

Complaint

111 F.T.C.

IN THE MATTER OF

JS&A GROUP, INC., ET AL.

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

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

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

Appearances

For the Commission: *Toby M. Levin.*

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

COMPLAINT

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

PARAGRAPH 1.

- (a) JS&A Group, Inc., is an Illinois corporation.
- (b) JS&A Group, Inc. has its principal office and place of business at One JS&A Plaza, Northbrook, Illinois.
- (c) Joseph Sugarman is President of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporation.
- (d) The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PAR. 7. In truth and in fact:

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

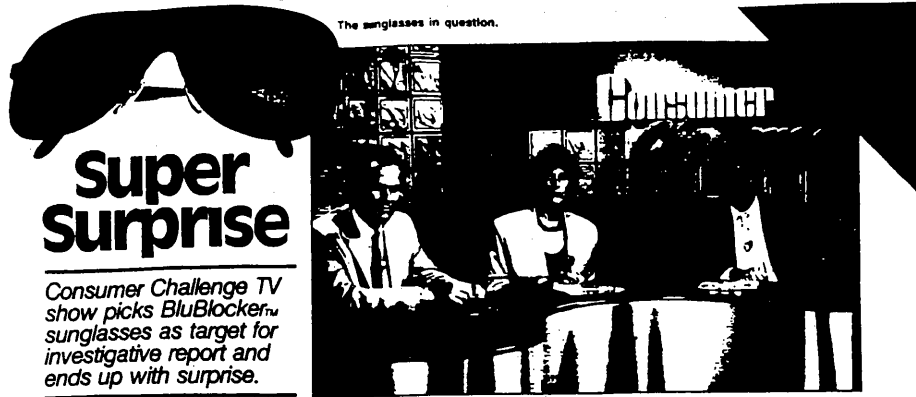
(b) The producers and investigative reporters of "Consumer Challenge" did not conduct an independent and objective investigation of BluBlockers without receiving any reimbursement or other financial benefit, directly or indirectly, from its marketers, JS&A Group, Inc., or its agents. They were paid by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

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

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

Commissioner Machol not participating.

EXHIBIT A



Super Surprise

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

By Joseph Sugarman

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

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

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

TOTAL PRAISE

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

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

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

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

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

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

FILTERS OUT BLUE

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

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

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

GREATEST ASSET

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

JS&A offers three models of BluBlockers. One is an modified high-tech aluminum pair with a flexible spring hinge. The second is a polarizable version using the aluminum frame and hinge and the third is our precision plastic pair without the spring hinge. All three models utilize the same quality, high resolution BluBlocker lenses and come complete with padded carrying case and a

one year no-nonsense limited warranty. All three are designed to fit both men and women with almost any sized face and all models look identical. There is also a high quality clip-on model that fits over prescription lenses.

EXPERIENCE THE MIRACLE

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

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

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

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

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

Polarized Deluxe (0032YY9)	\$99.95
Aluminum Deluxe (0025YY9)	69.95
Clip-On Model (0028YY9)	29.95
Precision Plastic (0031YY9)	39.95

JS&A
ORDER TOLL-FREE
IN WASH. DWEST DIST.
800 356-6000
IN ALASKA & ALASKA 800-356-6000
TOLL-FREE ORDERS BY CREDIT CARD ONLY

DECISION AND ORDER

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

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

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

1. Respondent JS&A Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at One JS&A Plaza, in the City of Northbrook, State of Illinois.

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

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

ORDER

I.

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

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

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

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

II.

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

III.

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

IV.

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

Commissioner Machol not participating.

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Complaint

IN THE MATTER OF

CLEVELAND AUTOMOBILE DEALERS' ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3247. Complaint, Mar. 2, 1989—Decision, Mar. 2, 1989*

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

Appearances

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

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

COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commissioner Machol not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

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

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

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

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

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

ORDER

I.

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

III.

It is further ordered, That:

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

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

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

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

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

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

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

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

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

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

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

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

IV.

It is further ordered, That:

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

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

V.

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

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

VI.

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

Commissioner Machol not participating.

APPENDIX A

Please Read This.
It Is Very Important.

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

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

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

#

IN THE MATTER OF
R. J. REYNOLDS TOBACCO COMPANY

*Docket 9206. Interlocutory Order, March 4, 1988*¹

ORDER

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

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

Chairman Oliver dissenting.

OPINION OF THE COMMISSION

BY STRENIO, *Commissioner*:

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

I. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

II. FTC JURISDICTION.

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

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

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

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

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

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

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

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

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

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

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

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

B. Commercial Speech.

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

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

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

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

The Supreme court has not established a bright line test for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Consideration of Extrinsic Evidence.

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

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 un rebutted affidavit of Dr. McNeill is consistent with our finding that the ALJ erred when he granted respondent's motion to dismiss.

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

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

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

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

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

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

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

441 U.S. at 171.

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

