1988 WL 490114 (F.T.C.)

FEDERAL TRADE COMMISSION (F.T.C.)

In the Matter of
R.J. REYNOLDS TOBACCO COMPANY, INC., a corporation.

Docket No. 9206
ISSUED: March 4, 1988

***1** COMMISSIONERS:

Daniel Oliver, Chairman

Patricia P. Bailey

Terry Calvani

Mary L. Azcuenaga

Andrew J. Strenio, Jr.

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.

By the Commission, Chairman Oliver dissenting.

Benjamin I. Berman

Acting Secretary

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

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 the pleadings alone; consideration of extrinsic evidence was both irrelevant and itself violative of the First Amendment. [2]

***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 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.

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 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).

***3** 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 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 (19 87); Sears, Roebuck & Co. v. FTC, 676 F.2d 385 (9th Ci r.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.

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; 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:

***4** [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).

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

***5** 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).

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 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?

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]

***6** 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. 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 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 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 1 63. 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; Bolger v. Youngs Drug Products, 463 U.S. at 67; National Commission on Egg Nutrition, 570 F.2d at 163.

***7** Thus, viewed in light of the allegations contained in the complaint, 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 jurisdiction, [13] he shall permit further opportunity to develop and present evidence on the issue. See Part II.D, infra at 1 7-22. 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, contends that reliance upon extrinsic evidence is irrelevant and itself violative of the First Amendment.

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 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.

***8** 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 the reasoning in Herbert v. Lando applicable here. [17] Thus, 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 opened 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 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.

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 constitutes commercial speech, and consequently, would be subject to the Commission's jurisdiction.

***9** 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.

***10** SEPARATE STATEMENT OF CHAIRMAN 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 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. 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.

***11** 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 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 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 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 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:

***12** 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 hear 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 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.[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]

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

New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (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 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]

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]

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 products. 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."

***14** 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 foregone entirely.

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

***15** 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 "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:
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.

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 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.

***16** 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 commissions' 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 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 from 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.

***17** 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 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).

III. CHARACTERIZATION OF THE RJR COMMUNICATION

***18** 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 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] 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 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.

***19** 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 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 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 their assertion: “Accepting the allegations of the 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.

***20** 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 reveals that it 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 possibility, [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.

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.

***21** 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 opened 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 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 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 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 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. 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.

***22** 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 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 as intended to further. I would affirm the Administrative Law Judge and dismiss the complaint.

EXHIBIT 1

***23** 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 (MRFIT).

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.

***24** R.J. Reynolds Tobacco Company

EXHIBIT 2-A

Can we have an open debate about smoking?

The issues that surround smoking are so complex, and so emotional, it's hard to debate them objectively.

In fact, many of you probably believe there is nothing to debate.

Over the years, you've heard so many negative reports about smoking and health and so little to challenge these reports that you may assume the case against smoking is closed.

But this is far from the truth.

Studies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary. These scientific findings come from research completely independent of the tobacco industry.

We at R.J. Reynolds think you will find such evidence very interesting. Because we think reasonable people who analyze it may come to see this issue not as a closed case, but as an open controversy.

We know some of you may be suspicious of what we'll say, simply because we're a cigarette company.

We know some of you may question our motives.

But we also know that by keeping silent, we've contributed to this climate of doubt and distrust. We may also have created the mistaken impression that we have nothing to say on these issues.

That is why we've decided to speak out now, and why we intend to continue speaking out in the future.

During the coming months we will discuss a number of key questions relating to smoking and health. We will also explore other important issues including relations between smokers and non-smokers, smoking among our youth, and “passive smoking.”

Some of the things we say may surprise you. Even the fact that we say them may prove controversial.

But we won't shy away from the controversy because, quite frankly, that's our whole point.

We don't say there are no questions about smoking. Just the opposite. We say there are lots of questions but, as yet, no simple answers.

Like any controversy, this one has more than one side. We hope the debate will be an open one.

R.J. Reynolds Tobacco Company

EXHIBIT-2B

What not to do in bed.

You can read.

You can rest.

You can sleep.

You can make phone calls.

You can eat breakfast.

You can watch television.

You can listen to music.

You can exercise.

You can snore.

You can even eat crackers provided you're alone.

And yes, you can snuggle.

But don't ever light up a cigarette when you're in bed.

Because if you doze off just once, all your dreams can go up in smoke.

R.J. Reynolds Tobacco Company

EXHIBIT 2-C

A message from those who don't to those who do.

We're uncomfortable.

To us, the smoke from your cigarettes can be anything from a minor nuisance to a real annoyance.

We're frustrated.

Even though we've chosen not to smoke, we're exposed to second-hand smoke anyway.

We feel a little powerless.

Because you can invade our privacy without even trying. Often without noticing.

***25** And sometimes when we speak up and let you know how we feel, you react as though we were the bad guys.

We're not fanatics. We're not out to deprive you of something you enjoy. We don't want to be your enemies.

We just wish you'd be more considerate and responsible about how, when, and where you smoke.

We know you've got rights and feelings. We just want you to respect our rights and feelings, as well.

A message from those who do to those who don't.

We're on the spot.

Smoking is something we consider to be a very personal choice, yet it's become a very public issue.

We're confused.

Smoking is something that gives us enjoyment, but it gives you offense.

We feel singled out.

We're doing something perfectly legal, yet we're often segregated, discriminated against, even legislated against.

Total strangers feel free to abuse us verbally in public without warning.

We're not criminals. We don't mean to bother or offend you. And we don't like confrontations with you.

We're just doing something we enjoy, and trying to understand your concerns.

We know you've got rights and feelings. We just want you to respect our rights and feelings, as well.

Brought to you in the interest of common courtesy by

R.J. Reynolds Tobacco Company

EXHIBIT 2-D

Smoking in public:

Let's separate fact

from friction.

There has always been some friction between smokers and non-smokers. But lately this friction has grown more heated.

The controversy has been fueled by questionable reports which claim that “second-hand smoke” is a cause of serious diseases among non-smokers.

But, in fact, there is little evidence and certainly nothing which proves scientifically that cigarette smoke causes disease in non-smokers.

Skeptics might call this the wishful thinking of a tobacco company. But consider the scientific judgment of some of the leading authorities in the field including outspoken critics of smoking.

For example, in 1983 the organizer of an international conference on environmental tobacco smoke (ETS) summarized the evidence on lung cancer as follows: “An overall evaluation based upon available scientific data leads to the conclusion that an increased risk for non-smokers from ETS exposure has not been established.”

Even the chief statistician of the American Cancer Society, Lawrence Garfinkel, has gone on record as saying, “passive smoking may be a political matter, but it is not a main issue in terms of health policy.”

Which brings us back to our original point: cigarette smoke can be very annoying to non-smokers.

But how shall we as a society deal with this problem?

Confrontation? Segregation? Legislation?

No. We think annoyance is neither a governmental problem nor a medical problem. It's a people problem.

Smokers and non-smokers have to talk to one another. Not yell, preach, threaten, badger or bully. Talk.

Smokers can help by being more considerate and responsible. Non-smokers can help by being more tolerant. And both groups can help by showing more respect for each other's rights and feelings.

***26** But eliminating rumor and rhetoric will help most of all.

Because when you stick to the facts, it's a lot easier to deal with the friction.

R.J. Reynolds Tobacco Company

EXHIBIT 2-E

We don't advertise to children.

Who are you kidding?

The newspapers and magazines and billboards are filled with cigarette ads. Kids can't help but see them.

How can you expect us to believe you're not trying to reach and influence our children?

We're not surprised if many people feel this way especially when years of negative publicity have made them totally cynical about our industry.

Nevertheless, we'd like to set the record straight.

First of all, we don't want young people to smoke. And we're running ads aimed specifically at young people advising them that we think smoking is strictly for adults.

Second, research shows that among all the factors that can influence a young person to start smoking, advertising is insignificant. Kids just don't pay attention to cigarette ads, and that's exactly as it should be.

Finally and this is sometimes hard for people outside the marketing field to understand all of our cigarette ads are what we call “brand advertising.” Its purpose is to get smokers of competitive products to switch to one of our brands, and to build the loyalty of those who already smoke one of our brands.

At the present there are some 200 different cigarette brands for sale in the U.S. Many of them have only a very small fraction of the total cigarette market. Getting smokers to switch is virtually the only way a cigarette brand can meaningfully increase its business.

That's why we don't advertise to young people.

Of course, if you'd like to share this ad with your children, that would be just fine with us.

R.J. Reynolds Tobacco Company

EXHIBIT 2-F

Second-Hand Smoke:

The Myth

and The Reality.

Many non-smokers are annoyed by cigarette smoke. This is a reality that's been with us for a long time.

Lately, however, many non-smokers have come to believe that cigarette smoke in the air can actually cause disease.

But, in fact, there is little evidence and certainly nothing which proves scientifically that cigarette smoke causes disease in non-smokers.

We know this statement may seem biased. But it is supported by findings and views of independent scientists including some of the tobacco industry's biggest critics.

Lawrence Garfinkel of the American Cancer Society, for example. Mr. Garfinkel, who is the Society's chief statistician, published a study in 1981 covering over 175,000 people, and reported that “passive smoking” had “very little, if any” effect on lung cancer rates among non-smokers.

You may have seen reports stating that in the course of an evening, a non-smoker could breathe in an amount of smoke equivalent to several cigarettes or more.

But a scientific study by the Harvard School of Public Health, conducted in various public places, found that non-smokers might inhale anywhere from 1/1000th to 1/100th of one filter cigarette per hour. At that rate, it would take you at least 4 days to inhale the equivalent of a single cigarette.

***27** Often our own concerns about our health can take an unproven claim and magnify it out of all proportion; so, what begins as a misconception turns into a frightening myth.

Is “second-hand smoke” one of these myths? We hope the information we've offered will help you sort out some of the realities.

R.J. Reynolds Tobacco Company

EXHIBIT 2-G

Second-hand smoke:

Let's clear the air.

Can cigarette smoke in the air cause disease in non-smokers?

That's an emotional question for smokers and non-smokers alike. So we'll try to set the record straight in the most direct way we know.

There is little evidence and certainly nothing which proves scientifically that cigarette smoke causes disease among non-smokers.

You don't have to take our word for it.

U.S. Surgeon General Julius B. Richmond who was no friend of smoking said in his 1979 Report: “Healthy non-smokers exposed to cigarette smoke have little or no physiologic response to the smoke, and what response does occur may be due to psychological factors.”

And in the 1982 Report, Surgeon General C. Everett Koop could not conclude that passive smoking is a cause of cancer in non-smokers.

The director of the National Heart, Lung and Blood Institute, Dr. Claude Lenfant, has been one of the tobacco industry's sharpest critics. Yet Dr. Lenfant stated in 1980 (and we believe it remains true today) that “the evidence that passive smoking in a general environment has health effects remains sparse, incomplete and sometimes unconvincing.”

We've decided to speak out on passive smoking because there is so much rumor and rhetoric on this subject today. And we intend to continue, from time to time, to speak out on other topics of concern to you and to us.

Our critics may try to discredit these messages as self-serving. In a sense, they will be right. We will challenge allegations that are unproven and attacks we think are unfounded. If that is self-serving, so be it.

The questions that surround smoking raise many important issues. We believe that you're entitled to hear all sides of these controversies.

R.J. Reynolds Tobacco Company

EXHIBIT 2-H

How to handle

peer pressure.

If some of your friends smoke, and they make you feel like you should smoke, too, that's “peer pressure.”

But even though we're a cigarette company, we think young people shouldn't smoke. Even the decision to smoke or not to smoke should wait until you're an adult.

So we put together these ideas to help you recognize peer pressure and resist it.
Tactic # 1: Go ahead and take a puff what's the matter, are you chicken?

Answer: You must think I'm pretty dumb to fall for that one. It takes a lot more guts to do your own thing than to just go along with the crowd.

Tactic # 2: Come on, all the cool kids smoke.

Answer: Maybe the kids who smoke are trying to look cool. But if they really were cool, maybe they wouldn't have to try so hard.

***28** Tactic # 3: Hey, I'm your friend would I steer you wrong?

Answer: Friends are people who like you for who you are, not for what they want you to be. If you're really my friend, back off.

Tactic # 4: Do you want everybody to think you're a nerd?

Answer: Sure I care what other kids think of me. But if they base their opinions on stuff like smoking, their opinions aren't worth much.

Tactic # 5: I bet you're just scared your parents will find out.

Answer: I wouldn't blame my parents for getting teed off. How can I expect them to treat me like an adult if I sneak around and act like a kid?

It's natural for you to want to be just like your friends.

But if you don't smoke, maybe your friends will want to be just like you.

R.J. Reynolds Tobacco Company

EXHIBIT 2-I

Some surprising advice to young people from R.J. Reynolds Tobacco.

Don't smoke.

For one thing, smoking has always been an adult custom. And even for adults, smoking has become very controversial.

So even though we're a tobacco company, we don't think it's a good idea for young people to smoke.

Now, we know that giving this kind of advice to young people can sometimes backfire.

But if you take up smoking just to prove you're an adult, you're really proving just the opposite.

Because deciding to smoke or not to smoke is something you should do when you don't have anything to prove.

Think it over.

After all, you may not be old enough to smoke. But you're old enough to think.

R.J. Reynolds Tobacco Company

EXHIBIT 2-J

Passive smoking:

An active controversy.

Periodically the public hears about an individual scientific study which claims to show that “environmental tobacco smoke” (ETS) may be harmful to non-smokers. These reports usually receive sensational media coverage.

Yet, three times within two years, groups of distinguished experts have gathered to review not just one study but the whole body of evidence on this subject. In all three cases, the scientists came to similar and far less sensational conclusions.

Yet the media have remained almost silent.

In March 1983 there was the “Second Workshop on Environmental Tobacco Smoke” in Geneva, Switzerland. In May 1983 there was the “Workshop on Respiratory Effects of Involuntary Smoke Exposure” in Bethesda, Maryland.

And, most recently, in April 1984, leading experts from around the world gathered in Vienna for a symposium, “Passive Smoking from a Medical Point of View.”

After this symposium was over, the presidents of the two organizing groups issued a press release summarizing their findings.

The summary said, “the connection between [ETS] and lung cancer has not been scientifically established to date.” It also said “there is a high probability that cardiovascular damage due to [ETS] can be ruled out in healthy people.”

And it went on to say, “Should law-makers wish to take legislative measures with regard to [ETS], they will, for the present, not be able to base their efforts on a demonstrated health hazard from [ETS].”

***29** Perhaps the media would say they cannot be blamed for devoting little attention to what some would consider "non-news." But we at R.J. Reynolds are concerned about the effects such one-sided coverage may be having on the public.

For today, many non-smokers who once saw cigarette smoke merely as an annoyance now view it as a threat to their health. Their growing alarm is being translated into heightened social strife and unfair anti-smoker legislation.

We believe these actions are unwarranted by the scientific facts and that it is rhetoric, more than research, which makes passive smoking an active controversy.

R.J. Reynolds Tobacco Company

EXHIBIT 2-K

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 (MRFIT).

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.

***30** Despite the results of MRFIT 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

EXHIBIT 2-L

Smoking in public:

A radical proposal.

These days the level of social discourse between smokers and non-smokers is approaching that of a tag-team wrestling match.

While some people try to solve this problem through segregation or confrontation, we at R.J. Reynolds have been proposing a more daring solution: greater courtesy.

For these outlandish views we might be called dreamers and cockeyed optimists. But we continue to believe in the power of politeness to change the world.

We can almost imagine how it might begin.

A smoker is about to light a cigarette in public. He pauses in mid-match, suddenly conscious of the non-smoker next to him. Bracing himself for a hostile response, he asks, “Excuse me, do you mind if I smoke?”

The non-smoker is momentarily stunned by this unexpected act of courtesy. She stifles several witty replies that leap to mind; she cannot let his politeness go unchallenged. “I don't mind,” she answers, “as long as you don't let your smoke blow in my face.”

Her flagrant tolerance puts the smoker on the defensive. But he tries to regain the upper hand. “I'll do my best,” he responds. “Let me know if the smoke bothers you.”

A deft comeback. But the non-smoker presses her attack: “I will and thanks for asking.” Not to be outdone, the smoker brazenly replies, “Thanks for being so understanding.”

An unlikely dialogue? Perhaps. But, who knows? If this sort of thing ever caught on, it might lead to a sudden outbreak of civil decency. Or even escalate into full-scale friendliness.

Common courtesy. It's just crazy enough, it might work.

Brought to you in the interest of common courtesy by

R.J. Reynolds Tobacco Company

EXHIBIT 2-M

The most inflammatory question of our time.

“Hey, would you put out that cigarette?”

Just seven little words. But in today's over-heated climate of opinion, they can make sparks fly.

For with all the rhetoric about “second-hand smoke,” many non-smokers are beginning to feel not just bothered but threatened by cigarettes.

And with all the talk about anti-smoking legislation, many smokers are beginning to feel threatened by non-smokers.

***31** This is not exactly a recipe for social harmony. In fact, it's practically a guarantee of further discord.

Since we have discussed scientific aspects of the “passive smoking” controversy in previous messages, we'd like to focus here on the social questions.

Will more confrontation or more segregation produce less abrasion? Do we solve anything by creating yet another way to divide our society? Shouldn't all of us be wary of inviting government to involve itself further in our private lives?

At R.J. Reynolds, we see an alternative.

We think we should start not by raising barriers, but by lowering our voices. We think smokers and non-smokers can work out their differences together, in a spirit of tolerance and fairness and respect for each other's rights and feelings. We think common courtesy can succeed where coercion is bound to fail.

And maybe, after we have learned peaceful coexistence by talking to each other civilly and sensibly, we can apply the same approach to our many other problems.

Because, after all, this is hardly the most inflammatory question of our time.

Brought to you in the interest of common courtesy by

R.J. Reynolds Tobacco Company

EXHIBIT 2-N

Does smoking really make you look more grown up?

It's a crazy world.

Most adults we know would love to look younger than they really are. While most young people are busy trying to look more adult.

This is one reason why many young people take up smoking.

Well, we wish they wouldn't.

For one thing, it doesn't work. A fifteen-year-old smoking a cigarette looks like nothing more or less than a fifteen-year-old smoking a cigarette.

Even though we're a tobacco company, we don't think young people should smoke. There is plenty of time later on to think about whether or not smoking is right for you.

Besides, when you think about it, being grown up is highly overrated. You have to go to work, pay taxes, wear normal clothes and raise kids who grow up to be teenagers.

Why be in such a hurry?

R.J. Reynolds Tobacco Company

EXHIBIT 2-O

The second-hand smokescreen.

For decades, public and private organizations have waged a massive campaign to discourage cigarette smoking. For most of that time, the target of this effort has been the smoker.

Recently, however, the emphasis has undergone a major shift. Today there are scientists who claim that cigarette smoke in the air can actually cause disease in non-smokers. We hear a great deal about “second-hand smoke” and “passive smoking.”

But is this new approach wholly motivated by concern for the non-smoker, or is it the same old war on smoking in a new guise?

These doubts are raised when we recall statements like the following, by a spokesperson for the American Lung Association: Probably the only way we can win a substantial reduction [in smoking] is if we can somehow make it nonacceptable socially.... We thought the scare of medical statistics and opinions would produce a major reduction. It really didn't.

***32** Obviously, one way to make smoking “nonacceptable socially” would be to suggest that second-hand smoke could cause disease. So it is not surprising that we are now seeing a flurry of research seeking scientific support for these suggestions.

Many independent experts believe the scientific evidence on passive smoking is questionable. But a zealous group of anti-smokers are using this issue in their campaign against tobacco as if the claims were established scientific fact.

We deplore the actions of those who try to manipulate public opinion through scare tactics. As the late, respected pathologist, Dr. H. Russell Fisher, stated in testimony submitted to a Congressional hearing on passive smoking:
... [I]n the absence of any scientific proof of harm from atmospheric tobacco smoke, we are dealing with a social question and not a medical one. In this regard it should be noted that, since fears and phobias can lead to ill health, those who urge policies based on fear and not scientific facts could be making a medical problem out of a social one. This is indeed a strange prospect to see coming from the efforts of members of the medical profession.

We are not ignoring the fact that cigarette smoke can be bothersome to many non-smokers. But we believe this problem is best solved not by governments but by individuals, and not with more rhetoric but more common sense and courtesy.

Of course, if anti-smoking advocates want to work for the abolition of smoking, that is their right. We only wish they would come out from behind their second-hand smokescreen.

R.J. Reynolds Tobacco Company

EXHIBIT 2-P

Some straight talk about smoking for young people.

We're R.J. Reynolds Tobacco, and we're urging you not to smoke.

We're saying this because, throughout the world, smoking has always been an adult custom. And because today, even among adults, smoking is controversial.

Your first reaction might be to ignore this advice. Maybe you feel we're talking to you as if you were a child. And you probably don't think of yourself that way.

But just because you're no longer a child doesn't mean you're already an adult. And if you take up smoking just to prove you're not a kid, you're kidding yourself.

So please don't smoke. You'll have plenty of time as an adult to decide whether smoking is right for you.

That's about as straight as we can put it.

R.J. Reynolds Tobacco Company

EXHIBIT 2-Q

Workplace smoking restrictions:

A trend that never was.

Reports in the news media may have given you the impression that restrictive corporate smoking policies are the wave of the future.

But, when the facts are analyzed, the wave shrinks to just a ripple.

Today, most of corporate America continues to rely on the common sense and common courtesy of employees not on formal policy to resolve differences arising out of smoking in the workplace.

This is the key finding of a major new survey of America's leading companies. The survey, commissioned by the Tobacco Institute and completed early in 1985, was conducted by the Human Resources Policy Corporation of Los Angeles among the Fortune 1000 service and industrial companies and Inc. magazine's 100 fastest-growing companies.

***33** Only about one-third of the responding companies said they had any official smoking guidelines in effect. Furthermore, the reasons most frequently given centered around common-sense situations where workers dealt with hazardous substances, sensitive equipment or food. And almost half of these policies had been in effect for over five years.

Two-thirds of the companies reported they prefer to encourage individual workers to settle smoking issues with mutual respect for each other's legitimate rights and feelings.

We at R.J. Reynolds think this is not just common sense, but good business. Because it also gives managers the flexibility they need to make decisions in the best interest of the company as a whole.

That's the way it's worked in the past. And we think it's the best blueprint for the future.

R.J. Reynolds Tobacco Company

EXHIBIT 2-R

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R.J. Reynolds Tobacco Company

FTC

Footnotes

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).

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)).

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. at 67 n. 14.

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).

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.

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.

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).

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 F.T.C. 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 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.

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.

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.

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).

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.

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 view's'." quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurther, 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., concurring) (quoting Mr. Justice Brandeis in Whitney v. California, 272 U.S. 357, 376-77).

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

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

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 Ohralok v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978), rehearing denied, 439 U.S. 883 (1978).

19 Young Drug Products Corp. v. Bolger, 526 F.Supp. 823 (1981) ("In this case all three types of proposed 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.

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.

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.").

27 See note 1, infra.

28 Complaint, ¶ 5b.

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).

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.

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

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