

IN THE MATTER OF

R.J. REYNOLDS TOBACCO COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9206. Complaint, June 16, 1986—Decision, May 8, 1990*

This consent order prohibits, among other things, a Winston-Salem, N.C. tobacco corporation from misrepresenting the results, design, purpose or content of any scientific test or study concerning any association between cigarette smoking and health effects.

Appearances

For the Commission: *Judith D. Wilkenfeld.*

For the respondent: *Judith Oldham, Collier, Shannon, Rill & Scott*, Washington, D.C. *Floyd Abrams, Cahill, Gordon & Reindel*, New York, N.Y. and *W.A.openhauer, Womble, Carlyle, Sandridge & Rice*, Winston-Salem, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that R.J. Reynolds Tobacco Company, Inc., a corporation, (R.J. Reynolds or "respondent") has 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. R.J. Reynolds is a New Jersey corporation, with its offices and principal place of business located at 401 North Main Street, Winston-Salem, North Carolina.

PAR. 2. Respondent manufactures, advertises, offers for sale, sells and distributes cigarettes and other tobacco products.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent has disseminated or caused the dissemination of an advertisement entitled "Of cigarettes and science," attached hereto as Exhibit A.

PAR. 5. In this advertisement respondent has represented, directly or by implication, that:

(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; and

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

PAR. 6. The representations set forth in paragraph five are false or misleading.

PAR. 7. In light of the representations made in the advertisement, and because of the way in which the advertisement describes the MR FIT study and its results, respondent's failure to disclose:

(a) That men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or

(b) That the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality,

renders the advertisement deceptive.

PAR. 8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Of cigarettes and science.

This is the way science is supposed to work.

A scientist observes a certain set of facts. To explain these facts, the scientist comes up with a theory.

Then, to check the validity of the theory, the scientist performs an experiment. If the experiment yields positive results, and is duplicated by other scientists, then the theory is supported. If the experiment produces negative results, the theory is re-examined, modified or discarded.

But, to a scientist, both positive and negative results should be important. Because both produce valuable learning.

Now let's talk about cigarettes.

You probably know about research that links smoking to certain diseases. Coronary heart disease is one of them.

Much of this evidence consists of studies that show a statistical association between smoking and the disease.

But statistics themselves cannot explain *why* smoking and heart disease are associated. Thus, scientists have developed a theory: that heart disease is *caused* by smoking. Then they performed various experiments to check this theory.

We would like to tell you about one of the most important of these experiments.

A little-known study

It was called the Multiple Risk Factor Intervention Trial (MR FIT).

In the words of the *Wall Street Journal*, it was "one of the largest medical experiments ever attempted." Funded by the Federal government, it cost \$115,000,000 and took 10 years, ending in 1982.

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 theory persists

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 accurately. It is an opinion. A judgment. But *not* scientific fact.

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.

R.J. Reynolds Tobacco Company

DISSENTING STATEMENT BY CHAIRMAN DANIEL OLIVER

I respectfully dissent from the Commission's decision to issue a complaint challenging R.J. Reynolds' paid "editorial" titled "Of Cigarettes and Science." The challenged statement, as I read it, engages an issue that is a subject of public concern, and expresses a point of view that is unlikely to be articulated elsewhere. I believe that, as a matter of public policy, it is valuable for the public to hear all sides of an issue, and I am concerned about taking any action that may inhibit free expression of views that might not be popular to government regulators. Although, after reviewing the evidence presented to the Commission, I cannot conclude that issuance of this complaint is in the public interest, I, of course, express no view on the underlying legal and factual issues raised by this case.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent, R.J. Reynolds Tobacco Company, with violation of 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, R.J. Reynolds Tobacco Company, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by R.J. Reynolds Tobacco Company 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 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 3.25 of its Rules, now in further conformity with the procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent R.J. Reynolds Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of New Jersey, with its office and principal place of business located at 401 Nottingham Street, Winston-Salem, North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of R.J. Reynolds Tobacco Company, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent, R.J. Reynolds Tobacco Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising or promotion of cigarettes that constitutes commercial speech under the First Amendment of the U.S. Constitution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication that the MR FIT study was designed and/or performed to test whether cigarette smoking causes coronary heart disease.

B. Representing directly or by implication that the MR FIT study is credible scientific evidence that cigarette smoking is not as hazardous as the public or the reader had been led to believe.

C. Representing directly or by implication that the MR FIT study tends to refute the theory that smoking causes coronary heart disease.

D. Failing to disclose, in any discussion of the MR FIT study that questions the relationship between smoking and smokers' risk of coronary heart disease, that: (a) men in the study who quit smoking had a significantly lower rate of coronary heart disease death than men who continued to smoke; or (b) that the MR FIT study results are consistent with previous studies showing that those who quit smoking enjoy a substantial decrease in coronary heart disease mortality.

E. Misrepresenting in any manner, directly or by implication, in any discussion of cigarette smoking and chronic or acute health effects, the results, design, purpose or content of any scientific test or study explicitly referred to concerning any claimed association between

cigarette smoking and chronic or acute health; *except that* this paragraph shall not apply to: (i) any scientific test or study concerning the amount of tar and nicotine in any cigarette; or (ii) claims phrased as opinions unless (a) they are not honestly held, (b) they misrepresent the qualifications of the holder or the basis of his opinion, or (c) reasonable consumers are likely to interpret them as implied statements of fact.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a written report setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Azcuenaga dissenting and Commissioner Owen not participating.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The consent order the Commission issues today against R.J. Reynolds Tobacco Company ("Reynolds") is unusually and conspicuously weak. It provides less protection for consumers than the Commission sought when it issued the complaint in this proceeding, less protection than the Commission ordinarily would seek in a deceptive advertising case, particularly one with serious public health implications, and less protection than is justified under the circumstances. The order to which the majority has acceded conveys to me the troubling message that when a major cigarette company boldly runs an advertisement that misrepresents important scientific evidence about the relationship between smoking and health, this Commission will do precious little in response. I dissent.

Beyond its weakness, a more serious peril lurks within this order. The order implicitly represents that the Commission is protecting consumers from deceptive cigarette advertising, even in the guise of a paid-for editorial. Consumers may be lulled by this message into a false sense of security that they can trust what they read in cigarette ads. In recent years, the federal government had displayed an increasingly high degree of care and concern about the relationship between smoking and health, and consumers reasonably may assume from this order that the Federal Trade Commission is guarding their interests with the same high degree of care. In fact, the public health protection this order affords is so illusory that consumers might very well be better off if the Commission issued no order at all.

Nothing in the record or the litigation posture to date suggests a need to accept a weak, compromise order. Yet the remarkable concessions that the majority is willing to make to settle this case suggest a certain squeamishness about the Commission's authority to regulate deceptive advertisements that look like editorials, which is the only defense that Reynolds has asserted. Reasonable people may disagree about whether the First Amendment protects a deceptive advertisement that looks like an editorial, such as the so-called "MR. FIT" ad that Reynolds ran, but we can do more to protect consumers if we take a firm position one way or the other. If we announce that the Commission will not challenge advertisements that are designed to masquerade as editorials, we will warn consumers to be on guard and to exercise any natural suspicion they may have regarding the truth of a paid-for editorial advertisement.

On the other hand, if we intend to regulate such ads, we should do so decisively and demand remedies that are as rigorous as in any other deceptive advertising matter. By accepting this pared-down order, the majority implicitly asserts that the order is adequate and signals to the public generally that the Commission is protecting consumers.¹ At the same time, however, it signals to cigarette companies and other advertisers, through the specifics of the order, which will be studied by their legal experts, that they may shade the truth, or even deceive consumers outright, if they choose to try the advertising "editorial" approach in the future. Although certainly the Commission does not intend this result, in a very real sense the Commission itself is

¹ One of my colleagues has ventured so far as to say this is a "strong" order and a "victory for consumers." Statement of Commissioner Andrew J. Strenio, Jr., Concurring in the Commission's Acceptance of the Order for Public Comment, September 20, 1989 ("Strenio Statement") at 1, and Concurring Statement of Commissioner Andrew J. Strenio, Jr. ("Strenio Concurrence") at 1.

practicing a deception on the American consumer, and a dangerous deception at that.

This case involves a Reynolds advertisement that the Commission found reason to believe deceptively represented that a major government study tends to refute the theory that smoking causes coronary heart disease. When it issued the complaint, the Commission attached a proposed order ("notice order"). It indicated that if the facts were established as alleged, the notice order "should issue" and that the Commission might order additional protection as necessary or appropriate.

The heart of the notice order, as I read it, is Paragraph I-E, which along with Paragraphs I-A through I-D, constitute what usually would be known in Commission parlance as "core relief." The notice order, like other Commission orders, contains both "core" and "fencing-in" provisions. Core relief, to the best of my knowledge, has not been formally defined, but it generally refers to the Commission's primary law enforcement remedy, which is to prohibit the unlawful conduct. Its message is basically, "Do not do this again." The Commission's authority to impose core relief stems from Section 5(b) of the FTC Act. All other relief in Commission orders is characterized as "fencing-in" relief designed to "close all roads to the prohibited goal, so that [the core relief in the] order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (footnote omitted).

Reasonable minds sometimes differ over which provisions in a particular order constitute core or fencing-in relief, depending on how one views the scope of the misconduct at issue. From his earlier statement when the Commission accepted the proposed consent for public comment, it appears that Commissioner Strenio views Reynolds' misconduct narrowly, as consisting only of Reynolds' dissemination of a particular ad. He states that the core relief in the order includes only those provisions in Paragraphs I-A through I-D prohibiting Reynolds' further dissemination of that one ad. Strenio Statement at 1 n.2. He designates Paragraph I-E, which prohibits misrepresentations of tests or studies in discussing smoking and health, as fencing-in. *Id.* at 4. I believe that on this record, Reynolds has violated the law not just by disseminating a single deceptive ad but by the act of misrepresenting scientific tests or studies in advertising that discusses smoking and health, and, in my view, Commissioner Strenio's characterization of Reynolds' misconduct is unduly limited.

If the Commission had tried this case and had found liability, it doubtless would not hesitate to say that Reynolds had engaged in deceptive advertising by misrepresenting the nature or results of scientific tests or studies in discussing the relationship between smoking and health. It would then no doubt have imposed core relief, that is, relief that simply prohibits the unlawful conduct, with a provision much like Paragraph I-E of the notice order. The most obvious reading is that the Commission viewed Paragraph I-E of the notice order as core relief when it issued the complaint. That was certainly my understanding at that time and is so now.

Under Section 5(b) of the FTC Act, once the Commission finds liability, it automatically has authority to impose core relief. For fencing-in relief, the Commission also must show that the remedy is reasonably related to the violation and necessary to ensure the core relief. This is often easy to do, but it is nevertheless an additional step the Commission must take. My colleague's narrow and apparently solitary approach to defining core conduct, in my view, does not serve us well in this case and, if ever accepted by the Commission, could impose an undesirable and unnecessary burden on the Commission in future cases.

The core relief contained in Paragraph I-E of the notice order would prohibit Reynolds from:

Misrepresenting in any manner, directly or by implication, the design, purpose, content, or results of any scientific test or study in any discussion of smoking and health.

This is a simple requirement that flows directly from the serious allegations in the complaint. Since the complaint issued, nothing has happened to suggest that its allegations are anything less than completely true. Yet the majority now accepts substantially less protection for consumers than it initially projected by adopting several notable limitations to the core prohibition quoted above. When combined, these limitations narrowly constrict the relief imposed and create a potential litigation quagmire should the Commission ever seek to enforce the order. No explanation for these major concessions on the part of the majority is readily apparent, and the resulting order is not more than a gesture in response to deceptive advertising claims that may cause grave consumer injury.²

² Although the order probably bars Reynolds from again disseminating the identical "MR. FIT" advertisement that gave rise to the complaint, even this is not entirely free from doubt.

The principal limitation to the substantive protections of the order narrows the core prohibition in Paragraph I-E to cover only those misrepresentations concerning scientific tests or studies "explicitly referred to" in a Reynolds advertising message. The usual language used to redress misrepresentations of tests or studies, as reflected in the notice order, extends to all references to such tests or studies, even if implicit³ or generic. Allowing a company under order this much leeway to misrepresent the safety of its product is rare, at best. Indeed, I am aware of no other Commission order that is so limited. *See, e.g., Removatron International Corp.*, D. 9200, slip op. at 3 (Nov. 4, 1988) ("cease and desist from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study"), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *American Home Products Corp.*, 98 FTC 136, 425 (1981) ("cease and desist from . . . [m]isrepresenting in any manner any test, study or survey or any of the results thereof concerning. . ."), *aff'd*, 695 F.2d 681 (3d Cir. 1982); *Litton Industries, Inc.*, 97 FTC 1, 82 (1981) ("cease and desist from . . . [m]isrepresenting in any manner the purpose, sample, content, reliability, results, or conclusions of any survey or test"), *aff'd*, 676 F.2d 364 (9th Cir. 1982); *Sears, Roebuck & Co.*, 95 FTC 406, 526 (1980) ("cease and desist from . . . [m]isrepresenting. . . the purpose, content or conclusion of any test, experiment, demonstration, study, survey, report, or research"), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

Already this provision has spawned questions. Since the agreement was signed, counsel supporting the complaint and counsel for Reynolds have exchanged letters concerning interpretation of Paragraph I-E of the order. *See* attached correspondence dated August 17, 1989, from Judith Wilkenfeld and Judith Oldham. This correspondence is interesting, but it is not part of the order.⁴ Perhaps the correspondence will help the Commission if it ever needs to enforce the order on this precise point. But other gaps in the coverage of Paragraph I-E have not been filled, even in this informal *post hoc* fashion. The purpose of the consent order is, after all, to reduce to

³ Prohibiting misrepresentation in implicit references to scientific tests need not discourage accurate descriptions of the makeup of a product or its performance characteristics.

⁴ The consent agreement signed by Reynolds and counsel supporting the complaint, consistent with the model order specification contained in the Commission's *Operating Manual* (Ch. 6.8 and Illustration 2), expressly states: "The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order." Consent Agreement at 2, ¶ 7.

writing any such "understandings" between the parties and to make those "understandings" binding.

It is entirely appropriate and desirable to bar Reynolds from making any deceptive statements that suggest the existence of scientific, empirical support or expert, scientific opinion for product claims in addition to those that explicitly mention a "test" or "study." What if, for instance, an advertisement deceptively uses phrases such as "experts agree," or "government agency reviews scientific evidence and concludes," or "empirical research shows," or "scientific data prove"? The number of other examples is limited only by the imagination of a good marketing department or advertising agency. Unlike the Commission's notice order, this order does not prohibit Reynolds from using these phrases deceptively.⁵

A comment filed with the Commission on behalf of the American Heart Association, the American Cancer Society, the American Lung Association and their umbrella group the Coalition on Smoking OR Health "agrees that it is essential" that the order should apply to references such as those I have just described.⁶ The only way the Commission could ensure that the order so applies would be to delete the order provisions that plainly was drafted to exclude those references from the coverage of the order. This the Commission has not done. No quantity of earnest side pronouncements can cure that flaw because the Commission will not be the final arbiter of what the order covers. That honor will go to the courts and, it has been my observation, courts generally conclude that orders cover what they say they cover and do not cover that which they specifically exclude.

Another limitation on the core provisions of the order arises from the deletion of the simple phrase "smoking and health," which appeared in Paragraph I-E of the notice order and its replacement with the more narrow phrase "smoking and chronic or acute health effects." Under the revised language, the Commission will be able to enforce the order against only a more limited range of deceptive claims and Reynolds can contest the Commission's interpretation of

⁵ One of my colleagues stoutly asserts that the order does bar such claims. Strenio Concurrence at 2. To support his point, he is reduced to citing another letter, thereby highlighting the unfortunate lack of coverage in the controlling document, the order itself. His assertion ignores the common sense flag that Reynolds negotiated this change in the order for a reason.

⁶ Like my colleagues, I acknowledge the substantial expertise of the Coalition on the relationship between smoking and health and their related concern about the accuracy of advertising in this area. Because this order does not seem to promote what I understand to be the Coalition's ultimate goal, I regret that they endorsed the order and did not see fit to employ their considerable persuasiveness to urge a different result.

the additional words "chronic," "acute" or "effects," none of which is defined in the order.⁷

Still another limitation of the core prohibition appears in the language approved by the majority that condones misrepresentations "concerning the amount of tar and nicotine" in cigarettes. Such misrepresentations relate directly to the issues of smoking and health that are at the heart of this proceeding, and therefore, are well within the scope of the Commission's authority to impose relief. *See, e.g., FTC v. Ruberoid Co.* 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). The Commission previously has treated deceptive tar and nicotine claims as serious violations of Section 5. *FTC v. Brown and Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in part and remanded in part*, 778 F.2d 35 (D.C. Cir. 1985), *modified*, No. 83-1940 (D.D.C. April 4, 1986).

The final ornament in the now heavy load of exceptions that decorates Paragraph I-E further limits and complicates the provision by expressly allowing claims that are phrased as opinions unless (i) they are "not honestly held" (a particularly interesting subject for proof), (ii) they misrepresent the qualifications of the holder or the basis of his opinion, or (iii) reasonable consumers are likely to interpret them as implied statements of fact.⁸ This provision serves no useful purpose for the Commission or the public, and it has not appeared in other Commission orders. The provision also substantially increases the likelihood that any enforcement of the order will be difficult and protracted.

In addition to the serious cuts it has approved in the core protections of the order, the majority also has departed from the Commission's routine practice by acquiescing in Reynolds' demand that the order expressly apply only to advertising or promotion of cigarettes "that constitutes commercial speech under the First Amendment of the United States Constitution." Because the Commission's jurisdiction necessarily is limited by the First Amendment, this language is

⁷ It has been suggested that the new phrase has been defined by the World Health Organization. Even assuming, and I do not, that we want that definition to control, the order does not so specify.

⁸ This provision derives from the Commission's Deception Statement, which is a statement of policy to which the Commission refers in exercising its prosecutorial discretion. Letters dated October 14, 1983, to The Honorable Bob Packwood, Chairman, Committee on Commerce, Science, and Transportation, United States Senate and The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, United States House of Representatives (reprinted in Appendix to *Cliffdale Associates, Inc.*, 103 FTC 110, 174-83 (1984)). The fact that the Commission finds this language useful in a policy statement the interpretation of which is solely within its own discretion does not make it palatable in an order, every word and phrase of which Reynolds may challenge in an enforcement proceeding.

superfluous. The Commission does not reference in its orders the defenses proffered by respondents and making an exception here is unnecessary and undesirable.

Perhaps more important, when combined with the provision placing "claims phrased as opinions" outside the scope of the order, this language tells Reynolds and other advertisers that promotional material cloaked in the mantle of opinion are beyond the reach of the Federal Trade Commission. The Supreme Court, in considering the analogous question whether material containing discussions of public issues nonetheless could constitute "commercial speech," refused to encourage such sophistry:

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.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 63 (1983) (quoting *Central Hudson Gas & Elec. Corp. v. Public Utility Comm'n*, 447 U.S. 557, 563, n.5 (1980)).

Finally, the majority fails to disassociate itself from the staff's letter of May 12, 1989 (attached), to Reynolds that sets forth the staff's "intent" about the scope of the order.⁹ To be sure, the letter recites that Reynolds "predicates" its acceptance of the consent agreement simply on the "assurance that this letter will be forwarded to the Commission." It seems all too clear, however, that Reynolds hopes to achieve indirectly by this letter what the Commission has refused to grant it directly: a delineation of what the Commission will consider to be the limits of commercial speech developed without reference to a factual record.

It is well established that the staff has no authority to bind the Commission, but absent a direct and express disavowal of this letter, the Commission may be hard pressed to avoid arguments over the letter in an enforcement proceeding. The letter can serve only to undermine the force of the order it purports to construe. Another potential inconvenience might arise if, in an enforcement proceeding, the Commission asserts that this letter from complaint counsel interpreting one part of the order does not bind the Commission. The Commission might be hard-pressed to explain why the letter from

⁹ As a condition of the settlement imposed by Reynolds, complaint counsel sent a letter to Reynolds setting forth examples of forms of speech that they characterize as noncommercial and therefore, in their opinion, outside the scope of the order.

Reynolds counsel interpreting another part of the order, discussed earlier, nevertheless should be binding on Reynolds.

Such so-called "side letters" unfortunately are not unprecedented, but neither are they common. In all events, they are ill-advised. The Commission should make clear to the staff and to other potential respondents that they are unacceptable both here and in other cases.

Reynolds has argued that the Commission's enforcement action evidences a double standard that disfavors cigarette companies. *See, e.g.,* Reynolds' Answering Brief on Appeal at 16-17 and n.8. The majority's issuance of this consent agreement and order does, indeed, suggest the existence of a double standard—but not one that is biased against the cigarette industry. Rather, the order the Commission issues today accords this cigarette company treatment that is far more lenient than that ordinarily given to respondents in deceptive advertising cases. It is a surprising abandonment of the public interest, and I cannot endorse it.

ATTACHMENTS

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION WASHINGTON, D.C. 20580

August 17, 1989

Judith Oldham, Esquire
Collier, Shannon & Scott
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Dear Ms. Oldham:

During Commission consideration of the consent agreement signed by R.J. Reynolds Tobacco Company, a question has been raised about the meaning of a phrase in Part I.E. of the order. Specifically, I have been asked to clarify the understanding of the negotiating parties of the phrase "any scientific test or study explicitly referred to." My understanding is that this language, as intended by the parties, would limit the order's coverage to advertising claims that expressly refer to a test or study; *i.e.*, a reference to a specifically named test or study, such as MR FIT, or a generic reference to a test or study, such as "tests prove...." Please confirm by return mail if this reflects your understanding.

Sincerely,

Judith P. Wilkenfeld
Counsel Supporting the Complaint

Dissenting Statement

113 F.T.C.

Collier, Shannon & Scott
Attorneys-at-Law
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

August 17, 1989

Judith D. Wilkenfeld, Esquire
Program Director for Food and Drug Advertising
FEDERAL TRADE COMMISSION
601 Pennsylvania Avenue, N.W.
Room 4007
Washington, D.C. 20580

Re: MR FIT Settlement

Dear Ms. Wilkenfeld:

This is to confirm our understanding that the language in Paragraph E of the order in R.J. Reynolds Tobacco Company (Dkt. No. 9206), which prohibits misrepresentation of "the results, design, purpose or content of any specific test or study explicitly referred to concerning any claimed association between cigarette smoking and chronic or acute health . . ." was intended to limit the Order's coverage to advertising claims that expressly referred to a test or study, *i.e.*, a reference to a specifically named test or study such as MR FIT, or a generic reference to a test or study, *e.g.*, "tests prove."

Sincerely,

JUDITH L. OLDHAM

JLO:mdl

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

May 12, 1989/

James F. Rill, Esquire
Collier, Shannon, Rill & Scott
1055 Thomas Jefferson Street, N.W.
Washington, D.C. 20007

Re: In the Matter of R.J. Reynolds
Tobacco Company, Dkt. 9206

Dear Mr. Rill:

During recent discussions concerning a proposed settlement of the above matter, you requested on behalf of R.J. Reynolds Tobacco Company, clarification of our understanding of the scope of the meaning of the terms "advertising or promotion of cigarettes that constitute commercial speech under the First Amendment of the U.S. Constitution" as those terms are used in Section I of the proposed order.

The purpose of this letter, which will be forwarded to the Commission with the signed proposed consent agreement, is to provide some examples of speech we do not intend to come within the definition of "advertising or promotion of cigarettes that constitutes commercial speech" as those terms are used in the proposed order. We understand that the company's acceptance of the consent agreement is predicated on the contents of this letter and the assurance that this letter will be forwarded to the Commission in connection with its consideration of the signed consent agreement. In addition, it is our intention in writing this letter and providing these examples neither to vary nor contradict the terms of the order, but merely to explain and clarify our intent as to its coverage. Finally, our listing is not intended to be exhaustive or exclusive, but merely to provide examples of speech that we do not intend to be covered by the proposed order.

The following are examples of speech that we believe do not constitute advertising or promotion of cigarettes that constitutes commercial speech:

testimony or statements before government bodies,
communications, including press conferences, with independent news media,
presentations at scientific, legal and professional conferences,
op-ed pieces and letters to the editor published by independent news media in the
exercise of their editorial judgment,
articles published in professional, legal or scientific journals, and
statements made on independent broadcast news or talk shows. This category
excludes statements made in advertisements that take the form of news or talk
shows.

Concurring Statement

113 F.T.C.

Sincerely,

Judith P. Wilkenfeld
Counsel Supporting the Complaint

William C. MacLeod
Director
Bureau of Consumer Protection

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The Commission's initial review indicated that the consent agreement negotiated by complaint counsel and the R.J. Reynolds Tobacco Company, Inc. ("Reynolds") was both justified and commensurately strong. The Commission now has reexamined this issue following the receipt of public comments, and appropriately has decided to give final approval to the proposed settlement.

The comments filed by the Coalition on Smoking OR Health (which consists of the American Heart Association, the American Cancer Society, and the American Lung Association) in support of the proposed settlement were particularly insightful. Naturally, that came as no surprise since the Coalition has paid long-standing and serious attention to the matter. This interest dates back to the Coalition's petition requesting that the Commission initiate an investigation into the "Of Cigarettes and Science" advertisement, and also was evident at many other stages of the proceeding (such as the Coalition's participation in the appeal of the Administrative Law Judge's dismissal of the case in 1987).

After thoughtful discussion of various issues raised regarding the proposed agreement, the Coalition's comments to the Commission concluded:

[O]n balance the proposed Consent Order and Settlement Agreement represent a major achievement which will benefit consumers and which will reduce the type of misrepresentations found in "Of Cigarettes and Science." The Commission, and particularly the Commission's staff, should be commended for pursuing this litigation vigorously, for establishing the Commission's jurisdiction over "Of Cigarettes and Science," and for working out a settlement and consent order which will substantially further the public interest.

I, too, have concluded that the proposed settlement represents a victory for the public interest as well as a vindication of the

Commission's authority to challenge false or deceptive advertising in any guise.

Simply put, having found reason to believe that "Of Cigarettes and Science" constituted a deceptive advertisement, the consent order affirms that the Commission has jurisdiction over so-called "advertorials." This is the format where advertising wolves attempt to dress up in the sheep's clothing of editorials. The consent order prohibits Reynolds from using any form of commercial speech to misrepresent either the health risks associated with cigarettes or the results of scientific studies concerning those health risks. Thus, the consent order prevents Reynolds from engaging in the same or similar acts or practices that led to this litigation. Failure to comply with the order would make Reynolds liable for civil penalties of up to \$10,000 per day per violation.

These are noteworthy accomplishments for a case with more than its share of complex and novel elements. To be sure, this settlement is not written exactly as I would have preferred. By that standard, the settlement contains imperfections. However, based upon close scrutiny, I am convinced that under the circumstances these are relatively minor imperfections. My attached earlier statement explains in detail why these imperfections have no appreciable negative effect.

Rather than repeat this analysis here, I simply would like to reemphasize two basic points. First, it is implausible that Part I.E of the order would be taken out of context and misconstrued to exclude from the order's coverage generic references to tests or studies (such as "tests show" claims). The Commission majority voted to accept this settlement based upon the express understanding that Part I.E of the order refers both to specifically identified or named tests as well as to generic references to tests or studies. For elaboration upon this point, see the Commission response to the public comment from the Coalition on Smoking OR Health.

Second, the Commission views with disfavor side letters from FTC staff in general, and has made no exception for complaint counsel's guidance letter of May 12, 1989 in particular. Further, such side letters are not binding upon the Commission as a matter of law. Moreover, the Commission consistently, frequently, and pointedly has refrained from taking any action whatsoever to endorse the letter of May 12th or to otherwise accord it binding effect in any regard.

Renouncing the major accomplishments embodied in this consent because of its minor imperfections would be akin to rejecting a

doughnut because of the hole. Indeed, in accepting this consent, the Commission is putting all advertisers on notice that they cannot escape their legal responsibilities either by camouflaging an advertisement so that it resembles an editorial or by superficially linking a product to a current debate.

Any cigarette company, or other advertiser, who misreads the settlement as somehow symbolizing a lax Commission attitude toward false or deceptive advertising is in for an abrupt and rude awakening. In other words, the consent means that an advertiser who blows this kind of smoke is going to get burned.

In sum, the consent provides proportionate disincentives for recurrence of the allegedly unfair and deceptive advertising claims by Reynolds involving important public health concerns that are the essence of this case. The settlement also should help deter unfair or deceptive conduct by those few advertisers who may be tempted in the future to stray from the straight and narrow. Through careful balancing, the settlement advances both of these desirable goals without impeding the dissemination of truthful and non-deceptive information. This is important because the vast preponderance of advertisers utilize practices that are above reproach in supplying accurate and valued information to consumers. Accordingly, consistent with the Commission's mandate to protect consumers from unfair or deceptive advertising in any industry, acceptance of this consent is in the public interest.

ATTACHMENT A

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The Commission has chosen to accept, subject to final approval, the consent agreement negotiated by complaint counsel and the R. J. Reynolds Tobacco Company, Inc. ("respondent"). This action appears both justified and commensurately strong.¹

The action appears justified because the Commission continues to have reason to believe that respondent's advertisement, entitled "Of Cigarettes and Science," made false and misleading claims about the health effects of cigarette smoking. Respondent's advertisement led to the issuance of an FTC administrative complaint on June 16, 1986.

The action appears commensurately strong because the consent

¹ Of course, I will review with great care this assessment and all other preliminary conclusions and issues after completion of the comment period.

agreement secures virtually all of the relief sought in the notice order that accompanied the complaint. The settlement contains 100 percent of the remedies specified in the notice order for the core conduct at the heart of this proceeding.² In addition, the settlement provides the lion's share of the fencing-in relief specified in the notice order.³

To be sure, the settlement does not precisely track the notice order in all regards. But, these differences as a practical matter have no significant negative effect. Dismissing the public health value of this settlement by focusing disproportionately upon those relatively minor differences from the notice order would seem anomalous. Accordingly, the substantial public interest benefits that would flow from the core conduct and fencing-in relief included in the settlement tip the scales in favor of acceptance.

Should the Commission, then, reject this strong order and return to litigation in pursuit of a substance order that—if everything goes right—might be slightly stronger? I think not. To begin with, assuming such litigation were pursued vigorously and concluded successfully, it is improbable that the Commission would garner an appreciably stronger order than the one before us now. Further, the quest for a “perfect” settlement surely would divert agency resources that could be put to more productive use. Moreover, the public in the meantime would be harmed by the lingering uncertainty about the outcome of this case that easily could extend for many more years.

Reasonable people can differ over the importance of these individual factors and the overall balance to be struck. The impassioned and articulate dissent from my colleague proves as much. Nonetheless, the dissent's conclusion that continued litigation (with its attendant risks) necessarily is preferable to any settlement that does not adhere to the notice order in each and every particular exalts form over substance. Turning to the proposed settlement, I question whether it would serve the public interest to gamble so much tangible relief in hand, for so little theoretical reward that might—or might not—be lurking in the bush.

Comparison of the notice order and the proposed consent order reveals that the differences between them largely are superficial. One such difference is a change in the boilerplate language typically used in Commission orders. All things being equal, I would prefer not to

² The core provisions of the proposed consent order are identical to those of the notice order. Compare Parts I.A through I.D of both orders.

³ Both orders would prohibit respondent from making deceptive statements about tests or studies that discuss smoking and health. Compare Part I.E of both orders.

alter boilerplate. However, this change does not narrow the coverage or undercut the enforceability of the order. The boilerplate language in the proposed consent says that the order covers advertising or promotion of cigarettes "that constitutes commercial speech under the First Amendment of the Constitution." This provision merely states the obvious: the Commission has neither the desire nor the authority to obtain an order that would restrict fully protected, noncommercial speech.

Similarly, the added language in Part I.E.ii regarding opinion claims merely makes explicit that the order does not extend to such claims where the net impression is unlikely to mislead consumers. The order still would cover any opinion claim where the net impression has the potential to mislead consumers.

Part I.E. of the order, the fencing-in section, has another language modification. The notice order would have prohibited respondent from misrepresenting any scientific test or study in any discussion concerning "cigarette smoking and health." The proposed consent order changes that phrase to "cigarette smoking and chronic or acute health effects." This semantic change does not narrow the order's coverage, since the revised phrase encompasses all adverse health conditions associated with smoking. In fact, the Office on Smoking and Health, the federal office responsible for preparing the Surgeon General's annual report on the health consequences of smoking, has indicated that the revised phrase—"cigarette smoking and chronic or acute health effects"—simply is a more precise way to say "cigarette smoking and health."

Also in the fencing-in section, Part I.E of the proposed consent order excludes any scientific test or study regarding the amount of tar or nicotine in cigarettes. Unlike the other differences reviewed above, this change does amount to a narrowing of the scope of the fencing-in relief specified in the notice order. Thus, if respondent in the future were to misrepresent the quantity of tar or nicotine in its cigarettes, the Commission would not be able to file a lawsuit seeking civil penalties for violation of this order.

While I would rather not narrow the order in this fashion, the exclusion is limited and does not create a barrier to effective FTC action against misrepresentation of tar or nicotine quantity. Should respondent perpetrate an abuse of this nature, the Commission would retain—and, I trust, exercise—its full power to bring a new lawsuit, either as an administrative matter or as an injunction proceeding such

as the Barclay case.⁴ Further, the proposed consent order would cover claims made about tests or studies that discuss health risks associated with any level of tar or nicotine contained in cigarettes. In sum, this exclusion is not cause for rejecting the settlement.

Moving along to the remaining difference found within the fencing-in section, Part I.E of the proposed consent order includes the phrase, "explicitly referred to." If there were more than a hypothetical chance that this phrase could be taken out of context and misconstrued to exclude from the order's coverage generic references to tests or studies (such as "tests show" claims), I would not support the settlement. However, such a cramped construction of the order coverage would be an unreasonable and most unlikely reading of Part I.E. In my view, on the four corners of the order itself, Part I.E does cover claims such as "tests show" and other references to generic tests or studies in addition to claims concerning specifically-named tests or studies (such as the MR FIT study).⁵

Finally, there is the question of the complaint counsel guidance letter of May 12, 1989. I do not favor side letters such as this one in principle, and would prefer that complaint counsel not agree to send such letters during settlement discussions. However, side letters from complaint counsel are not binding upon the Commission as a matter of law. The Commission has taken no action to endorse this side letter or otherwise accord it binding effect. Accordingly, rejecting the settlement due to the mere existence of complaint counsel's letter would give undue weight to the missive.

In conclusion, although I like some aspects of the proposed settlement more than others, the net result looks to be that the benefits exceed the costs by a goodly margin. The proposed settlement appears to provide appropriate disincentives for recurrence of the allegedly unfair and deceptive claims involving important public health concerns that gave rise to this complaint. The proposed settlement also should help deter unfair or deceptive conduct by other advertisers—cigarette and non-cigarette companies alike—without impeding the dissemination of truthful and non-deceptive information. Accordingly, consistent with the Commission's mandate to protect consumers

⁴ *FTC v. Brown & Williamson Corp.*, 778 F.2d 35 (D.C. Cir. 1985).

⁵ The category of "test or studies" includes all references to any research performed according to methods recognized by the scientific community. There is no requirement for the literal presence of the words "test" or "study" before the order applies. Thus, the use of phrases such as "government agency reviews scientific evidence and concludes," or "empirical research shows," or "scientific data prove," or the like, would be covered.

from unfair or deceptive advertising in any industry, acceptance of the settlement for comment appears to be in the public interest.

IN THE MATTER OF

CULLIGAN, INC.

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

Docket 6673. Consent Order, May 23, 1957—Set Aside Order, May 14, 1990

The Federal Trade Commission has set aside a 1957 consent order with Culligan, Inc., (53 FTC 1072), thus deleting a provision prohibiting respondent from using exclusive dealing to foreclose competition in the water softener industry. The Commission concluded that changed factual circumstances merit setting aside the order.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER

On December 15, 1989, Culligan International Company ("Culligan") filed a request to reopen and set aside the consent order that was entered in this proceeding on May 23, 1957, in settlement of allegations that Culligan's exclusive dealing contracts violated Section 3 of the Clayton Act, 15 U.S.C. 14.¹ 53 FTC 1072 (1957). Culligan's petition was placed on the public record for 30 days. No comments were received. For the reasons described below, the Commission reopens and sets aside this order pursuant to Section 11(b) of the Clayton Act. 15 U.S.C. 21(b).

Culligan argues that its request is supported by changes of law and of fact as well as the public interest. The Commission has considered Culligan's request and has concluded that the company has made a sufficient showing of changed conditions of fact to require reopening the order and that on further consideration, these changes of fact justify setting the order aside.

I. BACKGROUND

A. *Culligan's Business At Time of Complaint*

Culligan's petition states that "from 1957-1962 Culligan probably enjoyed as high as a 30% share of the water-softener market based on factory exit shipments." Affidavit of Donald A. Mahlstedt ("Aff.") at 31. Culligan's water softening products were marketed in 1955 to

¹ The order that Culligan seeks to have set aside, Docket No. 6673, was based on a consent agreement between Culligan, Inc., and the Commission. Culligan is the successor to Culligan Inc., the respondent against which the order was entered.