

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 ($\frac{1}{8}$) 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.

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IN THE MATTER OF

R. J. REYNOLDS TOBACCO COMPANY

Docket 9206. Interlocutory Order, March 4, 1988¹

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.