressed to informed decision-making concerning consumers' purchases of insurance

granted respondent's motion to dismiss. In reaching his decision, the ALJ was required to consider the various "messages, means, and motives" of the advertisement (*see Bigelow,* 421 U.S. at 826), including the presence or absence of the characteristics identified by the case law as relevant to whether speech is commercial.

Accepting the allegations of the complaint concerning jurisdiction as true for purposes of this appeal,[12] the content of the Reynolds advertisement includes words and messages that **[15]** are characteristic of commercial speech. The advertisement refers to a specific product, cigarettes. Complaint, ¶¶2, 4; *Bolger v. Youngs Drug Products,* 463 U.S. at 66. Moreover, the advertisement discusses an important product attribute—the alleged connection between smoking and heart disease. Complaint, ¶¶4, 5; *Friedman v. Rogers,* 444 U.S. at 11; *National Commission on Egg Nutrition,* 570 F.2d at 163. A message that addresses health concerns that may be faced by purchasers or potential purchasers of the speaker's product may constitute commercial speech. *See Bolger v. Youngs Drug Products,* 463 U.S. at 66–67; *National Commission on Egg Nutrition,* 570 F.2d at 163.

Similarly, the complaint alleges that "Of Cigarettes and Science" is an advertisement (Complaint, ¶2), which we understand to mean a notice or announcement that is publicly published or broadcast and is paid-for. Thus, viewed in light of the allegations of the complaint, the "means" used to disseminate the Reynolds advertisement—paid-for advertising—is typical of commercial speech. *Bolger v. Youngs Drug Products,* 463 U.S. at 66; *Virginia State Board of Pharmacy,* 425 U.S. at 761.

Finally, the complaint alleges that respondent is in the business of selling cigarettes. Complaint, ¶4. It is reasonable to infer that Reynolds, as a seller of cigarettes, had a direct, sales-related motive for disseminating the "Of Cigarettes and Science" advertisement. As discussed above, economic motivation also may be indicative of commercial speech. *In re Primus,* 436 U.S. at 438 n.32; **[16]** *Bolger v. Youngs Drug Products,* 463 U.S. at 67; *National Commission on Egg Nutrition,* 570 F.2d at 163.

Thus, viewed in light of the allegations contained in the complaint,

[12] As noted above (*supra* at 4–5), under the standards applicable to motions to dismiss, the allegations of the complaint are presumed to be true. The factual allegations concerning jurisdiction include ¶¶2 and 4 of the complaint and the Reynolds advertisement, which is incorporated by reference as Attachment A. Similarly, whether an advertisement makes a claim is an issue of fact. *See FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 386 (1965); *Thompson Medical Co. v. FTC,* 791 F.2d at 197. As a result, complaint ¶¶5 and 7 also contain factual allegations relating to jurisdiction.

we conclude that the ALJ erred when he granted respondent's motion to dismiss at this stage of the proceeding.

It should be clear, however, that the Commission makes no final determination of jurisdiction. As we noted above, *supra* at 4–5, any such conclusion requires proof that the complaint allegations concerning jurisdiction are true. Inasmuch as respondent has not answered the complaint, the record does not indicate what factual allegations concerning jurisdiction, if any, are controverted. Thus, final findings of fact with respect to jurisdiction at this stage of the proceeding would be premature.

Instead, we think it is appropriate to remand the matter to the ALJ for the purpose of determining whether application of the facts to the appropriate legal standards supports a finding of jurisdiction. Upon remand, the ALJ may weigh the evidence and resolve any factual disputes. If the ALJ determines that additional evidence is needed to make a final determination on **[17]** jurisdiction,[13] he shall permit further opportunity to develop and present evidence on the issue. *See* Part II.D, *infra* at 17–22. We emphasize, however, that we have not concluded that presentation of extrinsic evidence is necessarily required for determining whether the Reynolds advertisement is commercial speech. The decision of what evidence to present in order to attempt to meet their burden of proving jurisdiction is a decision to be made properly by counsel supporting the complaint.

D. *Consideration of Extrinsic Evidence.*

Another issue that arose below is whether, and to what extent, consideration of extrinsic evidence is permitted to resolve the jurisdictional issue. As a general matter, a party may establish the existence of subject matter jurisdiction through the use of extrinsic evidence.[14] Respondent, however, **[18]** contends that reliance upon extrinsic evidence is irrelevant and itself violative of the First Amendment.

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[13] The ALJ granted complaint counsel's motion for an additional 10 days in which to file a response to the motion to dismiss. We find that 10 days is not a reasonable opportunity for discovery. Nonetheless, complaint counsel did obtain and present an affidavit from Dr. Dennis L. McNeill. Attachment A to Complaint Counsel's Memorandum of Law in Opposition to Respondent's Motion to Dismiss and to Stay Proceedings. Respondent has not filed a response to the affidavit. We note simply at this stage of the proceeding that the unrebutted affidavit of Dr. McNeill is consistent with our finding that the ALJ erred when he granted respondent's motion to dismiss.

[14] *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). *See also* 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice*, ¶12.07[2.1] at 12–47 (2d ed. 1987); 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶26.56[6] at 26–154 (2d ed. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1350 at 549 (1969); 8 C. Wright & A. Miller, *Federal Practice and Procedure* §2009 (1970).

We agree that consideration of extrinsic evidence is permitted only if the evidence is relevant to the issues presented and is not barred by any evidentiary privilege.[15] Nonetheless, we disagree with respondent's sweeping assertion that this standard prohibits any and all consideration of extrinsic evidence in determining whether the Reynolds advertisement is subject to the Commission's jurisdiction. We are aware of no decision holding that consideration of extrinsic evidence is impermissible in determining whether an advertisement constitutes commercial speech.

Indeed, the Supreme Court in *In re Primus*, 436 U.S. 412 (1978), clearly relied upon extrinsic evidence for its finding that application by the Supreme Court of South Carolina of its Disciplinary Rules to appellant's solicitation by letter on the American Civil Liberties Union's ("ACLU") behalf violated the First Amendment. In addition to considering the solicitation letter, the court looked to evidence relating to the circumstances that led to appellant's letter and the events that took place after the letter was sent, the aims and practices of the ACLU, and the appellant's lack of any economic motivation—**[19]** a characteristic which the court noted distinguished the appellant's solicitation from the purely commercial solicitation present in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), decided the same day.

Moreover, in *Herbert v. Lando*, 441 U.S. 153, 175 (1979), the Supreme Court held that the First Amendment did not bar a plaintiff in a defamation action from inquiring into the editorial processes of the respondent members of the press because the information sought to be discovered was directly relevant to proof of a critical element of the plaintiff's cause of action.[16] Instead, the court found that the relevancy requirement of Rule 26(b)(1) was sufficient protection against improper forays into the respondents' thought processes. We find **[20]** the reasoning in *Herbert v. Lando* applicable here.[17] Thus,

[15] *See* Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 402. Although the Commission is an administrative agency which is not bound by the Federal Rules, the Commission has held that the Rules "can provide an analytical framework for the disposition of related issues." *Crush International, Ltd.*, 80 FTC 1023, 1028 (1972).

[16] Like respondent, the defendants in *Herbert v. Lando* contended that permitting such discovery would chill their First Amendment rights. The court disagreed, noting:

> But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials.

441 U.S. at 171.

[17] We recognize that *Herbert v. Lando* involved discovery of evidence relevant to proving the plaintiff's case

(footnote continued)

we find no basis for concluding that discovery and presentation of relevant and non-privileged evidence concerning jurisdiction must be categorically barred.

Evidence that may be relevant to deciding whether the Reynolds advertisement is commercial speech includes facts concerning the publication or dissemination of the advertisement, such as whether it was paid-for, where and in which publications it was disseminated, whether it was placed in editorial space (such as an op-ed page) or advertising space in the publication, whether it was prepared as a letter to the editor, whether it was sent to representatives of the media for selection on merit by editorial boards, and to whom it was disseminated outside the media.

Evidence about the promotional nature of the advertisement also may be relevant. Therefore, it might be useful to consider the circumstances surrounding the development of the advertisement, such as whether it was targeted to consumers or legislators; whether it was intended to affect demand for Reynolds' cigarettes or brands or to affect particular legislative or regulatory proposals; whether the advertisement **[21]** was subjected to copy testing or to review by focus groups and, if so, the nature of the questions used in the copy tests or focus group sessions; and the results of those procedures both in terms of what they showed and what changes, if any, Reynolds made in response to those showings. Evidence relating to the message(s) Reynolds itself intended to convey through the advertisement also may be relevant. In addition, Reynolds' share of the cigarette market may be relevant to deciding whether including a brand name reference is a prerequisite to a determination that the advertisement constitutes commercial speech.[18]

Of course, to the extent that any specific facts are protected by an evidentiary privilege, their use would not be permitted even if relevant. Determination of whether or not evidence is privileged, however, should be made on an individual basis. In this connection, we disagree with respondent's contention that use of all evidence other than the "Of Cigarettes and Science" advertisement would violate the First Amendment. *See Herbert v. Lando*, 441 U.S. at 175.

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in chief, while the issue presented here concerns discovery of evidence relevant to proving the preliminary issue of jurisdiction. Nonetheless, Rule 26(b)(1) clearly does not distinguish between information relevant to proving jurisdiction and evidence relevant to proving a party's cause of action. Further, in both situations, the plaintiff bears the burden of proof, and in both situations, failure to meet that burden requires dismissal of the proceeding.

[18] The examples of relevant evidence discussed above are illustrative only and are not intended as an exclusive list of facts that may be relevant to the jurisdictional issue raised in this proceeding.

In sum, other than the relevancy and privilege requirements, we find no categorical evidentiary bar against discovery or presentation of extrinsic evidence that might assist in determining on the record whether the Reynolds advertisement **[22]** constitutes commercial speech, and consequently, would be subject to the Commission's jurisdiction.

III. Conclusion

For the reasons discussed above, we reverse the Administrative Law Judge's order granting respondent's motion to dismiss for lack of subject matter jurisdiction, and remand for further proceedings consistent with this opinion.

Separate Statement of Chairman Daniel Oliver, Dissenting

I. introduction

The First Amendment prohibits the federal government from acting as umpire in the contest of ideas. The government cannot select which issues are worth debating nor selectively exclude certain participants from that debate. Under the First Amendment, individuals and corporations alike have a fully protected right to engage in direct comment on public issues free from governmental regulation or censorship.

First Amendment protection of public debate generally coexists very peacefully with the Federal Trade Commission's exercise of its authority to ban deceptive commercial speech. While the First Amendment protects unfair and false statements in the public marketplace of ideas, it does not protect such statements in the commercial marketplace for goods and services. The Commission's jurisdictional authority extends to the hawking of wares, not the hawking of ideas.

The American marketplace for ideas is decentralized and occurs in numerous arenas: in Congress, in academia, in books and pamphlets, in newspapers, over the airways, over backyard fences, at the workplace, door-to-door. Seldom does the government step in to crown a victor or promulgate an official version of the truth. In the debate over public policies regarding smoking, however, the government has not only based its policies on an **[2]** official version of the truth, it has compelled private citizens to propagandize in favor of that

version of the truth.[1] In this case, the Federal Trade Commission is attempting to go one step further and regulate a challenge to the official orthodoxy.

At issue in this case is whether R.J. Reynolds Tobacco Co. (RJR) has a fully protected right under the First Amendment to question the officially accepted view regarding the link between cigarette smoking and heart disease. In March 1985, RJR paid various newspapers and magazines to publish a communication captioned "Of Cigarettes and Science," in which RJR questioned the objectivity of the scientists who examine the issue of smoking and health.[2] Relying on data from a governmentally funded study, RJR argued that there is still a scientific question about the link between cigarettes and heart disease.

The Federal Trade Commission responded by issuing a complaint that alleges that the RJR communication is deceptive. **[3]** RJR has in turn challenged the subject matter jurisdiction of the FTC, arguing that the publication at issue is fully protected under the First Amendment. The Administrative Law Judge ruled that RJR is correct, that the publication is an editorial rather than commercial speech, and dismissed the complaint for lack of subject matter jurisdiction.

In my opinion, RJR and the Administrative Law Judge are clearly correct. The RJR publication is, without doubt, a direct comment on a matter of public concern—the link between cigarette smoking and heart disease. Any commercial effect of the RJR communication is inextricably intertwined with RJR's participation in the contest of ideas. Accordingly, the RJR publication is fully protected by the First Amendment, even if one of the consequences of the publication is to affect cigarette consumption. R.J. Reynolds cannot be disqualified from questioning scientific certitude merely because its potential success in persuading the general public that the question remains open could also have an effect on sales of its product.

[1] The Comprehensive Smoking Education Act, 15 U.S.C. 1331 *et seq.*, requires four health warnings to be affixed on a rotational basis to each pack of cigarettes and contained on a rotational basis in all cigarette advertising. The four warnings are:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

[2] This piece was one of a series introduced by RJR to discuss various smoking issues. RJR ceased the entire campaign when the complaint was issued. Abrams Aff. ¶¶ 6–8. The other communications are attached.

The Commission majority attempts to finesse the issue of whether the RJR communication is commercial speech (which the Commission has subject matter jurisdiction over) or fully protected speech (thus requiring dismissal). The Administrative Law Judge is reversed, and the case remanded, but the reasons for doing so are not immediately apparent. Although finding that the words and message of the RJR communication are characteristic of commercial speech, the Commission majority purportedly declines **[4]** to decide whether the communication is commercial speech. Further, without ruling that additional extrinsic evidence is needed to decide the key jurisdictional issue,[3] the majority nonetheless sets forth the facts it believes *may* be relevant. On closer examination, it becomes apparent that the majority makes determinations that logically compel it to conclude that the piece is commercial speech, but seeks to duck the issue, sending the matter back to the ALJ for further discovery that might bolster a finding that the Commission has subject matter jurisdiction.

In my considered opinion there is no reason why the Commission cannot make an explicit determination today. The text and the context of RJR's communication are before the Commission. From the face of the document itself we can determine that the communication is a direct comment on a matter of public debate. The piece is not a solicitation for a commercial transaction with a gratuitous reference to a public debate thrown in to evade laws relevant to commercial advertising. RJR's direct comment on a **[5]** matter of public debate is inextricably intertwined with any commercial effect that may result from RJR's participation in that debate. As Supreme Court precedent establishes, direct comment on a matter of public debate is fully protected under the First Amendment, even if it has a commercial effect, unless the comment on the public issue is merely gratuitously linked with a commercial message. No discovery is needed or justified prior to a ruling on the Commission's subject matter jurisdiction. The factual inquiry that the majority proposes would either produce unnecessary background information or engage the Commission in an irrelevant quest to establish RJR's "intent" in running this piece. The

[3] The majority states at page 9: "The Commission considers it premature, particularly in the absence of a full record, to say which characteristics will be determinative in deciding whether the Reynolds advertisement constitutes commercial speech." Later, at page 17, the opinion says: "We emphasize, however, that we have not concluded that presentation of extrinsic evidence is necessarily required for determining whether the Reynolds advertisement is commercial speech." Nonetheless, the majority finds that the ALJ did not allow a "reasonable opportunity for discovery" page 19, n.14, and provides a list of the evidence that "may be relevant." Pages 20–21. The majority does not, however, suggest that resolution of the jurisdictional question must await resolution of the deception issues.

facts before the Administrative Law Judge and the Commission establish that we lack subject matter jurisdiction. Consistent with the First Amendment, we have no choice but to dismiss the complaint.

II. RELEVANT BACKGROUND FACTS

The RJR piece,[4] "Of Cigarettes and Science," was published in March 1985 in a number of newspapers and magazines. (Abrams Aff. ¶ 2) In that communication, RJR argues that one set of scientific principles is being used to judge most scientific matters but that a different set is being used for experiments **[6]** involving cigarettes. In support of this thesis, RJR cites its version of the scientific treatment of a study called the Multiple Risk Factor Intervention Trial (MR FIT). The study funded by the federal government, cost $115,000,000 and took ten years. RJR's communication describes the study as follows:

> The subjects were over 12,000 men who were thought to have a high risk of heart disease because of three risk factors that are statistically associated with this disease: smoking, high blood pressure and high cholesterol levels.
>
> Half of the men received no special medical intervention. The other half received medical treatment that consistently reduced all three risk factors, compared with the first group.
>
> It was assumed that the group with lower risk factors would, over time, suffer significantly fewer deaths from heart disease than the higher risk factor group.
>
> But that is not the way it turned out.
>
> After 10 years, there was no statistically significant difference between the two groups in the number of heart disease deaths.

The Commission does not allege that this description of the study is inaccurate.[5] Nor is it disputed that the results of the MR FIT were not as expected.[6]

After describing the study, RJR provides its view of the scientific reaction to that study:

> We at R.J. Reynolds do not claim this study proves that smoking doesn't cause heart disease. But we do wish to make a point.
>
> Despite the results of MR FIT and other experiments like it, many scientists have not abandoned or modified their original theory, or re-examined its assumptions.
>
> They continue to believe these factors cause heart disease. But it is important to label their belief **[7]** accurately. It is an opinion. A judgement. But not scientific fact.

[4] The Commission majority continually refers to the RJR communication as an "advertisement," a characterization that may, by itself, cause the majority to conclude that the RJR communication is commercial speech.

[5] The Commission has alleged, however, that RJR misrepresented the purpose of the study.

[6] *Multiple Risk Factor Intervention Trial*, 248 J. A.M.A. 1465 (1982).

We believe in science. That is why we continue to provide funding for independent research into smoking and health.

But we do not believe there should be one set of scientific principles for the whole world, and a different set for experiments involving cigarettes. Science is science. Proof is proof. That is why the controversy over smoking and health remains an open one.[7]

The Administrative Law Judge determined that the characterization of "Of Cigarettes and Science" as commercial speech or fully protected speech can be made from the face of the publication.[8] In summary, his conclusion was: "From a common sense approach, Reynolds' 'Of cigarettes and science' is clearly an editorial; it is not commercial speech by any stretch of the imagination."[9] **[8]**

III. CONTROLLING SUPREME COURT PRECEDENT

The Supreme Court has recognized that corporations are free to engage in public debate and have a fully protected right to do so, noting that: "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Belotti,* 435 U.S. 765, 777 (1978), *rehearing denied,* 438 U.S. 907 (1978). Corporations, like others, do not lose the protection of the First Amendment by virtue of the fact that they pay to make their views known. In rejecting a claim that libelous statements received no protection because they had been paid for in an advertisement attempting to raise funds, the Supreme Court stated:

That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure

[7] The Commission has alleged that this analysis falsely or misleadingly represents that "[a] major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe" and "[t]he MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease."

[8] Initial Decision at 14. The Administrative Law Judge also allowed the parties to introduce evidence (affidavits were, in fact, submitted and received) and heard oral argument on the jurisdictional issue. *Id.* at 1, 15 n.18, 16. In addition, at oral argument before the Administrative Law Judge complaint counsel agreed that Judge Hyun could decide the jurisdictional question on the basis of the record before him.

[9] Initial Decision at 7. Order of Administrative Law Judge Montgomery K. Hyun.

the "widest possible dissemination of information from diverse and antagonistic sources."

New York Times v. Sullivan, 376 U.S. 254, 266 (1964) **[9]** (citations omitted).[10]

Public debate is protected because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] The government may not "select which issues are worth discussing or debating" and "must afford all points of view an equal opportunity to be heard."[12] "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[13]

The First Amendment evidences a deliberate policy choice to limit the government's ability to control speech and to rely instead on the abilities of the citizenry to judge the facts and opinions offered by themselves. That choice is made with a clear **[10]** view of the consequences, that "erroneous statement of fact is ... inevitable in free debate .... The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974). Such an accommodation is necessary to give freedom of speech the "breathing space" which is necessary for its "fruitful exercise" (*Id.* at 342) and "survival." *NAACP v. Button,* 371 U.S. 415, 433 (1963). Indeed, "[u]nder the First Amendment there is no such thing as a false idea." *Gertz, supra,* 418 U.S. at 339. This does not imply that the truth is not preferred, but that the arbiters should be the public rather than the government. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[14]

[10] *See also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973), *rehearing denied,* 414 U.S. 881 (1973) ("[N]othing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment."); *Buckley v. Valeo,* 424 U.S. 1, 16 (1976) ("Yet this court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.")

[11] *Police Department of Chicago v. Mosely,* 408 U.S. 92, 95 (1972). *See also Consolidated Edison Co. v. Public Service Comm'n,* 477 U.S. 530, 536 (1980) ("But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views." *quoting Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result).

[12] *Police Dept. of Chicago v. Mosely, supra,* at 96.

[13] *Id.*

[14] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 477 U.S. 557, 582 (Stevens, J.,

Commercial speech, like debate over ideas, is protected under the First Amendment, but it receives a lower level of protection.[15] The distinction is drawn to avoid "dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to [noncommercial speech]."[16] **[11]**

Unlike noncommercial speech, commercial speech can be regulated to prohibit false and deceptive advertising. The Supreme Court has cited two aspects of commercial speech that justify regulation based on the content of the message:

> First, commercial speakers have extensive knowledge of both the market and their product. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. at 564 n.6.

The first basis for affording less protection to commercial speech, the relative costs of avoiding injury from untruthful speech, is discussed more fully in *Bates:*

> the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected.

Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977).

The second basis for affording less protection to commercial speech, its hardiness because it is the offspring of economic self-interest, was discussed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, n.24 at 771–72 (1976):

> Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Since commercial speech is used to sell goods and services and is "related solely to the economic interests of the speaker and its **[12]** audience," *Central Hudson, supra* at 561, an advertiser expects to be able to capture a large percent of the value of his commercial speech.

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[15] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

[16] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), *rehearing denied*, 439 U.S. 883 (1978).

By contrast, speech dealing with matters of public concern is potentially of value to a much broader audience, *i.e.*, to the public at large. Self-censorship is more likely to occur when speech relates to matters of public concern. To provide the necessary breathing space for vigorous public debate involving matters of public controversy, potentially false statements in communications relating to such matters receive a greater degree of protection under the First Amendment.[17]

To aid in the process of distinguishing commercial speech from more traditional First Amendment expression, the Supreme Court has provided two definitions of commercial speech. First, there is a "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,"[18] or, as restated, the "core notion of commercial speech" is "speech which does 'no more than propose a commercial **[13]** transaction'." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). The other definition of commercial speech is "expression related solely to the economic interest of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980).

These two definitions of commercial speech may not comprehend all commercial speech, as evidenced by *Bolger v. Youngs Drug Products Corp., supra. Bolger* involved a challenge to the application of a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. After the Postal Service had advised Youngs that certain proposed mailings would violate the statute, Youngs sought a ruling that the statute was unconstitutional as applied to the mailings in question. The district court held that the three types of mailings in question were all commercial solicitations but that the statutory prohibition was more extensive than necessary to protect the interests asserted by the government.[19] Accordingly, the district court held that the statute was unconstitutional as applied.

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[17] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985). The Court's determination that greater breathing space is required for speech that deals with a matter of public concern is seen most clearly in libel cases. When speech does not involve matters of public concern, injured parties can recover presumed and punitive damages for false statements made negligently and without malice. *Id.* at 755. By contrast, when speech involves a matter of public concern, only actual damages are recoverable by public figures or officials and only if the plaintiff shows "actual malice," that is, "knowledge of falsity or reckless disregard for the truth." *Id.*

[18] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–56 (1978), *rehearing denied*, 439 U.S. 883 (1978).

The Supreme Court affirmed the district court's ruling, but in the process addressed the question whether the mailings were commercial speech. The Supreme Court concluded that the mailings were commercial speech. Most of the mailings, it held, fell **[14]** "within the core notion of commercial speech" since they did 'no more than propose a commercial transaction.' *Id.* at 66. But the informational pamphlets could not "be characterized merely as proposals to engage in commercial transactions."[20]

The court concluded that the pamphlets could not be classified as commercial speech merely because they were "conceded to be advertisements" (*id.* at 66), merely because of a "reference to a specific product" (*id.* at 66), or merely because "Youngs has an economic motivation for mailing the pamphlets" (*id.* at 67). These three facts taken together, in this particular case, were, however, enough to satisfy the court that the pamphlets were commercial speech: "The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech." (*id.* at 67).

The *Bolger* Court noted that the pamphlets at issue "contain[ed] discussions of important public issues," *Id.* at 67–68, but held that the informational pamphlets were commercial speech notwithstanding the discussion of important public issues: **[15]**

> The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. *A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.*

mailings are commercial solicitations. Accordingly, this court must consider this case . . . within the framework set forth by the Supreme Court for commercial speech cases.") *Id.* at 826.

[20] *Id.* at 66. The informational pamphlets were described as follows: "The first, entitled 'Condoms and Human Sexuality,' is a 12-page pamphlet describing the use, manufacture, desirability, and availability of condoms, and providing detailed descriptions of various Trojan-brand condoms manufactured by Youngs. The second, entitled 'Plain Talk about Venereal Disease,' is an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease. The only identification of Youngs or its products is at the bottom of the last page of the pamphlet, which states that the pamphlet has been contributed as a public service by Youngs, the distributor of Trojan-brand prophylactics." *Id.* at 62–63, n. 4.

Id. at 67–68 (emphasis provided) (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 563, n.5).

The *Bolger* court's distinction between "direct comments on public issues" and "advertising which 'links a product to a current public debate'" is best understood by reference to two Supreme Court decisions cited in *Bolger: Consolidated Edison Co. v. Public Service Commission, supra,* and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, supra.*

In *Consolidated Edison,* Con Ed challenged a rule forbidding it from mailing, along with its billing statements, leaflets discussing controversial issues of public policy. The rule had been promulgated in response to a Con Ed leaflet proclaiming the benefits of nuclear power. The Supreme Court held that the rule conflicted with the First Amendment, emphasizing that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. at **[16]** 537. The court discussed its *Consolidated Edison* holding in the companion *Central Hudson* case, stating: "[w]e rule today in *Consolidated Edison Co.* v. *Public Service Commission* . . . that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 477 U.S. at 563 n.5.

In the *Central Hudson* case, the plaintiff utility company challenged a rule that banned an electric utility from advertising to promote the use of electricity. The rule was enacted in response to the perceived energy shortage. The Supreme Court struck down the rule, holding that the public utility commission's rule was more extensive than necessary to further the state's interest in energy conservation.

In a concurring opinion, Justice Stevens criticized the regulation as banning all promotional advertising and thus being overly broad:

> This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders.

Id. at 580–81 (Stevens, J., concurring in judgment).

In a footnote, the majority in *Central Hudson* discussed Justice Stevens' concerns. The majority concluded that the advertising ban "was restricted to all advertising 'clearly intended to promote sales'." *Id.* at 562 n.5. Further, while the **[17]** complaint and the lower court opinions viewed the litigation as involving only commercial speech, the majority addressed the issue whether full First Amendment protection should be afforded to "all promotional advertising that includes claims 'relating to . . . questions frequently discussed and debated by our political leaders'":

> Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today in *Consolidated Edison Co.* v. *Public Service Comm'n, ante,* 530, that utilities enjoy the full panoply of First Amendment protection for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.

Id. at 563 n.5.

A simple message flows form these cases. In *Consolidated Edison* the court held that the First Amendment did not allow the government to foreclose discussion of an entire topic—the benefits of nuclear power. In dealing with broad categories of messages, the court has gone no further than deciding that those 'clearly intended to promote sales' could be treated as commercial speech. *Central Hudson, supra,* at 565 n.5. Moreover, if companies attempt to evade regulation of commercial speech by including gratuitous references to public issues the court will not countenance it. *Bolger, supra,* at 68. There is no need to allow that sort of subterfuge because companies have full First Amendment rights to make their views known in other ways. *Id.* **[18]**

The dividing line is thus clear—if, by a common sense view, the advertisement is clearly intended to promote sales it is commercial speech. If, in addition, there is a public message incorporated, the advertisement can be regulated if inclusion of that public message is simply a gratuitous linkage. If, however, the message is direct comment on a public issue, the full protection of the First Amendment applies. If direct comment on public issues cannot be severed from

speech that otherwise might be characterized as commercial speech because it may affect sales, *i.e.*, if the two parts are inextricably intertwined, the full protection of the First Amendment must be afforded to direct comment on public issues. Otherwise, the speaker would be selectively excluded from participating in a public discussion of an entire topic, an outcome precluded by the First Amendment.

I point out, however, that my reading of the controlling Supreme Court precedent is not shared by the Commission majority. The Commission majority (pp. 13–14) reasons as follows:

> Although it may be difficult in some cases, the Commission thinks that it is possible to determine whether a specific advertisement that includes information connected to public issues nonetheless addresses the concerns of a purchaser of the advertiser's product or service. To conclude otherwise would allow sellers of certain products to avoid the proscription against false and misleading advertising merely by linking their product to a public issue.

Note that the Commission majority uses the words "whether" and "nonetheless." In the view of the Commission majority, a communication that "addresses the concerns of a purchaser of the advertiser's product or service" can never be fully protected **[19]** speech, no matter how close the link between the public issue addressed and the potential commercial effect that may arise because the communication deals in part with a characteristic of the speaker's product or service of interest to consumers. Under the Commission majority's analysis, a product manufacturer loses its fully protected right to engage in debate over a matter of public concern whenever the public issue is the manufacturer's product.

On this critical issue, the Commission majority and I part company. On my reading of the controlling Supreme Court precedent, a product manufacturer cannot be selectively excluded from participating in a public discussion of an entire topic. I conclude that product manufacturers, like everyone else, "enjoy the full panoply of First Amendment protection for their direct comments on public issues," *Central Hudson, supra,* at 563 n.5; that they cannot be singled out for "[s]elective exclusions from a public forum . . . based on content alone . . . [or] justified by reference to content alone," *Police Department of Chicago v. Mosely, supra,* at 96; that they cannot be barred from "public discussion of an entire topic," *Consolidated Edison Co. v. Public Service Commission, supra,* at 537; and that this full First Amendment protection is not lost unless the consequence would be to

allow a product manufacturer "to immunize false or misleading product information from government regulation *simply* by including references to public issues." *Bolger, supra,* at 68 (emphasis supplied). **[20]**

III. CHARACTERIZATION OF THE RJR COMMUNICATION

RJR's "Of Cigarettes and Science" does not come within either of the two Supreme Court definitions of commercial advertising. It does more—far more—than propose a commercial transaction. It does not relate solely to the economic interest of the speaker and its audience.

Nor would regulation of the RJR piece come within the rationales provided for the commercial speech distinction. The verifiability rationale does not apply because the claims made in "Of Cigarettes and Science" do not address an aspect of cigarettes uniquely within the knowledge of RJR. Since the MR FIT study was not conducted by RJR, others can determine as readily as RJR whether the statements in "Of Cigarettes and Science" are truthful.[21] Nor does the hardiness rationale apply. Since the subject matter discussed by RJR is a matter of public concern, this type of speech by RJR is particularly susceptible to being crushed by regulation. Noncommercial speech by a firm such as RJR about public issues related to its products may well be chilled by discriminatory governmental regulation or by the threat of expensive investigations or litigation. Indeed, RJR **[21]** terminated its entire series of editorial-like communications once the FTC began this proceeding.

In addition to not fitting within the definitions or the rationales of commercial speech, the RJR communication does not fit within the three *Bolger* criteria. Although RJR undoubtedly had an economic motivation in paying for its publication, "Of Cigarettes and Science" is hardly an advertisement in the ordinary sense of that word;[22]

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[21] Product characteristics such as price, weight, and composition can generally be easily verified by a manufacturer. In this case RJR does not provide that type of product information; it discusses evidence developed by a governmentally funded study and implicitly questions the categorical statements contained in the government's health warnings.

[22] Only in a highly cerebral sense of the word could it be said that the RJR publication promotes the sale of RJR products. RJR products are not shown in an attractive light, and consumers are not assured that smoking will not lead to heart disease. The piece tells consumers explicitly that there are "studies that show a statistical association between smoking and [heart disease]." At best consumers are told that the case against cigarettes is not conclusive.

indeed, it refers only to a generic rather than a particular product.[23]

Even if "Of Cigarettes and Science" affects the sales of cigarettes, there is no question that it is also a direct comment on a matter of public concern.[24] The question thus arises whether "Of Cigarettes and Science" gratuitously invokes a matter of public concern. The answer is clear. There is no gratuitous link. The effect of cigarettes on health is itself the issue of public concern. RJR cannot possibly make its argument about the **[22]** correct conclusions to be drawn from MR FIT without at the same time discussing an attribute of cigarette smoking of concern to purchasers of its product.

If RJR is not permitted to publish a piece such as "Of Cigarettes and Science" without the fear of government censorship, then there is simply no way for RJR to engage effectively in the debate over cigarette smoking and health free from governmental oversight determining the truth or falsity of RJR's arguments.[25] RJR cannot argue about the lack of conclusiveness of scientific evidence without at the same time potentially influencing consumers' purchase decisions.

Virtually every other person and corporation in America is free to participate in the debate about cigarette smoking and health, without government evaluation whether their claims are true or false. Whether or not RJR's participation in the debate is "unfair or deceptive," its speech challenged by this proceeding is undoubtedly a part of the contest of ideas. Under the First Amendment, RJR cannot be selectively excluded from participating in that debate merely because it produces cigarettes. **[23]**

Since "Of Cigarettes and Science" is a direct comment on a public issue, RJR cannot, consistent with the First Amendment, be precluded from publishing that comment. Can anyone doubt that a Congressional ban on all cigarette advertising[26] could not constitutionally be applied to the type of statement at issue in this case? And if Congress

[23] Although reference to a generic product obviously is not dispositive, it is an added factor corroborating the conclusion that the publication is not, in the ordinary sense of the term, an advertisement. In *Bolger*, the commercial speech referred to a specific brand and, *nota bene*, the brochures were "conceded [by Youngs] to be advertisements." *Bolger, supra,* at 66.

[24] The majority opinion does not question that the publication in issue is direct comment on a public issue.

[25] Complaint Counsel have suggested that RJR could frame the communication as a letter to the editor, testify before legislative bodies, or have representatives appear on talk shows. Even if these were equally effective means for RJR to engage in the debate of ideas, they could not constitutionally be limited to these means. As the Supreme Court stated in Consolidated Edison, *supra,* at 541 n.10, "we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."

[26] Such a ban has been proposed. *See,* H.R. 1272, 100th Cong., 1st Sess. (1987) (a bill that would prohibit any "tobacco sales promotion.").

cannot ban such a communication, how can the Federal Trade Commission regulate its content?

Consider the ironic result if "Of Cigarettes and Science" *were* held to be commercial speech. In that event, the RJR communication would be deemed to be a cigarette advertisement. As such, it would have to carry one of the four Surgeon General rotational health warnings.[27] Thus, an RJR editorial arguing that there is lack of definitive evidence on smoking and heart disease would have to be accompanied by a governmentally mandated warning that "Smoking Causes ... Heart Disease ..."

Quite simply, this case involves attempted federal regulation of the content of a communication that engages in a debate over ideas. RJR is forced to undergo this proceeding in part because it has the temerity to argue, in the words of the Commission's complaint, that "[a] major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as **[24]** the public or the reader has been led to believe ..."[28] RJR is in a distinct minority. It has challenged the official position taken by the Surgeon General and the United States Congress. RJR may be wrong. But on my reading of the Constitution, that determination is to be made by each individual, not by the government.

IV. THE MAJORITY'S BASES FOR NOT DISMISSING THE COMPLAINT

A. *Propriety of Postponing a Ruling on Jurisdiction*

Although this case in on appeal from an Administrative Law Judge's determination that the Commission lacks subject matter jurisdiction because the communication is fully protected speech, the majority has declined to determine whether the RJR communication is commercial speech or noncommercial speech. Postponing a ruling on the determinative First Amendment question might be understandable (even if wrong) if the majority had determined that further discovery were necessary before the Commission could make such a ruling. The Commission majority has not, however, made any such determination. Absent a holding that the Commission needs more evidence to decide whether the communication is commercial speech, the majority has no justifiable basis for not ruling on that issue.

The apparent explanation for the majority's action (or inaction) is

[27] *See* note 1, *infra*.
[28] Complaint, ¶ 5b.

their assertion: "Accepting the allegations of the **[25]** complaint concerning jurisdiction as true for purposes of this appeal, the content of the Reynolds advertisement includes words and messages that are characteristic of commercial speech." (p.15, citation omitted) This explanation, however, provides no basis for not ruling on the commercial speech question. The complaint's allegations referred to by the majority discuss facts that are apparent from the face of the RJR communication itself. Since the RJR communication is itself attached to and incorporated within the complaint, the complaint by itself, under the majority's own reasoning, provides a full basis for ruling on the question of commercial versus noncommercial speech.

Consider the complaint allegations cited by the majority. First, the majority cites the complaint for the proposition that RJR's communication "refers to a specific product, cigarettes" and "discusses an important product attribute—the alleged connection between smoking and heart disease." (p.15) These facts are apparent from the face of the communication. Second, the majority states: "the complaint alleges that 'Of Cigarettes and Science' is an advertisement (Complaint ¶ 2), which we understand to mean a notice or announcement that is publicly published or broadcast and is paid-for." (pp.15–16) The communication evidences on its face that it was publicly published. RJR's name at the bottom of the communication indicates that the communication was paid for by RJR. Finally, the majority states: "the complaint alleges that respondent is in the business of selling cigarettes." The communication itself **[26]** reveals that is was presented by R.J. Reynolds Tobacco Company; the name and the content of the communication indicate that RJR is in the business of selling cigarettes.

On the basis of the complaint allegations cited above, the majority asserts, "the content of the Reynolds advertisement includes words and messages that are characteristic of commercial speech." Having made this determination, the Commission majority must logically conclude that the communication is commercial speech unless (1) there is some step between having the characteristics of commercial speech and being commercial speech or (2) there is a possible characteristic of a communication that will cause it be fully protected even though it also has the characteristics of commercial speech. Since the Commission majority has already excluded the second possibili-

ty,[29] only the first possibility could possibly remain. As to that possibility, I can only ask: what step could there be between having the characteristics of commercial speech and being commercial speech? As I read the complaint and the majority opinion, the Commission majority has, whether it realizes it or not, already concluded that the communication is commercial speech. **[27]**

B. *Propriety of Further Discovery*

As a means of possibly garnering additional support for a finding that the Commission has subject matter jurisdiction, the majority has instructed the Administrative Law Judge to permit further discovery. The further discovery suggested by the majority is irrelevant. Accordingly, such discovery itself would be an unjustifiable burden on RJR's exercise of the First Amendment rights.

The Commission majority suggests two lines of discovery. The first line relates to the publication itself (p.20):

> Evidence that may be relevant to deciding whether the Reynolds advertisement is commercial speech includes facts concerning the publication or dissemination of the advertisement, such as whether it was paid-for, where and in which publications it was disseminated, whether it was placed in editorial space (such as an op-ed page) or advertising space in the publication, whether it was prepared as a letter to the editor, whether it was sent to representatives of the media for selection on merit by editorial boards, and to whom it was disseminated outside the media.

No discovery is necessary or relevant regarding background information of this type.[30] From the face of the publication, it is self-evident where it was published. The communication was not on an op-ed page nor a "letter to the editor." Since RJR's name appears at the bottom of the communication, the indication is that RJR paid for the publication. Whether the communication "was disseminated outside the media" is irrelevant. If the **[28]** communication as published is commercial speech, it does not become any less so by virtue of having been disseminated outside the media. If the communication as published is not commercial speech, dissemination outside the media

[29] As pointed out above, the Commission majority has concluded that a product manufacturer does not enjoy full First Amendment protection for direct comment on a matter of public concern if that comment also "addresses the concerns of a purchaser of the advertiser's product or service." In addition, there is no hint in the Commission opinion of any other ground under which a communication that is "characteristic of commercial speech" can receive full First Amendment protection.

[30] If this information were needed, RJR would undoubtedly stipulate to the facts. In addition, if the Commission majority truly believes that this evidence is necessary to its decision it could simply receive it without remanding. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 362 (D.C. Cir. 1977).

would not provide a basis for Commission action because such dissemination is not alleged in the complaint.

The second line of discovery suggested by the majority relates to RJR's intent in publishing the communication. (p. 20–21):

> Evidence about the promotional nature of the advertisement also may be relevant. Therefore, it might be useful to consider the circumstances surrounding the development of the advertisement, such as whether it was targeted to consumers or legislators; whether it was intended to affect demand for Reynolds' cigarettes or brands or to affect particular legislative or regulatory proposals; whether the advertisement was subjected to copy testing or to review by focus groups and, if so, the nature of the questions used in the copy tests or focus group sessions; and the results of those procedures both in terms of what they showed and what changes, if any, Reynolds made in response to those showings. Evidence relating to the message(s) Reynolds itself intended to convey through the advertisement also may be relevant. In addition, Reynolds' share of the cigarette market may be relevant to deciding whether including a brand name reference is a prerequisite to a determination that the advertisement constitutes commercial speech.

In deciding whether a publication is commercial speech, the Supreme Court has never looked to the subjective intent of the speaker.[31] Objective standards are essential. Otherwise, there **[29]** will be a chilling of fully protected speech. If the Commission cannot determine from the face of a publication that it is commercial speech, it has no basis for challenging such a publication. A fishing expedition to determine the subjective intent of particular RJR employees would impose an unjustifiable burden on RJR and chill its right to engage in free speech.

V. CONCLUSION

R.J. Reynolds has full First Amendment rights for its direct comments on public issues. "Of Cigarettes and Science" is patently direct comment on a public issue. In this case, it is precisely the product that is the public issue. Discussion of the health consequences of smoking can hardly be labeled a mere gratuitous linking of a

[31] As the court has noted: "Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is 'an associational aspect of "expression", and other activity subject to plenary regulation by government." *In re Primus*, 436 U.S. 412, 438 n.32 (citation omitted). In *Primus* the conduct at issue (client solicitation by an ACLU attorney) was association for the advancement of ideas or beliefs. *Id.* Thus the court concluded that the "motive of the speaker" was relevant only because that factor determined whether or not the expression was associational. *Id.* First Amendment rights of association are not present in the case before us. Thus the majority's conclusion (at p. 12) that *Primus* holds that the "motive of the speaker" is relevant to determining whether speech is commercial or fully protected is simply incorrect.

product with a current public debate.[32] If corporations have full First Amendment rights they must be allowed to participate in the public debate about issues involving their products, at least in an editorial format. **[30]** Effectively removing a company from a debate by contending that its message about its product is deceptive would infringe on its basic constitutional rights. In such a public debate the decision regarding truth and falsity must be made by the public, not the government. This is particularly true when the government itself has taken a public position and established its own orthodoxy. Having done so, it cannot then prohibit challenges to the governmentally approved version of the truth.

Publication of RJR's communication may or may not have an effect on cigarettes sales and such an effect may or may not have been intended. In my view, that is irrelevant. Extrinsic evidence of RJR's intentions is not needed to decide whether this communication is fully protected. It is, on its face, direct comment on a public issue and not commercial speech. To conclude otherwise would turn a common-sense distinction into an intrusive inquiry into facts about the motives of the speaker. If the editorial is deceptive, or not believable, or runs counter to other information on the health question that the public is aware of, consumers are free to reject the message in the editorial. But it is critical for First Amendment purposes that the public, and not the government, decide the answer to this question. To conclude otherwise would erode First Amendment protection by extending the commercial speech doctrine into areas traditionally thought to be fully protected. Governmental inquiry into the **[31]** motives of the speaker to determine if his views are to be constitutionally protected seems to me completely antithetical to the goals the First Amendment is intended to further. I would affirm the Administrative Law Judge and dismiss the complaint.

[32] That might be the case if a cigarette company talked about the need for clean air and incorporated false information about discount prices.

IN THE MATTER OF

SUN COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3246. Complaint, Mar. 6, 1989—Decision, Mar. 6, 1989

This consent order requires, among other things, a Radnor, Pa. corporation to divest terminals and related assets and operations of Atlantic Petroleum Corporation (Atlantic) that are located in certain parts of N.Y. and Pa., requires respondent to obtain FTC approval before making any acquisition of any light products terminals or light products pipelines in certain parts of N.Y. or Pa., and also requires the "hold-separate agreement" to continue in effect until the Commission has approved the divestiture of the property.

Appearances

For the Commission: *Arthur J. Nolan.*

For the respondent: *Robert H. Campbell & Jonathon C. Waller, in-house counsel,* Philadelphia, Pa. and *Keith E. Pugh, Jr., Howrey and Simon,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Sun Company, Inc. ("Sun"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired 100 percent of the stock of Atlantic Petroleum Corporation ("Atlantic"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; that said acquisition and the actions of the respondent to implement that acquisition constitute violations of Section 5 of the FTC Act; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Sun Company, Inc.

1. Respondent Sun is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at 100 Matsonford Road in Radnor, Pennsylvania.

2. Sun is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. Atlantic Petroleum Corporation

3. Atlantic is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1016 West 9th Avenue, King of Prussia, Pennsylvania.

4. Atlantic is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. The Acquisition

5. On or about July 4, 1988, Sun entered into a purchase agreement with Atlantic pursuant to which Sun agreed to purchase 100 percent of the capital stock of Atlantic Petroleum Maatschappij, B.V., which owns all the outstanding shares of Atlantic Refining and Marketing Corporation. Purchase of the capital stock would give Sun control of a refinery, about 900 miles of light products pipelines, 30 distribution terminals, and about 600 retail service stations and convenience stores primarily located in the states of Pennsylvania and New York. The total value of the proposed acquisition is $513 million with Sun paying an additional $113 million for Atlantic's petroleum inventories.

IV. Trade and Commerce

A. *Relevant Line of Commerce*

6. The relevant line of commerce in which to analyze to Sun's acquisition of Atlantic is the wholesale distribution and marketing of light petroleum products from terminals.

B. *Relevant Section of the Country*

7. The relevant sections of the country are the individual terminal distribution markets of Williamsport, PA and Binghamton, NY.

V. Market Structure

8. Distribution of light petroleum products from terminals in each relevant market is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

VI. Barriers to Entry

9. Entry into the relevant markets set out in paragraphs 6 and 7 herein, is very difficult.

VII. Actual Competition

10. Sun and Atlantic are actual competitors in the distribution of light petroleum products from terminals in Williamsport, PA and Binghamton, NY.

VIII. Effect

11. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition in the product market in relevant sections of the country described above in paragraphs 6 and 7 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

a. Actual competition between Sun and Atlantic will be eliminated;

b. Actual competition between competitors generally will be lessened;

c. Concentration will be increased which will increase the likelihood of collusion; and

d. Interdependent conduct, nonrivalrous behavior, collusion, or parallel policies of mutual advantage will be increased.

All of the above increase the likelihood that firms in the market will increase prices and decrease the likelihood that they will decrease prices in the near future and in the long run.

IX. Violation Charged

12. The acquisition agreement described in paragraph 5 as it relates to light products distribution and marketing assets in Williamsport,

PA and Binghamton, NY constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The proposed acquisition agreement described in paragraph 5 as it relates to light products distribution and marketing assets in Williamsport, PA and Binghamton, NY, would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Machol not participating.

Decision and Order

The Federal Trade Commission ("Commission") having initiated an investigation of Sun Company, Inc.'s ("Sun") acquisition of 100 percent of the stock of Atlantic Petroleum Corporation ("Atlantic"), and the respondent Sun having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent Sun, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Sun of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Sun is a corporation organized under the laws of Pennsylvania with its executive offices at 100 Matsonford Road in Radnor, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of respondent Sun, and the proceeding is in the public interest.

ORDER

I.

As used in this order (including the Agreement to Hold Separate, annexed to and made a part hereof), the following definitions shall apply:

(a) "*Acquisition*" means Sun's acquisition of shares of the common stock of Atlantic Petroleum Maatschappij, B.V.

(b) "*Light products pipeline*" means any pipeline or segment of a pipeline system that is used or that at any time during the two preceding years has been used for transportation of gasoline, diesel fuel, home heating oil, or kerosene-based jet fuel.

(c) "*Schedule A Properties*" means the assets and businesses listed in Schedule A of this order.

(d) "*Sun*" means Sun Company, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Sun and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(e) "*Atlantic*" means Atlantic Petroleum Maatschappij, B.V. as it was constituted prior to the acquisition, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Atlantic and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

(f) "*Light products terminal*" means a facility having the capacity to store ten thousand (10,000) barrels or more that is used or that at any time during the two preceding years has been used for receiving, storage, and truck distribution of gasoline, diesel fuel, home heating oil, or kerosene-based jet fuel.

(g) "*Retail Gasoline Properties*" means service stations, "convenience stores," and other real estate, whether owned in fee or leased, from which gasoline is sold to the public.

II.

It is ordered, That:

(A) Sun shall divest, absolutely and in good faith, within six months

of the date this order becomes final, the Schedule A Properties, as well as any additional assets and businesses relating to petroleum transportation and marketing that (i) Sun may at its discretion include as a part of the assets to be divested and are acceptable to the acquiring entity, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties as ongoing, viable enterprises, engaged in the businesses in which the properties are presently employed.

(B) Sun shall provide prospective acquirers of Schedule A Properties petroleum product exchanges if necessary to insure divestiture of the properties as ongoing, viable enterprises engaged in the same businesses in which the properties are presently employed.

(C) The Agreement to Hold Separate, attached hereto, shall continue in effect until such time as the Commission has approved Sun's divestiture of the Schedule A Properties or until such other time as the Agreement to Hold Separate provides, and Sun shall comply with all terms of said agreement.

(D) Divestiture of the Schedule A Properties shall be made only to a buyer or buyers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same businesses in which the properties are presently employed and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(E) Sun shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Schedule A Properties.

III.

It is further ordered, That, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until Sun has fully complied with the provisions of paragraph II of this order, Sun shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. Sun shall include

in compliance reports, among other things that are required from time to time, a full description of the contacts or negotiations for the divestiture of properties specified in paragraph II of this order, including the identity of all parties contacted. Sun also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That, for a period commencing on the date of service of this order and continuing for ten (10) years from and after the date of service of this order, Sun shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), or any interest in, or the whole or any part of the stock or share capital of, any company that is engaged in:

(A) The ownership or operation of light products terminals in any part of the states of Pennsylvania or New York (but excluding New York counties south of Orange and Putnam counties in the state of New York); or

(B) The ownership or operation of any light products pipeline in any part of the states of Pennsylvania or New York (but excluding New York counties south of Orange and Putnam counties in the state of New York), excluding any pipeline or pipeline segment entirely located within a circular area with radius of fifty (50) miles centered on the Sun refinery at Marcus Hook, Pennsylvania and also excluding any light products pipeline assets purchased for less than two million dollars ($2,000,000).

Provided, however, that these prohibitions shall not relate to the construction of new facilities or participation in joint ventures in which Sun is a participant on the date of service of the order.

V.

One year from the date of service of this order and annually thereafter for nine years, Sun shall file with the Commission a verified written report of its compliance with paragraph IV.

VI.

For the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Sun made to its principal office, Sun shall permit any duly authorized representative of the Commission:

(A) Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Sun relating to any matters contained in this order; and

(B) Upon five (5) days' notice to Sun and without restraint or interference from it, to interview officers or employees of Sun who may have counsel present regarding such matters.

VII.

It is further ordered, That Sun notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

Commissioner Machol not participating.

SCHEDULE A

Assets to be divested by Sun, as provided above, are the following:

1. All Atlantic light products terminals located in Broome County, New York (at 440 Prentice Road, Vestal, New York, near the city of Binghamton) and in Lycoming County, Pennsylvania (at RD 4 South Williamsport, Pennsylvania), including all associated on-site facilities and petroleum products inventories.

2. All retail gasoline properties owned by Atlantic at the following locations:

522 Hooper Road	Endwell, NY 13760
61 Glenwood Avenue	Binghamton, NY
3808 Vestal Parkway	Vestal, NY
2 Castle Creek Road	Binghamton, NY 13901
2680 Main Street	Whitney Point, NY 13862
1153 Vestal Avenue S Penn	Binghamton, NY 13903
236–240 Conklin Avenue	Binghamton, NY 13903
1010 Union Maine Highway	Endicott, NY 13760
500 Vestal Avenue	Endicott, NY 13760
341–343 Fron Street	Binghamton, NY 13905
110 N. Main Street	Jersey Shore, PA 17740
241–243 Broad Street	Montoursville, PA 17754
261 Washington Blvd.	Williamsport, PA 17701
507 Hepburn Street	Williamsport, PA 17701
857 W. Third	Williamsport, PA

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement"), by and between Sun Company, Inc. ("Sun"), a Pennsylvania corporation, with executive offices at 100 Matsonford Road, Radnor, Pennsylvania, and the Federal Trade Commission ("the Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.* (collectively, "the parties").

PREMISES

Whereas, on July 4, 1988, Sun and Atlantic Petroleum Corporation, N.V. and John C.M.A.M. Deuss entered into a stock purchase agreement, pursuant to which Sun agreed to purchase all issued and outstanding shares of capital stock of Atlantic Petroleum Maatschappij, B.V. which owns all the outstanding shares of Atlantic Refining and Marketing Corporation ("Atlantic"); and

Whereas, the Commission is now investigating the transaction contemplated by the stock purchase agreement (the "acquisition") to determine if the acquisition would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached agreement containing consent order ("consent order"), the Commission must

place it on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the status quo ante of Atlantic's refining, transportation and marketing assets and businesses during the period prior to the final acceptance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of properties described in Schedule A to the consent order (the "Schedule A Properties") and the Commission's right to seek to restore Atlantic as a viable competitor; and

Whereas, the purpose of this agreement and the consent order is to preserve Atlantic as viable petroleum company pending the divestiture of the Schedule A Properties as viable, ongoing enterprises, in order to remedy any anticompetitive effects of the acquisition and to preserve Atlantic as a viable petroleum company in the event that divestiture is not achieved; and

Whereas, Sun's entering into this agreement shall in no way be construed as an admission by Sun that the acquisition is illegal; and

Whereas, Sun understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, Therefore, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from Sun with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestitures are not accomplished, to seek divestiture of such assets as are held separate pursuant to this agreement, as follows:

1. Sun agrees to execute and be bound by the attached consent order.

2. Sun agrees that, until the first to occur of (i) three business days

after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules; or (ii) if the Commission within 120 days after publication in the Federal Register of the consent order finally accepts such order, until all of the divestitures required by Schedule A of the consent order are approved by the Commission, Sun will hold all of Atlantic's refining, transportation, and marketing assets and business operations, separate and apart on the following terms and conditions:

a. All of Atlantic's refining, transportation, and marketing assets and businesses shall be operated independently of Sun;

b. Sun shall not exercise direction or control over, or influence directly or indirectly, any of Atlantic's refining, transportation, and marketing assets and businesses; *provided, however,* that Sun may exercise only such direction and control over Atlantic as is necessary to assure compliance with this agreement.

c. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating an agreement to dispose of assets, Sun shall not receive or have access to, or the use of, any "material confidential information" relating to Atlantic's refining, transportation and marketing assets and businesses not in the public domain, except as such information would be available to Sun in the normal course of business if the acquisition had not taken place. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Sun from sources other than Atlantic, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets).

d. Sun shall not change the composition of the management of Atlantic's refining, transportation and marketing assets and businesses except as provided in subparagraph (e) herein and except that the current Atlantic directors, serving on the "New Board" (as defined in subparagraph (g) shall have the power to remove employees for cause; Sun shall maintain the viability and marketability of Atlantic's refining, transportation and marketing assets and businesses and shall not sell, transfer, encumber, or otherwise impair their marketability or viability (other than in normal course of business).

e. In the event that employees of Atlantic leave or resign from

Atlantic prior to the expiration of this agreement, and such vacancies are required to be filled in order to ensure the viability of Atlantic's operations and business, Sun may fill such vacancies, if any, with Sun employees, on the condition that the employees so appointed shall comply with all terms and conditions of this agreement and shall enter a confidentiality agreement prohibiting disclosure of confidential information.

f. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 2(a) - (e) hereof, shall be subject to a majority vote of the New Board (as defined in subparagraph (g)).

g. Sun may adopt new Articles of Incorporation and Bylaws, provided that they are not inconsistent with other provisions of this agreement, and may elect a new three person board of directors of Atlantic ("New Board") once it is a majority shareholder of Atlantic. Sun may elect the directors to the Board; provided, however, that such Board shall consist of at least two current Atlantic employees and no more than one Sun director, officer, employee, or agent. Except as permitted by this agreement, the director of Atlantic who is also a Sun director, officer, employee or agent, shall not receive in his or her capacity as director of Atlantic material confidential information relating to Atlantic's refining, transportation and marketing assets and businesses and shall not disclose any such information received under this agreement to Sun or use it to obtain any advantage for Sun. Said director of Atlantic who is also a Sun director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of confidential information. Such director shall participate in matters that come before the New Board only for the limited purpose of considering a capital investment or other transactions exceeding $5,000,000 and carrying out Sun's and Atlantic's responsibility to assure that Schedule A Properties and such other properties as the Commission may elect to add under paragraph II of the consent order are maintained in such manner as will permit their divestiture as ongoing, viable assets to achieve the remedial purposes of the consent order. Except as permitted by this agreement, such Director shall not participate in any matter, or attempt to influence the votes of the other directors with respect to matters that would involve a conflict of interest if Sun and Atlantic were separate and independent entities. Meetings of the Board during the term of this agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this agreement.

h. Nothing herein shall prevent the New Board from negotiating or entering into agreements to dispose of Atlantic's assets, provided that any such agreements with respect to refining, transportation and marketing related assets and businesses are conditioned on and not consummated prior to final approval of the consent order by the Commission.

i. Nothing contained in this agreement shall preclude a loan by Sun to Atlantic at closing in an amount sufficient to retire existing bank debt owed by Atlantic. Such loan shall be unsecured and bear interest at prevailing market rates payable to Sun and falling due fourteen (14) days after any denial of final approval of this consent order by the Commission.

j. A majority of the New Board may declare a dividend and payment not greater than the amount paid in the same quarter in 1987. Except for such dividend payment, all earnings and profits of Atlantic shall be retained separately in Atlantic. Sun shall have the right to borrow monies from Atlantic upon approval by the majority of the New Board on the same terms and conditions described in paragraph (i); *provided, however*, that Sun shall not borrow funds if the result would be to impair Atlantic's ability to operate its refining, transportation and marketing assets and businesses at its 1987 levels of expenditure on an annualized basis.

k. Whereas Atlantic's refinery has previously been supplied with crude oil by related companies, and whereas Atlantic's crude oil supply needs to be maintained in order to ensure the viability of Atlantic's operations and businesses, Sun may enter into an agreement to supply crude oil to Atlantic, provided that such agreement shall be negotiated by Sun and the New Board on an arm length basis and that the terms of such agreement shall provide that the purchases be based on the then current fair market value for crude oil.

l. Should the Federal Trade Commission seek in any proceeding to compel Sun to divest itself of the shares of Atlantic Petroleum Maatschappij, B.V. stock it shall acquire, or to compel Sun to divest any refining, transportation and marketing assets or businesses that it may hold, or to seek any other injunctive or equitable relief, Sun shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted Atlantic Petroleum Maatschappij, B.V. stock to be acquired. Sun also waives all rights to contest the validity of this agreement.

3. For the purpose of determining or securing compliance with this agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to Sun made to its principal office, Sun shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Sun and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Sun relating to compliance with this agreement;

b. Upon five (5) days notice to Sun, and without restraint or interference from it, to interview officers or employees of Sun, who may have counsel present, regarding any such matters.

No information or documents obtained by the Commission shall be divulged by any representative of the Commission, except in the case of legal proceedings to which the Commission is a party, or for the purpose of securing compliance with this consent order, or as otherwise required by law.

If, at any time, information or documents are furnished by Sun and Sun identifies such documents as "confidential," then the Commission shall provide to Sun ten (10) days notice or, if ten (10) days is not possible, as many days notice as possible prior to divulging such material in any legal proceeding to which that entity is not a party.

4. This agreement shall not be binding until approved by the Commission.

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

Docket 9206. Show Cause Order, March 24, 1989

SHOW CAUSE ORDER

On October 28, 1988, Chief Administrative Law Judge Montgomery Hyun certified to the Commission for enforcement a subpoena and a set of interrogatories that had been directed to the respondent, R.J. Reynolds Tobacco Company ("Reynolds").[1] Reynolds has declined to respond to the subpoena, to answer the interrogatories or to participate in the remainder of this proceeding before the administrative law judge on the ground that such participation would violate its First Amendment right to free speech. On September 20, 1988, complaint counsel moved that the judge impose sanctions on Reynolds in the form of adverse inferences drawn from the subpoena and interrogatories to which Reynolds has refused to respond and to permit complaint counsel to present evidence in support of the complaint. The judge declined and, on his own motion, certified the subpoena and interrogatories to the Commission for enforcement.

The issue before the Commission is whether to seek enforcement or to take other action. For the reasons below, the Commission has decided not to seek enforcement at this time but to direct the respondent to show cause why the Commission should not impose sanctions in the form of adverse inferences, as provided in the Rules of Practice.

A subpoena enforcement action would be advisable if we believed that it would promote expeditious completion of the administrative proceedings. *See UAW* v. *NLRB,* 459 F.2d 1329, 1339 (D.C. Cir. 1972) ("enforcement against a really intransigent party can be costly and time consuming, where the enforcement process is of necessity collateral to the main case"). Reynolds has stated that it intends to defend its refusal to comply with complaint counsel's discovery on the ground that the Commission lacks jurisdiction to conduct this proceeding. Although Reynolds would appear to prefer litigating this issue in the court of appeals without first proceeding in district court, and indeed opposes a subpoena enforcement action here as inefficient,

[1] Also included in the certification was a subpoena directed to a nonparty, Stanley H. Katz, Leber Katz

it has promised to argue its case vigorously in any district court subpoena enforcement proceeding, raising the question to higher courts, if necessary. Respondent's Memorandum Regarding Certification and Responding to Statement of Complaint Counsel at 10–11. This procedure, of course, is permissible, but not likely to facilitate or expedite this proceeding.

Generally, a question of agency authority or jurisdiction should be judicially reviewed only after agency action has been completed, and the courts will defer to agency expertise, permitting the agency to develop the necessary factual background on which decisions should be based. *See, e.g., Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 214 (1946); *FTC* v. *Markin,* 532 F.2d 541, 543, (6th Cir. 1976), *quoting McKart* v. *United States,* 395 U.S. 185 (1965). *See also American Medical Ass'n,* 94 FTC 701, 1027–28 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court,* 445 U.S. 676 (1982).[2]

The courts, however, have recognized several exceptions to the general rule favoring judicial review of jurisdiction only after final agency action. These exceptions, as we noted in *American Medical Ass'n,* apply in instances in which (1) the agency "has clearly violated a right secured by statute or agency regulation;" (2) the issue is "strictly legal . . . not involving the agency's expertise or any factual determinations;" or (3) "the issue cannot be raised upon judicial review of a later order of the agency." 94 FTC at 1028; *see FTC* v. *Miller,* 549 F.2d 452, 460 (7th Cir. 1977). The courts have also ruled on jurisdiction in enforcement proceedings when presented with agency action of an "unprecedented" nature. *See e.g., FEC* v. *Machinists Non-Partisan Political League,* 655 F.2d 380 (D.C. Cir.) *cert. denied,* 454 U.S. 897 (1981).[3]

If we agreed that the case law supported Reynolds' position, we might conclude that it would be inappropriate to impose sanctions instead of attempting to secure court enforcement of the subpoena and interrogatories. *American Medical Ass'n,* 94 FTC at 1027. We are not persuaded, however, that any of the above exceptions applies in this proceeding. In addition, cases involving alleged deceptive

[2] This position is consistent with the action of the Court of Appeals for the District of Columbia Circuit in July, 1988, when it refused to rule on Reynolds' jurisdictional question until the Commission had taken final agency action in its adjudicatory proceeding. *R.J. Reynolds Tobacco Co. v. FTC,* No. 88–1355 (D.C. Cir. July 1, 1988, *reh. and reh. en banc denied,* July 15, 1988).

[3] In ruling against the FEC in this case, the court distinguished what it considered the narrow scope of that agency's jurisdiction from the "broad duties" of the Federal Trade Commission to "gather and compile information and to conduct periodic investigations concerning business practices." *Id.* at 387.

advertising are hardly "unprecedented" at the FTC and are well within the agency's statutory authority. Nor would seeking enforcement of the subpoena and interrogatories at this time be likely to result in a speedy resolution of the issues. For these reasons, we think it unwarranted to delay this proceeding with a discovery action.

Rule 3.38(c) of the Commission's Rules of Practice states that if a party fails to comply with a subpoena or to respond to an order requiring answers to interrogatories,[4] "[i]t shall be the duty of parties to seek and Administrative Law Judges to grant such of the . . . means of relief [listed in § 3.38(b)] or other appropriate relief as may be sufficient to compensate for withheld testimony, documents or other evidence." Only if the judge finds such compensatory measures "insufficient" does the rule direct him to certify the subpoena to the Commission for enforcement. The certification before the Commission does not persuade us that imposition of sanctions in the form of adverse inferences would be insufficient here. *See American Medical Ass'n,* 94 FTC 701, 1027–28 (1979), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court,* 445 U.S. 676 (1982).[5]

After careful consideration, the Commission has decided to order sanctions against Reynolds under Rule 3.38(b)(1), 16 CFR 3.38(b)(1)(1988), in the form of the adverse inferences listed in Appendix A, unless Reynolds shows good cause why it should not do so.

The Commission believes it appropriate, before imposing these sanctions, to permit Reynolds a final opportunity to comply voluntarily with the subpoena and interrogatories outstanding against it. *See International Tel. & Tel. Corp.,* 104 FTC 280, 449–51 (1984). In addition, in *American Medical Ass'n,* the Commission stated that "[a]pplication of the adverse inference rule may only be made when the party's failure to produce documentary or other evidence is not

[4] Reynolds has waived its right, *inter alia,* to insist that before imposing sanctions, the administrative law judge issue orders directing a response to the interrogatories or that he issue subpoenas for any additional information sought by complaint counsel. Stipulation dated Aug. 22, 1988 at ¶ 5.

[5] Most courts have held that administrative agencies may impose sanctions for failure of respondents to comply with discovery orders. *See, e.g., P.R. Mallory & Co. v. NLRB,* 400 F.2d 956, 959 (7th Cir. 1968), *cert. denied,* 394 U.S. 918 (1969); *NLRB v. A.P.W. Products Co.,* 316 F.2d 899, 903–04 (2d Cir. 1963); *NLRB v. Wallick,* 198 F.2d 477, 483 (3d Cir. 1952); *NLRB v. Remington Rand, Inc.,* 94 F.2d 862, 868 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938). *But see NLRB v. International Medication Systems,* Ltd., 640 F.2d 1110, 1116 (9th Cir. 1981), *cert. denied,* 455 U.S. 1017 (1982) (rejecting agency's use of sanctions before district court enforcement of subpoena but distinguishing use of adverse inference rule that does not turn on failure to obey subpoena). In addition, sanctions in the form of adverse inferences have been upheld as an appropriate response to subpoena noncompliance, even when the agency could have sought court enforcement of the subpoena, *UAW* v. *NLRB,* 459 F.2d 1329, 1339 (D.C. Cir. 1972).

adequately explained." 94 FTC at 1027 (citations omitted). Reynolds is invited, therefore, in its response to this order to present any additional explanation of its position, including its views on the proposed adverse inferences. *See* 5 U.S.C. 554(c) and 555(e). Respondent also may want to address the proper weight to be accorded the proposed inferences under the standard in *American Medical Ass'n* that an inference "may be strong or weak, depending on the person's conduct and the surrounding circumstances." *Id.* at 1027 (citations omitted).

In the event that Reynolds does not respond to this order, the Commission will issue the attached sanctions and remand the matter to the administrative law judge for further proceedings, including the presentation of evidence. Accordingly,

It is hereby ordered, That Reynolds show cause in writing within 30 days from service of this order on its Washington, D.C. counsel why the Commission should not issue an order imposing sanctions on Reynolds in the form of the attached adverse inferences; and

It is further ordered, That complaint counsel may respond to any submission by Reynolds under this order within 20 days of the date on which Reynolds' submission is served on them.

APPENDIX A

PROPOSED ADVERSE INFERENCES

1. The acts and practices of R. J. Reynolds Tobacco Company, Inc. ("Reynolds") alleged in the Commission's complaint have been in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

2. Reynolds designed the MR FIT message to address an important and material product attribute of cigarettes, the connection between cigarette smoking and coronary heart disease.

3. Reynolds designed the MR FIT message to address health concerns associated with smoking that are of concern to consumers, including smokers who are purchasers or potential purchasers of cigarettes manufactured and sold by Reynolds.

4. Reynolds conducted copy tests, focus groups or other types of market research to assess likely consumer perceptions from the MR FIT message.

5. The results of Reynolds' market research were used to refine the MR FIT message and enhance its promotional message.

6. Reynolds designed the MR FIT message to provide consumers, including smokers of Reynolds' brands of cigarettes, with information purporting to refute the theory that smoking causes heart disease in order to cause or attempt to cause smokers to continue smoking and purchasing cigarettes including Reynolds' brands.

7. Reynolds designed the MR FIT message to address a target audience of consumers, smokers of Reynolds' and other brands of cigarettes, and to promote the sale of such cigarettes to those consumers.

8. Reynolds designed the MR FIT message in textual format in order to increase the persuasiveness of the message to consumers, including smokers, and to add credibility to the claims contained in the message.

9. Reynolds included in the MR FIT message a description of the purpose and results of the Multiple Risk Factor Intervention Trial (MR FIT) to add credibility to its advertising claim that there is credible scientific evidence that smoking is not as hazardous as the public or the reader of the message had been led to believe.

10. Reynolds included in the MR FIT message a description of the purpose and results of the MR FIT study to add credibility to its advertising claim that the study refutes the theory that smoking causes coronary heart disease.

11. Reynolds' purpose in running the MR FIT message was to induce consumers, including smokers of Reynolds' brands of cigarettes, not to quit smoking or to purchase cigarettes including Reynolds' brands of cigarettes.

12. Reynolds designed the MR FIT message to convey the following affirmative messages to consumers:

(a) The Multiple Risk Factor Intervention Trial (the MR FIT study) was designed and performed to test whether cigarette smoking causes coronary heart disease,

(b) A major government study about smoking and coronary heart disease (the MR FIT study) provides credible scientific evidence that smoking is not as hazardous as the public or the reader has been led to believe,

(c) The MR FIT study, a major government study, tends to refute the theory that smoking causes coronary heart disease.

13. Reynolds, through its review of an article in the *Journal of the American Medical Association*, 248, 1465 (Sept. 24, 1982), about the results of the Multiple Risk Factor Intervention Trial and as a result of

consultation with experts in the field of coronary heart disease, was aware that its description of and representations about the MR FIT study and the claims based on that description contained in the MR FIT message were false, deceptive and misleading and could not be supported by the evidence.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

Whatever I may have posited on the merits of issuing the underlying complaint in this matter, I believe that Commission process, like a Commission order, must be obeyed. Consequently, I have voted to authorize the sanction of adverse inferences against respondent R.J. Reynolds Tobacco Company. Indeed, I would have preferred stronger action.

Respondent's conduct in this case constitutes deliberate disregard of Commission process. Should respondent persist in this course, the strongest sanctions that could be imposed would be an order finding respondent in contempt, or a judgment of conviction for violation of Section 10 of the Federal Trade Commission Act (15 U.S.C. 50). To procure such sanctions, the Commission must first apply to the district court for subpoena enforcement.

Moreover, court enforcement is the only means of obtaining discovery against the non-party witness whose refusal to comply with subpoenas is also before us, following certification from the ALJ. It is unfortunate that the Commission may not have the benefit of evidence from this source.

In view of the foregoing considerations, I favored seeking court enforcement of the subpoenas issued in this proceeding. However, this approach was not supported by a majority of Commissioners. In voting for the order to show cause, I have joined my colleagues in the conclusion that some action is better than none.

IN THE MATTER OF

CANADA CEMENT LAFARGE LTD., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3100. Consent Order, Dec. 21, 1982—Modifying Order, Apr. 4, 1989

This order reopens the proceeding and modifies Paragraph VIII of the Commission's consent order (100 FTC 563) by deleting the requirement for prior approval of acquisitions in the state of Florida. The modifying order is the result of the Commission granting in part and denying in part the respondents' requests for modifications of the terms of the original order.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED DECEMBER 21, 1982

On December 5, 1988, Lafarge Corporation ("Lafarge") filed a Supplemental Petition To Reopen And Modify Consent Order ("Supplemental Petition") and asked that its original Petition to Reopen and Modify Consent Order ("Petition") filed August 11, 1988, be deemed refiled. Under the order, Lafarge is the successor to Canada Cement Lafarge Ltd. ("CCL"). Pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, the Supplemental Petition asks the Commission to reopen and modify the order in Docket No. C-3100. Lafarge requests that the order be modified by setting aside Paragraph VIII to relieve it of the need to obtain prior Commission approval for acquisitions of cement assets. The Petition and the Supplemental Petition were placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from the acquisition by CCL of General Portland Inc. ("GPI") in October 1981. 100 FTC 583 (1982). According to the complaint, the relevant geographic markets were the Inland Market and the Florida Market.

The "Inland Market" was defined as northern and eastern Alabama, Georgia, southeastern Tennessee and northern Florida. The "Florida Market" was defined as the peninsular region of the State of Florida. 100 FTC at 584. Paragraph VIII of the order, which was issued by the Commission on December 21, 1982, prohibits respondents for a ten year period ending on January 10, 1993, from acquiring without the prior approval of the Commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama, Tennessee, and Florida or in any Plant Areas in which respondents, at the time of the acquisition, are then engaged in the manufacture of cement. 100 FTC at 570. The order defines "Plant Area" as each area in the United States within a 300 mile radius of any cement plant owned or leased by respondents in either the United States or Canada.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part." A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C–2956, Letter to John C. Hart (June 5, 1986), at 4.

If the Commission determines that the petitioner has made the required showing of changed conditions, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the repose and finality of Commission orders. *See Federated Department Stores v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest warrants such action. Section 2.51 of the Commission's Rules invites respondents in petitions to reopen to show how the public interest warrants the

requested modification. 16 CFR 2.51. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C–2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96–500, 96th Cong., 1st Sess. 9–10 (1979).

The Commission has determined that reopening the order and modifying Paragraph VIII by deleting the State of Florida from the geographic coverage of the prior approval provision are warranted by changed conditions of fact. Lafarge has demonstrated changes in the Florida Market, resulting from technological and other developments, that have led to significantly increased cement imports. These changes, which have occurred in the northern part of Florida as well, remove any significant concerns that any Lafarge acquisition in Florida might raise antitrust concerns and so should be subject to prior approval. Developments in unloading technology have lowered water transportation costs, and reduced world-wide demand has caused foreign producers to ship more cement into Florida. As a result, Florida is likely a part of a broader geographic market including western Europe and Latin America. It is unlikely that any acquisition in that broader geographic market would warrant antitrust scrutiny.

After carefully considering the remainder of Lafarge's request for relief from the prior approval requirement, the Commission has

concluded that Lafarge has not made a satisfactory showing that changed conditions of fact or the public interest require Paragraph VIII to be further modified. After reviewing Lafarge's Petition and Supplemental Petition, as well as the affidavits and economic analyses supplied therewith, it does not appear that Lafarge has shown that changed conditions eliminate the need for the prior approval requirement or that any injury from the prior approval requirement outweighs the need for the order.

Lafarge has not shown that the same changes that have eliminated the need to review acquisitions in Florida have affected the Inland Market or other regional markets to the same extent. Indeed, whatever changes in imports that have occurred in those areas do not appear to have been significant. Lafarge concedes that the factual changes alleged in the Inland Market and in Plant Areas were possibly foreseeable and have been less extreme than in Florida, and Lafarge recognizes that its evidence of changed conditions in those markets may not be sufficient to meet its burden of proving changed factual circumstances. Petition at 7, 16. Lafarge has also not shown changes of fact that demonstrate that the Inland Market is not a relevant geographic market.[1] The Commission has therefore concluded that Lafarge has not shown changed conditions that eliminate the need for a prior approval provision in these areas.

Lafarge also asserts in its Petition that the changes related to the Inland Market and to the markets where the Plant Areas are located, though possibly foreseeable, have so altered the public interest balance that the prior approval requirement should be removed under the public interest standard. Lafarge contends that "the public interest is harmed by continuation of the prior approval requirement because Lafarge is unable to compete in the market for cement-producing and distributing assets, even if no significant antitrust risk is created by the potential acquisition." Petition at 19. The Petition and the Economic Report submitted with the Petition[2] identified three instances in which the prior approval requirement allegedly prevented or inhibited Lafarge's ability to acquire certain cement assets.[3] Those,

[1] Lafarge's analysis of the Inland Market in its cement market studies may not accurately depict the appropriate geographic market because its assessment of the supply response of firms on the fringe of the postulated markets may be overstated. Moreover, the deregulation of railroad rates, which is a basis for Lafarge's analysis of geographic markets, occurred prior to the date of the issuance of this order and therefore is not a changed condition.

[2] Michael W. Klass, "Economic Analysis of the Proposed Relaxation of the Prior Approval Provision of the Consent Order Governing Lafarge Corporation's Acquisition of United States Cement Assets," August 11, 1988 ("Economic Report").

[3] The first instance involved GPI's attempt to acquire a cement terminal in West Palm Beach, Florida, from

(footnote continued)

however, are instances in which it was clearly foreseeable that the order's prior approval provision would apply. It was also foreseeable at the time the respondents agreed to the order that the prior approval requirement would impose costs upon such acquisitions by Lafarge, and it was equally foreseeable that Lafarge's competitors would not be subject to similar requirements. The costs identified by Lafarge do not ordinarily provide a sufficient basis to justify termination of a prior approval provision in an order. *See* Order Reopening and Setting Aside Order Issued on April 21, 1981, *Albertson's, Inc.*, Docket No. C–3064, July 1, 1987, at 4. Unlike the showing in *Albertson's*, Lafarge has failed to show that no acquisition or series of acquisitions that it might make over the next four years would raise competitive concerns. The Commission has therefore determined that Lafarge has failed to make the threshold showing of injury under the public interest standard.

Additionally, even if Lafarge had met its threshold burden of showing a need for relief from the prior approval provision for acquisitions in the Inland Market and in Plant Areas, Lafarge has not established that the reasons for making the modification outweigh the continuing need for the order's prior approval requirements. In the Petition and the Economic Report, Lafarge alleges that while changes in the Inland Market may not be sufficient to establish changed conditions of fact necessitating reopening the order, the facts do establish that under current merger analysis, the Inland Market, as defined in the complaint, never existed or no longer is a relevant market. Petition at 16, Economic Report at 29. Lafarge claims that since the Inland Market, as redefined by Lafarge, is no longer concentrated, the public interest requires elimination of the prior approval requirement for acquisitions in that area. After reviewing Lafarge's Supplement Petition and supporting documents, the Com-

Ideal Basics Industries in November 1982, while the consent order in this matter was pending. According to Lafarge, Ideal backed out of the transaction because of the need for GPI to obtain prior Commission approval of the sale—"a time consuming process." Petition at 13–14. Subsequently, in 1984, Lafarge desired to lease a West Palm Beach terminal, but instead entered into an allegedly more costly through-put arrangement because it was uncertain if the lease of the terminal was subject to the prior approval requirement. In neither instance did Lafarge seek prior approval from the Commission.

The second instance involved a cement plant in Seattle, which was sold at auction. Lafarge claims that the prior approval requirement prevented it from bidding on those assets. Petition at 19–20. The third situation cited by Lafarge involved its acquisition of the Huron Division of National Gypsum Company. Lafarge alleges that the costs of the acquisition were raised by the legal and economic expert fees it incurred to seek prior approval and by the 11 month wait for the Commission's prior approval process to be concluded. Petition at 20–21. The Commission notes, however, that Lafarge did make that acquisition, and notes further that Lafarge's delay in responding to the staff's requests for information contributed to the time needed to decide

mission has concluded that Lafarge has failed to show that there is no continuing need for the order in the Inland Market defined in the complaint. In addition, absent extraordinary circumstances, the Commission will not reconsider whether the markets alleged in the complaint are valid. Lafarge chose not to contest the complaint. Absent a showing of changed conditions or a threshold showing of injury, the Commission will not revisit issues that could have been, but were not contested.

Lafarge's claims relating to the lack of a continuing need for prior approval of acquisitions within 300 miles of Lafarge's currently existing cement plants are mainly based on the same factual allegations as its arguments relating to the Inland Market. It claims that, due to changes in transportation regulations and technology, it is now economically feasible to ship cement longer distances than at the time of the order and that as a result, cement markets are geographically broader and less concentrated. It also claims that the changes in the technology of shipping cement by water have opened the U.S. markets to imports, obviating the need to be concerned about possible anticompetitive activity by domestic producers.

Lafarge has failed to demonstrate that there are no geographic markets within the United States in which any possible acquisition by Lafarge would warrant the Commission's scrutiny. As noted previously, Lafarge's cement market studies may not accurately depict the appropriate geographic market in which to review acquisitions in Plant Areas, and thus fail to demonstrate that no acquisition in any Plant Areas would warrant scrutiny by the Commission.[4] Lafarge's proposed acquisition of the Huron Division from National Gypsum is an example of a recent transaction subject to the order that raised significant antitrust issues and required extensive scrutiny before the Commission granted approval.[5]

The Petition requests that if the prior approval provision is not set aside, the Commission substitute a prior notification requirement for the prior approval requirement for acquisitions made in Plant Areas. Because the Commission has determined that Lafarge has failed to

[4] Because neither the complaint nor the order define the geographic market for acquisitions in Plant Areas, the Commission will determine the appropriate market analysis at the time any request for prior approval is made.

[5] Even Lafarge's demonstration that water-based terminals can be constructed in Florida within a two-year time frame does not demonstrate that such terminals could be constructed anywhere on the United States coastline. The permitting process varies from jurisdiction to jurisdiction, and Lafarge has not shown that a terminal could be built within two years in other Plant Areas. Therefore, Lafarge has not shown that acquisitions in Plant Areas that include deep water ports should be removed from order coverage.

show that there is no longer a continuing need for prior approval of acquisitions by Lafarge in Plant Areas and because prior notification would not be an adequate substitute for the Commission's review under a prior approval provision, this request is also denied.

The Commission, therefore, has determined to grant Lafarge's request to reopen and modify Paragraph VIII of the order to delete the requirement for prior approval of acquisitions in the State of Florida. Further, the Commission has determined to deny Lafarge's request in all other respects.

According, *it is ordered,* that this matter be reopened and that Paragraph VIII of the Commission's order in Docket No. C–3100 be modified, as of the date of service of this order, to read as follows:

VIII.

If is further ordered, That for a period of ten years respondents shall not acquire, without the prior approval of the commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama and Tennessee or in any Plant Areas (other than in Florida) in which respondents, at the time of the acquisition, are then engaged in the manufacture of cement.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

I concur in the Commission's decision to grant Lafarge's request to reopen and modify Paragraph VIII of the order, by deleting the requirement for prior approval of acquisitions in the State of Florida, and to deny Lafarge's request in all other respects. However, in reaching this conclusion, I do not join in imposing the standard espoused in *Damon Corp.*, Docket No. C–2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2, that petitioner demonstrate some "affirmative need" for modification when invoking the public interest. The "affirmative need" standard is required neither by Section 5(b) of the Federal Trade Commission Act nor by Rule 2.51 of the Commission's Rules of Practice, and the Commission should not impose this additional hurdle. The "affirmative need" standard creates no discernible benefits. Nevertheless, in my view, the public interest is served by continuing to impose the prior approval requirement for acquisitions in the Inland Market and Plant Areas outside of Florida.

IN THE MATTER OF

PPG INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9204. Complaint, Jan. 29, 1986—Decision, Apr. 5, 1989

This consent order requires, among other things, a Pittsburgh, Pa. manufacturer and seller to obtain prior Commission approval before acquiring any interest in a company that makes aircraft transparencies, if that company has more than $750,000 in sales in the U.S., and to provide the FTC prior notice before making other acquisitions.

Appearances

For the Commission: *Steven A. Newborn.*

For the respondents: *Joseph A. DeFrancis, Carla Hills, Scott G. Knudson, Irwin Goldbloom* and *Peter L. Winik, Latham, Watkins & Hills,* Washington, D.C.; *David J. Hickton, David J. Armstrong,* and *Dorothy A. Davis, Dickie, McCamey & Chilcote,* Pittsburgh, Pa. and *Bertum Kantor, Wachtell, Lipton, Rosen & Katz,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents, PPG Industries, Inc. ("PPG") and Swedlow, Inc. ("Swedlow"), corporations subject to the jurisdiction of the Commission, have entered into agreements that violate Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45); that through those agreements PPG has agreed to acquire Swedlow; that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended; and it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the

Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. PPG Industries, Inc.

1. PPG Industries, Inc. ("PPG") is a corporation organized and doing business under the laws of Pennsylvania, with its principal office at One PPG Place, Pittsburgh, Pennsylvania.

2. For the year ending December 31, 1984, PPG's total net sales were $4.242 billion, and its net income was $527 million.

3. PPG is primarily engaged in three business segments: glass products for the transportation and construction markets; protective and decorative coatings and resins for automobiles, appliances and industrial equipment; and chemicals.

4. PPG is engaged in the manufacture and sale of products, including aircraft transparencies, throughout the United States and the free world and is engaged in or affects commerce within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.

II. Swedlow, Inc.

5. Swedlow is a corporation organized and doing business under the laws of California, with its principal office at 12122 Western Avenue, Garden Grove, California.

6. In its 1985 fiscal year, which ended March 31, 1985, Swedlow had net sales of $46.3 million, and its net earnings were $1.9 million.

7. Swedlow is engaged primarily in the manufacture and sale of aircraft transparencies, acrylic sheet, fiber-reinforced and transparent abrasion-resistant products, and ballistic resistant materials.

8. Swedlow is engaged in the manufacture and sale of products, including aircraft transparencies, throughout the United States and the free world and is engaged in or affects commerce within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.

III. The Agreements Between PPG and Swedlow

9. On or about August 21, 1985, PPG and Swedlow entered into an Agreement and Plan of Merger ("Merger Agreement") pursuant to which Swedlow will be merged into the BV Acquisition Corporation, a wholly-owned subsidiary of PPG created specifically for this transaction. Each outstanding share of common stock, $1.00 par value, of

Swedlow, other than shares held by PPG or its subsidiaries and shares held by stockholders who properly exercise any available dissenters' rights, will be converted into the right to receive $32.60 in cash, payable to the holder thereof, without any interest thereon, upon surrender of the certificate representing such share. In addition, pursuant to the Merger Agreement, outstanding employee stock options to purchase 58,750 shares of common stock will be cancelled in consideration of the payment by PPG of the difference between $32.60 per share and the exercise price per share covered by such options.

10. On or about August 21, 1985, PPG also entered into a Stock Purchase Agreement with David A. Swedlow, Jack Gold as trustee of the Jack and Ann Gold Residuary Trust, and Jack Gold as trustee for the benefit of Patricia M. West (the "stockholders"). Pursuant to the Stock Purchase Agreement, PPG has agreed to purchase from the stockholders, and the stockholders have agreed to sell to PPG, an aggregate of 609,259 shares, representing approximately 49% of the currently outstanding shares for a price of $32.60 per share. In addition, the stockholders have granted to PPG under the Stock Purchase Agreement proxies on such shares to vote on the Merger Agreement and other matters.

IV. Definitions

11. *Aircraft transparencies* are components of fixed-wing and rotary-wing aircraft that provide a surface capable of being seen through and that are incorporated into the airframe. Aircraft transparencies are manufactured primarily from glass, acrylic, polycarbonate or some combination of two or more of these materials. Unless otherwise indicated by the context in which it is used, the term "aircraft transparencies" means all such transparencies made of any of these materials or combinations.

12. *"Abrasion resistant coating products"* refers to any and all coating products applied or added to plastic materials to increase their durability, strength, and resistance to abrasion or chemical attack.

13. *"High performance aircraft transparencies"* refers to all transparencies except those aircraft cabin windows and as-cast acrylic products that require relatively little technology to produce.

V. Nature of Trade and Commerce

14. The relevant geographic markets are the United States as a whole and the free world.

15. The relevant product markets are:

(a) All aircraft transparencies;
(b) All high performance aircraft transparencies;
(c) All acrylic aircraft transparencies;
(d) All stretched acrylic aircraft transparencies;
(e) All composite aircraft transparencies;
(f) All glass/plastic laminated aircraft transparencies; and
(g) All acrylic/polycarbonate laminated aircraft transparencies.

VI. Market Structure

16. Each of the relevant markets is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

VII. Barriers to Entry

17. The barriers to entry into the manufacture and sale of the relevant products are significant.

VIII. Actual and Potential Competition

18. PPG and Swedlow are actual and potential competitors in the manufacture and sale of the relevant products.

IX. Effects

19. The effect of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) It will eliminate actual and potential competition between PPG and Swedlow and between Swedlow and others in the relevant markets;
(b) It will significantly increase the already high levels of concentration in the relevant markets;
(c) It will create a firm whose share of the relevant markets is so high as to lead to dominant firm status; and

(d) It will enhance the possibility of collusion or interdependent coordination among the remaining firms in the relevant markets.

X. Violations Charged

20. The proposed acquisition of Swedlow by PPG would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

21. The Merger Agreement and the Stock Purchase Agreement set forth in Paragraphs 9 and 10 constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

22. The proposed acquisition of Swedlow by PPG would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent, PPG Industries, Inc., with violation of Section 7 of the Clayton Act, as amended and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent PPG Industries, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at One PPG Place, in the City of Pittsburgh, State of Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For the purposes of this order, the following definitions shall apply:

"PPG" means PPG Industries, Inc. as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns, as well as the officers, employees and agents of its parents, divisions and subsidiaries.

II.

It is ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from the date this order becomes final, PPG shall not acquire, without the prior approval of the Commission, directly or indirectly, the whole or any part of the stock, share capital, equity interest, or assets, other than purchases of manufactured product in the ordinary course of business, of any company engaged in the manufacture or sale of aircraft transparencies, and which has sold more than $750,000 of aircraft transparencies in the United States in the twelve months ending on the date of the offer or agreement to acquire the stock, share capital, equity interest, or assets of such company.

III.

It is further ordered, That any successor corporation to PPG shall be bound by this order to the same extent as PPG; further PPG shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or

dissolution of such subsidiaries or any other change that may affect compliance obligations arising out of the order.

IV.

It is further ordered, That for so long as this order is in effect, PPG shall notify the Commission at least sixty (60) days in advance of any proposed acquisition by it of the stock, share capital, equity interest or assets of any company engaged in the manufacture or sale of aircraft transparencies and having direct sales of such aircraft transparencies in the United States for which prior Commission approval is not required; *provided,* however, that this provision shall not require PPG to notify the Commission of any acquisition that must be reported pursuant to the Hart-Scott-Rodino Act, 15 U.S.C. 18a.

V.

It is further ordered, That PPG shall within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Machol not participating.

IN THE MATTER OF

COOPER RAND CORPORATION

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

Docket C-3250. Complaint, Apr. 18, 1989—Decision, Apr. 18, 1989

This consent order prohibits, among other things, a New York marketer of consumer products from representing that any lighter-to-lighter charger will restart a discharged battery instantly or as quickly as jumper cables, or from making any other performance claim for the product, unless respondent can substantiate such claims. In addition, the order requires respondent to prominently disclose in each advertisement and in the product instruction insert, either a statement concerning the product's limitations or the specific length of time needed to recharge a battery.

Appearances

For the Commission: *Allen Hile.*

For the respondent: *William R. Hansen, Nims, Howes, Collison & Isner,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Cooper Rand Corporation, hereinafter referred to as respondent, has 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 as follows:

PARAGRAPH 1. Cooper Rand Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 45 West 25th Street, New York, New York.

PAR. 2. Respondent is now and for sometime in the past has been engaged in the marketing, distribution, advertising, offering for sale, and selling to the public of "Auto Starter" and other lighter-to-lighter

chargers, which are devices to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles.

PAR. 3. In the course and conduct of its business, respondent causes, and in the past has caused, the Auto Starter and other lighter-to-lighter chargers to be offered and sold from its place of business to purchasers located in various States of the United States and the District of Columbia. Respondent maintains and at all times mentioned herein has maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined by the Federal Trade Commission Act, as amended.

PAR 4. In the further course and conduct of its aforesaid business, respondent has at all times mentioned herein made numerous statements in writing, in various product packaging and promotional materials and instruction sheets prepared and/or disseminated by respondent for use in selling respondent's products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid are the following:

"[S]tart your car without jumper cables . . . instantly!"
"[The Auto Starter lighter-to-lighter charger] replaces jumper cables."
"[Using the Auto Starter] you'll be back on the road in just minutes."
"[Using the Auto Starter] in just a few minutes you will be ready to go . . ."
"When the power monitor light goes on, the disabled car is ready to start."

PAR. 5. Through the use of the statements referred to in paragraph four, and others contained in product packaging and promotional materials, instruction sheets, and advertisements not specifically set forth herein, respondent has represented, and now represents, directly or by implication, that:

(a) Lighter-to-lighter chargers can or will restart a vehicle disabled by a discharged battery as quickly as jumper cables;

(b) Lighter-to-lighter chargers can instantly restart a vehicle disabled by a discharged battery; and

(c) Illumination of the lighter-to-lighter charger's power monitor light indicates that the disabled vehicle is ready to restart.

PAR. 6. In truth and in fact:

(a) Lighter-to-lighter chargers cannot restart a disabled vehicle as quickly as jumper cables. Lighter-to-lighter chargers take significant-

ly longer than jumper cables to restart a vehicle, even under the most favorable circumstances.

(b) Lighter-to-lighter chargers cannot restart a vehicle disabled by a discharged battery instantly.

(c) Illumination of the lighter-to-lighter charger's power monitor light is not an accurate indicator that a disabled vehicle is ready to start.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the statements referred to in paragraph four, and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph five it possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time respondent made the representations set forth in paragraph five, it did not possess and rely upon a reasonable basis for them. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent, Cooper Rand Corporation, and the respondent having been furnished thereafter with a copy of a complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Cooper Rand Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 45 West 25th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purpose of this order, *"lighter-to-lighter charger"* means any device to be used to recharge the battery in a disabled vehicle by connection to an operating vehicle through the cigarette lighter receptacles of both vehicles.

I.

It is ordered, That respondent, Cooper Rand Corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the marketing, advertising, offering for sale, sale, or distribution of the Auto Starter or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

a. That any such lighter-to-lighter charger can or will restart a vehicle disabled by a discharged battery as quickly as jumper cables;

b. That any such lighter-to-lighter charger can or will instantly restart a vehicle disabled by a discharged batter; or

c. Any performance characteristic of any lighter-to-lighter charger unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence which substantiates such representation; provided, however, that to the extent such evidence consists of any test, experiment, analysis, research, study or other evidence based on the expertise of professionals in a relevant area, such evidence shall be "competent and reliable" for purposes of this paragraph only if the test, experiment, analysis, research, study, or other evidence is conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent, Cooper Rand Corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the marketing, advertising, offering for sale, sale or distribution of the Auto Starter or any other lighter-to-lighter charger in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith and for a period of five (5) years from the effective date of service of this order cease and desist from failing to disclose clearly and prominently in each solicitation for the sale of such lighter-to-lighter charger, on a hang tag affixed to each such lighter-to-lighter charger, and in the product instruction insert either

(a) The following information expressed in the exact language set forth below in ten point or larger bold face Helvetica type:

This product will not instantly start your car. Unlike a jumper cable, it must first recharge your battery. Also, older batteries or colder temperatures may significantly increase the amount of time needed to restart your car.

or

(b) The specific length of time required to recharge a battery in a given state of discharge, accompanied by a statement disclosing whether the specified time is a maximum, minimum, typical, or other such time, and that older batteries or colder temperatures may increase charging times.

III.

It is further ordered, That respondent, Cooper Rand Corporation, its successors and assigns, shall, within fifteen (15) days after the date of service of this Order, using lists of names and addresses of purchasers of lighter-to-lighter chargers Cooper Rand has compiled from its own files, and from the files of each credit card issuing company or other company through which Cooper Rand Corporation sold or distributed lighter-to-lighter chargers to the public, send by first class mail to each of the approximately 131,000 purchasers of a lighter-to-lighter charger whose name and address appears on such lists a 4" by 6" postcard containing only the exact language as set forth in Appendix A, attached hereto and incorporated herein by reference, and clearly stamped on the front in at least twelve (12) point type with the words "IMPORTANT PRODUCT INFORMATION."

IV.

It is further ordered, That Cooper Rand Corporation, its successors and assigns, shall distribute a copy of this Order to each present and future officer, employee, agent and representative having sales, advertising, or policy making responsibilities for any lighter-to-lighter charger and secure from each such person a signed statement acknowledging receipt of said order.

V.

It is further ordered, That respondent, Cooper Rand Corporation, its successors and assigns, shall maintain for at least three years and make available to the FTC with reasonable notice for inspection records showing the names and addresses of all owners to whom the notice required by Part III of this order is sent.

VI.

It is further ordered, That respondent, Cooper Rand Corporation, its successors and assigns, shall maintain for at least three years and upon request make available to the Federal Trade Commission for inspection and copying:

(a) The originals of signed statements required by Part IV of this order;

(b) All materials relied upon to substantiate any representation covered by this order;

(c) All test reports, studies, data or other materials and other documents or information in respondent's possession or control that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation;

(d) Records showing the name and address of any consumer who contacts respondent pursuant to the notice provided by Part III of this order, and the total number of such contacts; and

(e) Records showing any action respondent takes in response to any such consumer contact in response to the notice provided by Part III of this order, and the total number of such actions.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail, the manner and form in which it has complied with this order.

APPENDIX A

Dear Customer:

Our records show that some time ago you purchased a lighter-to-lighter auto battery charger distributed by Cooper Rand Corporation.

We want you to be aware that lighter-to-lighter chargers cannot restart a disabled vehicle as quickly as jumper cables can. This is because they work by recharging a battery rather than by providing a brief "jolt" of energy to restart your vehicle, as jumper cables do.

Also, longer charging time is needed with low outdoor temperatures, older batteries, and batteries in poor condition. If a battery is too old or its condition is too poor, it may not accept a charge.

Cooper Rand is concerned that our customers accurately understand the use of this product. We trust that the above information will clarify the proper use of your lighter-to-lighter charger.

Sincerely,

Michael Flood, Vice President
Cooper Rand Corporation

IN THE MATTER OF

LENOX, INCORPORATED

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE CLAYTON AND THE FEDERAL TRADE COMMISSION ACTS

Docket 8718. Consent Order, June 24, 1970—Set Aside Order, April 19, 1989

The Federal Trade Commission has set aside a portion of the 1970 consent order with Lenox, Inc., (77 FTC 860), thus removing the provisions that prohibited respondent from terminating dealers after receiving complaints from other dealers and that required the respondent to reinstate dealers terminated for discounting prices or for transshipping products.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND SET ASIDE ORDER

On December 20, 1988, Lenox, Incorporated ("Lenox"), filed a "Request of Lenox, Incorporated to Vacate Final Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In the Request, Lenox asks the Commission to reopen the proceeding and set aside the cease and desist order entered by the Commission on June 24, 1970 (77 FTC 860) and modified by the Commission on July 12, 1982 (100 FTC 259). Lenox alleges that setting aside the order is warranted by changed conditions of fact and law and the public interest. Request at 2. The Request was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and two comments were received. On February 24, 1989, Lenox submitted an affidavit responding to one of the public comments.

The Commission has carefully considered Lenox's Request, the public comments and Lenox's response to one comment and has concluded that Lenox has not made a satisfactory showing that changed conditions of fact or law or the public interest require that the order be set aside in its entirety. The order prohibits Lenox from agreeing with its dealers with respect to resale prices and in essence requires compliance with Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). Lenox has not shown changed circumstances that eliminate the need for the order. Lenox also has not shown that it is unduly burdened by an order that merely requires

it to abide by the law, and, therefore, setting aside the order is not warranted in the public interest.

The Commission believes that the second part of Paragraph 3 of the order should be set aside in the public interest. The second part of Paragraph 3 prohibits conduct that by itself may not be unlawful, and this provision is no longer necessary to ensure Lenox's compliance with the law. In addition, Paragraphs 9(a) and (b), which require Lenox to reinstate dealers terminated for failing to observe Lenox's suggested resale prices or for transshipping Lenox products, are inconsistent with subsequent modifications of the order. Consequently, the public interest is served by setting aside these provisions.

I.

The Commission's complaint in this matter, issued October 13, 1966, alleged that Lenox agreed with its dealers to fix the resale prices for its products. In the original proceeding, the Commission found that "agreements as to resale prices between respondent and its dealers do in fact exist," 73 FTC at 597, and held that Lenox had entered into unlawful price agreements with its dealers in violation of Section 5 of the Federal Trade Commission Act. On appeal, the United States Court of Appeals for the Second Circuit affirmed the Commission's decision and order, as modified. *Lenox, Inc. v. FTC,* 417 F.2d 128 (2d Cir. 1969).[1]

The final order of the Commission contains provisions to remedy unlawful price maintenance by Lenox.[2] Paragraphs 1 and 2 of the order prohibit Lenox from requiring its dealers to agree to sell Lenox products at specified prices as a condition of dealing. The first part of Paragraph 3 prohibits Lenox from asking its dealers "to report any person or firm who does not observe the resale prices suggested by respondent." The second part of Paragraph 3 prohibits Lenox from "acting on reports so received" by refusing to sell to noncompliant dealers. Paragraph 4 prohibits Lenox from "[h]arassing, intimidating, coercing, threatening or otherwise exerting pressure on dealers" to

[1] The court held that the Commission lacked authority to prohibit resale price maintenance agreements in states permitting such agreements under "fair trade laws," enacted pursuant to the McGuire Act. The Commission modified the order accordingly, incorporating a fair trade law proviso as Paragraph 9 (later renumbered as Paragraph 8) of the order. 77 FTC 860.

[2] Four of the remaining eight paragraphs of the original order have no further effect. Paragraphs 5 and 6 were time-limited and expired in 1973. Former Paragraph 8, which prevented Lenox from banning dealer transshipments of its products, was set aside by the Commission in 1982. Finally, Lenox complied with the order provision that required it to file a compliance report 60 days after service of the order.

comply with established resale prices. Paragraph 7 prohibits Lenox from "[u]tilizing any other cooperative means of accomplishing the maintenance of resale prices." Paragraph 10 (later renumbered as Paragraph 9) requires Lenox to reinstate dealers that had been terminated for failing to maintain resale prices or for transshipping.

Paragraphs 5 and 6 of the order, both of which expired in 1973, prohibited Lenox from selling to dealers at a discount from retail prices and from publishing suggested retail prices. Paragraph 8, which was vacated in 1982, prohibited Lenox from banning transshipment of its products by dealers. 100 FTC 259 (1982).[3]

II.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. S. Rep. No. 96–500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C–2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C–2916, Letter to Joel C. Hoffman, Esq. (March 24, 1983), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C–2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification

[3] After Paragraph 8 was set aside, Paragraphs 9 and 10 were renumbered Paragraphs 8 and 9. 100 FTC at 259.

requested against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96–500, 96th Cong., 2d Sess. 9–10 (1979). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III.

Lenox has shown neither changed conditions of law or fact nor public interest considerations that require setting aside the order in this matter in its entirety. The order prohibits agreements to fix resale prices, conduct that is *per se* unlawful. The changed circumstances advanced by Lenox do not affect the *per se* illegality of agreements to maintain resale prices or bring the order into conflict with existing law. In addition, Lenox "has not shown that complying with an order that essentially requires adherence to the law is causing it injury." *William H. Rorer, Inc.,* Docket No. 8599, Order Modifying Cease and Desist Order, 104 FTC 544, 545 (1984).[4]

Lenox asserts that the law governing vertical restraints and the

[4] In *Rorer,* the Commission declined to modify an order provision that "in essence" required the respondent to comply with Section 2(a) of the Robinson-Patman Act. *See also Alhambra Motor Parts,* Docket No. 6889, Letter to John C. Peirce, Esq. (January 19, 1988), at 6–7 (denying petition to set aside order prohibiting violations of Section 2(a) of Robinson-Patman Act).

circumstances in which an unlawful agreement can be inferred have changed significantly since the order was entered in 1970. According to Lenox, its argument in the original proceeding that its conduct was unilateral and therefore lawful under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), was rejected by the Commission on the authority of decisions that had expanded the circumstances in which an agreement between a manufacturer and its dealers could be inferred. Subsequent decisions, according to Lenox, "have changed the legal criteria for evaluating whether an agreement to maintain resale prices can be inferred" to such an extent that the evidence considered by the Commission in this matter "would not have given rise to [the original] proceeding must less to a conclusion of violation, under today's standards." Request at 55.

Lenox relies on *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), in which the Supreme Court said that an unlawful vertical price agreement must be proved by unambiguous evidence so as not to deter or penalize legitimate, unilateral conduct and legitimate communications between a manufacturer and its dealers. The evidence must "tend to exclude the possibility that the manufacturer and the nonterminated distributor were acting independently." Lenox also cites *Business Electronics Corp. v. Sharp Electronics Corp.*, __ U.S. __ 108 S. Ct. 1515 (1988), in which the Court said that a vertical restraint is not *per se* unlawful unless it includes an agreement on price or price levels.[5] In both of these cases, the Supreme Court reiterated the *Colgate* doctrine that a manufacturer generally has a right to deal or to refuse to deal with whomever it likes, as long as it does so independently.

The Commission's conclusion in the original proceeding that Lenox had engaged in unlawful resale price agreements was based on findings consistent with these cases. The Commission expressly found that Lenox had required its dealers to agree to resale prices. *See* 73 FTC at 594–95 & 597. Lenox is incorrect when it suggests that the standards applied by the Commission in the original proceeding are inconsistent with current law. Accordingly, Lenox has not shown that changed conditions of law require the Commission to reopen and set aside the order

Here, as in *Monsanto*, it is necessary to distinguish between

[5] In *Monsanto*, the Court held that a *per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints. In *Sharp*, the Court said that a vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price

concerted and independent action and between concerted action to set prices, which is *per se* unlawful, and concerted action on nonprice vertical restraints, which is judged under the rule of reason. The order in this matter proscribes concerted action to set prices. Paragraphs 1 and 2 of the order prohibit Lenox from entering into agreements concerning price with its dealers. These prohibitions are consistent with *Monsanto* and *Sharp,* in which the Court said that vertical agreements to fix price are *per se* unlawful.

The first part of Paragraph 3 and Paragraphs 4 and 7 of the order also are consistent with *Monsanto* and *Sharp.* The first part of Paragraph 3, which bars Lenox from "[r]equesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent," in essence prohibits Lenox from inviting its dealers to participate in a resale price maintenance scheme. *See Monsanto,* 465 U.S. at 764 n.9 & 765. This provision does not bar dealers from complaining to Lenox about price cutters. Instead, it bars Lenox from seeking the dealers' participation in policing and maintaining resale prices.

Similarly, Paragraph 4 of the order prohibits Lenox from coercing its dealers, by threats of termination or otherwise, to comply with Lenox's resale prices. Paragraph 7 prohibits Lenox from using "any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent." Nothing in *Monsanto* makes the conduct described in these provisions of the order lawful. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds." *Monsanto,* 465 U.S. at 765 & n.10. Although cooperation and coordination between Lenox and its dealers "to assure that their product will reach the consumer persuasively and efficiently" is not unlawful, 465 U.S. at 763–64, cooperation to maintain resale prices clearly is unlawful.

The second part of Paragraph 3 of the order prohibits Lenox from "acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported." As written, this provision applies only when Lenox solicits and obtains the cooperation of its dealers in enforcing compliance with resale prices and acts on the information so obtained. In addition, termination of a price cutting dealer is not lawful in all circumstances. For example, a manufacturer's threat to refuse to deal to obtain compliance with resale prices can evidence an invitation to an unlawful agreement. *Monsanto,* 465 U.S. at 765. Nevertheless, this provision will be set aside in the public interest. As

the Court explained in *Monsanto,* dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763–64. To the extent that this second part of Paragraph 3 may inhibit Lenox from legitimate unilateral conduct, it may cause competitive injury.[6] Because any conduct that would be unlawful under this part of Paragraph 3 would be prohibited by other provisions of the order, the reasons to set aside this provision outweigh any reasons to retain it.

IV.

Lenox alleges that "changes in market facts warrant vacation of the order." Request at 36. Lenox has not shown that these alleged changed conditions require setting aside the order. Agreements to fix resale prices remain unlawful, and Lenox has not shown that changed conditions of fact require setting aside order provisions that require compliance with the law.

Lenox claims that intrabrand competition has increased significantly. Since 1976, when the McGuire Act was repealed, Lenox states that it has authorized "multiple, quality dealers" in all marketing areas and that price competition among Lenox dealers is and will continue to be "the norm." Request at 36–37. An increase in the number of authorized Lenox dealers and increased competition among them are not changed conditions that eliminate the need for the order or make continued application of it inequitable. Instead of demonstrating a need to reopen and modify the order, these conditions appear to be consistent with compliance with the order.

Lenox also claims that interbrand competition has changed since 1970. According to Lenox, domestic manufacturers of fine china have withdrawn from the market, and imports have become dominant. Lenox claims that its foreign rivals are not restricted from preventing dealer practices that "tarnish[] [Lenox's] image and sap[] the profit of other quality dealers," so that Lenox is at a competitive disadvantage. Request at 38. Lenox does not claim that Lenox is

[6] As discussed below, Lenox's claims of competitive disadvantage and injury are premised for the most part on its perceived inability unilaterally to refuse to deal with firms that have small retail mark ups and do not provide customer services. Request at 16–20 & 52–54; *see* note 8 *infra.* Although Paragraph 3 does not prohibit unilateral refusals to deal, the modification eliminates any ambiguity in that regard.

competitively disadvantaged by the fact that other U.S. firms are no longer its competitors.[7] Increased competition from foreign firms also is not a changed condition that requires reopening and modification of the order. To the extent that the foreign firms do business in the United States, they, like domestic firms, are required to comply with the law, and they are not free to agree with their dealers to fix resale prices.

Lenox also alleges that marketing has changed, citing increased competition from "certain deep-discounting dealers, trading on the efforts of others" and "destroying Lenox's distribution through prestige outlets." Request at 38–39. According to Lenox, "deep" discounters often sell Lenox products at prices 30% to 50% less than suggested resale prices. *See* Velsmid Affidavit at 2. These discounters usually (but not always) maintain inferior displays and only minimal inventories of Lenox china and do not offer the full range of services that Lenox expects from its dealers. *Id.* at 3. Many of these discounters accept telephone orders from distant customers, who select their china from the displays of full-service dealers.

As a result of deep discounting and free riding, Lenox claims, full-service dealers discontinue or reduce their sales efforts for Lenox products, Request at 39–40, and Lenox's image of quality, prestige and elegance has begun to erode. To substantiate this claim, Lenox has submitted affidavits from its employees and from "prestige" retailers who say that such retailers have either cut back or discontinued their displays and sales of Lenox products, because widespread deep discounting has made carrying them both unprofitable and incompatible with the "quality image" of their stores. Lenox vigorously contends that its quality image is a major component of the value of fine china to consumers and that it must be allowed to terminate deep discounters to protect that image before it is irreversibly damaged. Request at 40–45. In addition, Lenox asserts that interbrand competition is impaired when prestige retailers curtail or discontinue sales of the Lenox lines. Request at 37–38.

Neither free riding nor the erosion of Lenox's quality image is a changed condition that would warrant vacating the order. The order prohibits vertical price fixing, which is unlawful. The order does not bar Lenox from imposing lawful nonprice vertical restraints to protect

[7] Lenox also does not claim that the withdrawal of other domestic firms, impliedly reducing interbrand competition, is in any way attributable to the order.

its product image.[8] Lenox, however, has made a threshold showing that continued application of the second part of Paragraph 3 and of Paragraphs 9(a) and (b) of the order is causing injury to its competitive position. As discussed above, the second part of Paragraph 3 may inhibit Lenox from legitimate conduct. Paragraphs 9(a) and (b) of the order require Lenox to reinstate dealers terminated for discounting or for transshipping Lenox products.[9] Because unilateral termination of a dealer for discounting is not unlawful and because the order's prohibition of Lenox's ban on transshipments was set aside in 1982, requiring Lenox to reinstate dealers for these reasons would be inconsistent with the order, as modified, and clearly would serve no further remedial purpose. To the extent that conduct described in these provisions might be in furtherance of an unlawful scheme to fix resale prices, such conduct would be prohibited by the other provisions of the order. Consequently, the need to set aside these provisions of the order outweighs any reasons to retain them.

Accordingly, *it is ordered,* that Lenox's Request to reopen and set aside the order in this matter in its entirety be, and it hereby is, denied; and

If it further ordered, That this matter be reopened and that the Commission's order in Docket No. 8718, issued June 24, 1970, as modified by order dated July 12, 1982, be, and it hereby is, modified, as of the date of service of this order, by setting aside Paragraph 9 and by deleting from Paragraph 3 "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported."

[8] To the extent that Lenox's injury claim turns on free riding by deep discounters on services provided by :her dealers, Lenox has been able to ban resale of its products to unauthorized dealers since the 1982 :odification of the order. Nothing in the order prevents Lenox from requiring its dealers to provide customer :rvices and from terminating dealers for failing to do so.

[9] Lenox asserts that these provisions are "no longer applicable." Request at 7–8, footnote. By their terms, :wever, these paragraphs are still in effect.