

1 EDMUND G. BROWN JR.  
Attorney General of the State of California  
2 JANET GAARD  
Acting Chief Assistant Attorney General  
3 DENNIS ECKHART  
Senior Assistant Attorney General  
4 SHARI B. POSNER (State Bar No. 168738)  
Deputy Attorney General  
5 JEANNE FINBERG (State Bar No. 88333)  
Deputy Attorney General  
6 1515 Clay Street, 20<sup>th</sup> Floor  
P.O. Box 70550  
7 Oakland, CA 94612-0550  
Telephone: (510) 622-2147  
8 Facsimile: (510) 622-2121  
E-mail: [Jeanne.Finberg@doj.ca.gov](mailto:Jeanne.Finberg@doj.ca.gov)

9 Attorneys for Plaintiff

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 FOR THE COUNTY OF SAN DIEGO

14 PEOPLE OF THE STATE OF  
15 CALIFORNIA, ex rel. Edmund G. Brown Jr.,  
Attorney General of the State of California,

16 Plaintiff,

17 v.

18 R.J. REYNOLDS TOBACCO COMPANY, a  
19 New Jersey corporation,

20 Defendant.

CASE NO. JCCP 4041

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
APPLICATION FOR ORDER TO SHOW  
CAUSE/MOTION FOR ENFORCEMENT  
OF THE CONSENT DECREE AND  
MASTER SETTLEMENT  
AGREEMENT/RESTRAINING THE USE  
OF CARTOONS**

Hearing Date: December 4, 2007  
Time: 1:30 p.m.  
Department: 71  
Judge: Hon. Ronald S. Prager

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1 This Memorandum of Points and Authorities is filed in support of plaintiff's Application for  
2 Order to Show Cause and Motion for Enforcement of the Master Settlement Agreement and  
3 Consent Decree restraining the use of cartoons in tobacco advertising and promotion. R.J.  
4 Reynolds has used and continues to use cartoons in its advertising and promotion of Camel  
5 cigarettes. Since cartoons, as specifically defined in the MSA, are expressly prohibited by the  
6 MSA and the Consent Decree, Reynolds' action is unlawful and should immediately be restrained  
7 by this Court.

## 8 I. INTRODUCTION

9 The Master Settlement Agreement entered into in November 1998 and the Consent Decree  
10 entered by this Court on December 9, 1998, concluded California's landmark litigation against  
11 several tobacco companies, including R.J. Reynolds, the defendant herein. *People v. the State of*  
12 *California, et al. v. Philip Morris Inc., et al*, Judicial Council Coordination Preceding No. 4041.  
13 A central goal of the Consent Decree and the MSA is to prevent and reduce underage tobacco  
14 use. Thus, the MSA prohibits defendants from taking any action that either directly or indirectly  
15 targets youth in the advertising and promotion of tobacco products. (MSA § III(a).) In addition  
16 to the broad ban on targeting youth, the MSA also expressly prohibits using cartoons to promote  
17 cigarettes, regardless of whether such cartoons target youth. (MSA, § III(b).) The MSA, at  
18 section II(l), broadly defines what constitutes a cartoon for purposes of the ban. While expressly  
19 including Reynolds' "Joe Camel," the definition, as relevant here, also includes "any drawing or  
20 depiction of an object, person, animal, creature or any similar caricature" that uses "comically  
21 exaggerated features" or that attributes "human characteristics to animals, plants or other  
22 objects," or that attributes "unnatural . . . abilities." (MSA § II(l).)

23 Since the signing of MSA, R.J. Reynolds has consistently engaged in aggressive marketing  
24 campaigns skirting on the edge of the MSA's strictures, and sometimes crossing over into  
25 outright violations. For example, the People have successfully sued Reynolds for its MSA  
26 violations involving outdoor advertisements at racetracks, *People ex rel. Lockyer v. R.J. Reynolds*  
27 (2003) 107 Cal.App.4th 516, and print advertisements, *The People ex rel. Bill Lockyer v. R.J.*  
28 *Reynolds Tobacco Company* (2004) 116 Cal.App.4th 1253. This lawsuit addresses the most

1 recent, blatant example of an MSA violation.

2       Currently, Reynolds is engaging in several marketing campaigns in its promotion of its  
3 Camel brand, which violate the MSA. A number of state attorneys general and their  
4 representatives have corresponded with and met with Reynolds officials, including its general  
5 counsel, expressing serious concerns that Reynolds' recent marketing campaigns and activities  
6 violate the MSA in numerous ways including violations of the Youth targeting, brand name  
7 merchandise and Cartoon provisions. The letters and discussions addressed several campaigns,  
8 including the Farm Rocks campaign at issue here. The Attorneys General and their  
9 representatives expressed their particular concern that Reynolds' use of fashion, music, and art in  
10 these campaigns seems likely to appeal to underage consumers. Despite these expressions of  
11 concern, Reynolds has persisted with these campaigns.

12       The current Farm Rocks campaign is a particularly egregious example of unlawful  
13 promotion of tobacco products. In the Farm Rocks campaign Reynolds promotes musical groups  
14 on its web site, [www.thefarmrocks.com](http://www.thefarmrocks.com), in print advertising and at various musical events. The  
15 People have expressed concern that many of the bands and musical groups particularly appeal to  
16 young people, and therefore, are inappropriate in cigarette advertising. California and several  
17 other states are in the process of investigating Reynolds' various campaigns and analyzing the  
18 various MSA violations.

19       In the midst of these investigations and various communications with Reynolds about them,  
20 and immediately after an in-person meeting with Reynolds' general counsel, the November 15,  
21 2007, 40th Anniversary Edition of *Rolling Stone* magazine appeared on the newsstands. The  
22 Farm Rocks advertisement spread in the magazine is such a clear-cut, egregious MSA violation  
23 that the People are seeking immediate relief restraining further unlawful Farm Rocks campaign  
24 activity.

25       The seriousness and effectiveness of the use of cartoons in cigarette advertising to get the  
26 attention of children is well documented. *See eg.* Cohen, Joel B, "Playing to Win: Marketing and  
27 Public Policy at Odds Over Joe Camel," (Fall 2000) 19 Jo. of Pub. Pol. & Mark. 155. Prior to  
28 the MSA Reynolds used Joe Camel very effectively to target new young smokers. *Id* at 160-166.

1 **A. Cartoons in Rolling Stone magazine**

2 The *Rolling Stone* magazine, lodged separately with the Court as an exhibit, contains a  
3 nine-page Farm Rocks advertising spread. The first page, which is unnumbered page 64 of the  
4 magazine, contains the Camel logo at the top, a welcome to the Farm banner with various  
5 floating objects including several cartoons, as defined in section II(1) of the MSA. Underneath  
6 the banner is the Surgeon General's warning, a note about age restrictions and tar and nicotine  
7 content. The next page contains a drawing of a spiral notebook labeled, "Indie Rock Universe."  
8 On the notebook cover are cartoon-like drawings of spaceships or planets, stars and swirls. The  
9 bottom of the page is labeled "illustrations by Benjamin Marra," and in larger type is printed  
10 "special foldout inside )))". The next two facing pages continue the Camel Farm Rocks  
11 promotion and are cover pages to a big, four-page foldout which is covered with Cartoons. The  
12 two cover pages contain the Camel logo flying up in the left hand corner. Also flying in this ad  
13 are a tractor with movie reels for wheels and a camera inside it, an old fashioned phonograph, a  
14 picture frame with clouds and a hand coming out of it, and two radios with helicopter-like blades.  
15 Other radios, speakers, and a TV appear to be growing on top of green plant stems. A Surgeon  
16 General's Warning appears in the bottom left corner. The text on the left side of these two pages  
17 open up to a four-page cartoon spread, filled with super heroes, flying objects, planets,  
18 cartoon-like animals and other illustrated cartoons.

19 On these inner pages various rock bands and musical groups are listed, grouped with the  
20 various cartoons labeled with fanciful names such as "the bearded men space station eleven,"  
21 "intergalactic ear killers," and "outer spiderland." Although the Camel logo does not appear on  
22 these four inner pages, they appear to be a integral part of the Camel Farm Rocks advertising  
23 spread. The last page (p. 71) shows the Camel, the Farm logo floating in the air, with shooting  
24 stars emanating from it, and a banner reading, "for the best new sounds, visit the Farm  
25 Rocks.com." (p. 71.) This page also contains the Surgeon General's warning, notice of age  
26 restrictions on the web site and at events, as well information about as tar and nicotine content.

27 **B. Cartoons on the Farm Rocks web site**

28 The Farm Rocks web site, sponsored by R.J. Reynolds, [www.thefarmrocks.com](http://www.thefarmrocks.com), also

contains some of the same as well as similar cartoons. Some of these images are attached to the Declaration of Shannon Ekwall, filed herewith. For example, the flying tractor, which appears to be a main Farm Rocks theme, emanates in what might be a cloud of smoke from the mouth of a man with his hands cupped. (Ekwall Dec., Exhibit 1.) A cartoon of a small flying tractor with jet engines appears on each web site page with a cartoon bubble emanating from it, with the word "HOME" inside the bubble. (Exhibits 2 and 3) A bird appears to be watching television on the "Bootlegs" pages. These cartoon images, unlawful under the MSA, are an integral part of the Farm Rocks campaign employed by Reynolds and various venues.

**C. Cartoons at music events**

Reynolds sponsors various music groups and events as part of the Farm Rocks campaign. At some of these events, cartoon images are displayed during the event and throughout the room. For example, at a recent event in Illinois, many of the Farm Rocks Cartoon images were displayed on the walls and moved in an animated way. For example, the camel, the hen, and the hands were shown with an electrical current crackling between two index fingers. We do not know how many, if any, similar events have taken place already in California, but California is listed on the web site as a venue of past events. Reynolds has posted on its web site additional events scheduled as part of the Farm Rocks campaign. To our knowledge, none are immediately scheduled to take place in California. Reynolds does however, mention several California clubs on its site, and Reynolds often sponsors events in California. (Ekwall Dec., Exhibit 3.) Therefore, it is likely that future events will be scheduled here, and as part of the relief we request from the Court, we request that an order restraining Reynolds from holding any future Farm Rocks musical events using cartoons in the State.

**D. Reasonable attempts to resolve the dispute**

The People have sought to resolve the compliance issues with Reynolds informally to no avail. Most recently, in an attempt to avoid litigation, California coordinated with the numerous other states investigating the MSA violations of Reynolds and the National Association of Attorneys General (NAAG). A letter dated November 21, 2007, from the NAAG Tobacco Committee co-chairs specifically notified Reynolds about the concerns raised by the *Rolling*

1 *Stone* advertisement and requested an immediate response. (Attachment 1.) In its November  
2 28, 2007, reply, Reynolds claims that it did not know before the magazine was in print that  
3 cartoons would be featured inside the gatefold and that if it had known in advance it "would not  
4 have advertised adjacent to the gatefold." (Attachment 2.) Reynolds' letter does not address the  
5 fact that the surrounding Farm Rocks ads themselves contain prohibited cartoons.

## 6 **II. LEGAL ARGUMENT**

### 7 **A. Cartoons are specifically prohibited by the MSA and Consent Decree**

8 The MSA provides:

9 "no participating manufacturer may use or cause to be used any Cartoon in the advertising,  
10 promoting, packaging or labeling of tobacco products." MSA § III(b).

11 A "Cartoon" is any drawing or other depiction of an object, person, animal,  
12 creature or any similar caricature that satisfies any of the following criteria:

- 13 1. the use of comically exaggerated features;
- 14 2. the attribution of human characteristics to animals, plants or other objects, or the  
15 similar use of anthropomorphic technique; or
- 16 3. the attribution of unnatural or extra human abilities, such as impervious to pain or  
injury, X-ray vision, tunneling at very high speeds or transformation.

17 MSA § II(l).

18 The Consent Decree § V.B. provides:

19 Each Participating Manufacturer is permanently enjoined from:

20 . . . . .

21 B. After 180 days after the MSA Execution Date, using or causing to be used  
22 within the State of California any Cartoon in the advertising, promoting,  
23 packaging or labeling of Tobacco Products.

24 The Consent Decree incorporates the definitions used in the MSA. Consent Decree § II.

25 This Court has continuing jurisdiction over Reynolds regarding MSA violations. Consent Decree  
26 § I, VI. A.

27 ///



1 **B. The Rolling Stone Ad Features Many Cartoons**

2 The *Rolling Stone* nine- page advertising spread is replete with cartoons.

3 **1. The four-page cartoon foldout**

4 The four inside pages are indisputably cartoons as defined by the MSA. There are dozens of  
5 figures and objects with apparently superhuman or a natural powers or characteristics. At least  
6 eight of the bands listed on these pages appear on Reynolds' web site as sponsored artists.  
7 [www.thefarmrocks.com](http://www.thefarmrocks.com) (Elkwall Dec.) Apparently, even Reynolds is not prepared to deny that  
8 these pages contain cartoons as defined by the MSA. Rather, the company claims that these  
9 pages are independent of its advertisement and it was unaware of the pages contend prior to  
10 publication. (Attachment 2.) This is an implausible claim. Even if it were true as to some  
11 Reynolds' employees, it in no way excuses Reynolds' violation of the MSA and Consent Decree.  
12 Given the express and unequivocal ban on using Cartoons to promote its products, Reynolds  
13 cannot hide behind its ignorance, but had a duty to inquire about the nature of the editorial  
14 content that would appear within the gatefold, and to ensure that the ad would not violate the ban  
15 on using Cartoons.

16 **2. The Camel Farm Rocks lead in pages**

17 Many pages of the advertisement containing the Camel logo themselves contain cartoons.  
18 These are described generally above and include specific Cartoon features:

- 19 • A woman has a dragon cartoon tatoo on her arm and a bird on her head. (p. 64).
- 20 • A hand sticks out of nowhere with a bird on it. (p. 64).
- 21 • A phonograph is floating in the air with a bird and a butterfly on it. (p. 64).
- 22 • The "Indie Rock Universe" notebook has cartoon drawings on it. (p. 65).
- 23 • A red tractor with movie reel wheels and a camera sticking out of it floats in the air.  
24 (p. 66).
- 25 • A rooster is riding on the tractor, and a bird is riding on the rooster. (p. 66).
- 26 • A duck rides on a cow. (p. 66).
- 27 • An eagle carries a picture frame in the air with framing clouds and a disembodied  
28 human hand coming out. (p. 67).

- Two radios fly through in the air with helicopter blades. (p. 67).
- TVs, speakers and radios are growing on green stalks in the grass. (p. 67).
- A partial man floats with a rooster and a television. (p. 72).
- Shooting stars emanate from the Farm logo. (p. 72).

Each of these images fits with the MSA definition of "Cartoon." MSA § II(1). Some are "comically exaggerated features." MSA § II(1)(1). Others are human characteristics attributed to animals or plants. MSA § II(1)(2). Many attribute "unnatural" or "extra human" abilities to objects. MSA § II(1)(3).

### **3. Integration of the package**

The pages designed and paid for by Reynolds are inextricably intertwined with the four-page cartoon spread. The pages are designed as leads and bookmarks, and all are part of one package. A partial list of the ways the lead in features and the Camel pages dovetail with the cartoon insert include:

- The cartoon decorated notebook page is introduced and surrounded by the Camel pages.
- The notebook page says, "special foldout inside )))".
- The two Camel inside "cover" pages have a banner headline – "committed to supporting and promoting independent record labels" and the right-hand page includes a woman with unnatural hair pointing to the interior pages. This along with the other music and fairy themed cartoon, introduces the four cartoon pages.
- The right corner of the right-hand page has a full paragraph describing the camel collaboration with independent artist and record labels. This opens up to the list of artists.
- All of the pages as a group describe the Farm Rocks collaboration with independent bands and recording labels.

### **C. The Farm Rocks web site features Cartoons**

Reynolds' web site itself has a number of cartoons on it in violation of the MSA. The main violation is the flying, jet propelled red tractor, which appears on all of the pages. (Ekwall Dec.)

1 Other images on the site are cartoons as well. A partial list includes:

- 2 • A flying red tractor with jet engines is flying out of a man's mouth. (Home page)
- 3 • The flying red tractor with a cartoon bubble saying "home" appears on virtually every
- 4 page of the web site.
- 5 • A duck with a bird on its head and flowers floating at its feet in front of a drum set.
- 6 ("Culture" tab)
- 7 • A TV set with a speaker for a screen with flames emanating and butterflies around.
- 8 ("Events" tab)
- 9 • A bird watches television. ("Bootlegs" tab)

10 Again, each of these images contains an element defined in the MSA as a "Cartoon." MSA  
11 § II(I). Mostly, they are objects with "unnatural features," but some are also "comically  
12 exaggerated features." MSA § II(I)(1) and (3).

#### 13 **D. Musical Events also utilize cartoons**

14 We believe that the Illinois event described above is probably one of a series of events  
15 promoting Camel, the Farm, that Reynolds has sponsored. Each of the cartoons shown in these  
16 events is an MSA violation. These types of events must be restrained. The *Rolling Stone* ad, the  
17 web site and the musical events with cartoon shows, taken together show consistent and  
18 egregious violations of Reynolds' duties under the MSA. The People urge this Court to take  
19 immediate action restraining Reynolds' conduct.

#### 20 **E. Reynolds' purported ignorance is not a defense**

21 Given the aggressive and blatant nature of the Farm Rocks campaign, and its integral use of  
22 cartoons in cigarette advertising, we believe Reynolds has committed a clear-cut violation of the  
23 MSA and the Consent Decree. Significant sanctions should be assessed.

24 Reynolds claims that it was not responsible for the four-page cartoon foldout in the *Rolling*  
25 *Stone* magazine, but rather that *Rolling Stone* is solely responsible for that part of the advertising  
26 spread. (Attachment 2.) First, as is evident from examining the magazine and the special  
27 fold-out section, the inner four pages are part of an integral package with several tie-ins to the  
28 Reynolds Camel advertising pages. Therefore, it seems unlikely that Reynolds did not have

1 some hand in developing, reviewing or otherwise designing the four-page cartoon spread.

2 Even if Reynolds was not involved in the design of the foldout pages, lack of actual  
3 knowledge is no defense to the MSA violation. The MSA prohibits Reynolds from "using" or "  
4 causing to be used" any Cartoon in the advertising or promotion of its cigarettes. MSA § III (b).  
5 Reynolds cannot hire or authorize the publisher of *Rolling Stone* to create advertisements which  
6 Reynolds itself is prohibited from making. MSA § III(i). Nor, can Reynolds turn a blind eye to  
7 the effect its advertisements or how its advertisements might be used or perceived. This Court  
8 essentially ruled on this issue in the print advertising case against Reynolds, which was affirmed  
9 by the Court of Appeal. *The People ex rel. Bill Lockyer v. R.J. Reynolds Tobacco Company*,  
10 aff'd (2004) 116 Cal. App. 4th 1253. In the print ad case Reynolds was held to know that its  
11 advertising campaign targeted youth, even though "Reynolds 'intentionally avoided' examining  
12 those data that would have confirmed whether or not Reynolds was succeeding in its stated  
13 intention to avoid exposure of its tobacco advertising to youth." 116 Cal.App.4th 1287.  
14 Reynolds' failure to measure whether it was meeting its stated goal of minimizing exposure to  
15 youth cast doubt on its intent. In the same way here, Reynolds' protestations that it was not  
16 involved in designing the four-page Indie Rock Universe cartoon spread are suspect. Moreover,  
17 Reynolds had a duty to ensure that cartoons were not used by *Rolling Stone* or any other entity as  
18 a component of or in combination with any of Reynolds advertisements. Reynolds also had a  
19 duty to "promptly take commercially reasonable steps against" any third parties to avoid MSA  
20 violations. (MSA § III(c).) Reynolds violated this duty when it took no action to prevent the  
21 distribution of the cartoons. Finally, as explained above, many of Reynolds' very own pages of  
22 advertisements in *Rolling Stone*, its web site and its music promotions also contain Cartoons.  
23 Reynolds has no defense for these actions.

### 24 **III. PENALTIES SHOULD BE ASSESSED AGAINST REYNOLDS**

#### 25 **A. The Consent Decree Provides for Civil Penalties**

26 This Court has continuing jurisdiction to enforce the MSA and the Consent Decree and to  
27 award sanctions, attorneys fees and costs.

28 in determining whether to seek an order for monetary, civil contempt or criminal  
sanctions for a violation, the Attorney General shall give good-faith consideration to

1 whether: (1) the participating manufacturer that is claimed to have committed a  
2 violation has taken appropriate and reasonable steps to cause the claimed violation to  
3 be cured, unless a party has been guilty of a pattern of violations of like nature; and (2)  
a legitimate, good-faith dispute exists as to the meeting of terms in question of this  
Consent Decree and Final Judgment.

4 Consent Decree § VI (A).

5 Taking these factors into account, the People seek a large monetary sanction against Reynolds.  
6 Reynolds has not taken appropriate steps to cure its MSA violations. Rather, Reynolds continues  
7 to proceed with marketing strategies that will support its business plan, trampling on the rights of  
8 the people of California. Moreover, Reynolds now has a pattern of violating the MSA. Only a  
9 large monetary sanction will effectively deter Reynolds' conduct in the future.

10 Following its usual pattern, we expect that Reynolds will claim a legitimate good-faith  
11 dispute exists. Although Reynolds has engaged in substantial quibbling about interpretations of  
12 several of the provisions of the MSA, there is no dispute about the definition of a Cartoon. As  
13 described above, "Cartoon" is specifically defined. Many of the images used by Reynolds in its  
14 Farm Rocks materials come squarely within the definition. Consequently, there is no good-faith  
15 dispute defense here.

#### 16 **B. Calculation of the Penalty**

17 The People request that a fine be assessed against Reynolds for each violation of the  
18 Cartoon prohibition. To count the violations the Court should consider the number of *Rolling*  
19 *Stone* magazines with the Farm Rocks promotion in circulation in the State, the number of  
20 cartoons in each issue as well as the number of readers of each magazine.<sup>1/</sup> The Court should  
21 also consider the number of cartoons on the Farm Rocks web site, as well as the numbers of  
22 California web site users. Finally, the Court should consider the number of cartoons utilized at  
23 any music events in California, and the number of attendees at each of those events. *See also*  
24 *The People ex rel. Bill Lockyer v. Fremont Life Insurance Company* (2002) 104 Cal.App.4th 508,  
25 528. (Applying California's consumer statute, Cal. Bus. & Prof. Code § 17206, which permits  
26 penalties up to \$2,500 per violation, the Court ruled that the number of violations is to be

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28 1. Media consultants estimate a pass along readership of 9.9 readers for each purchased copy  
of *Rolling Stone*. Ekwall Dec., Exhibits 4-5.

1 determined based upon the number of victims as well as the number of independent acts. In  
2 determining the penalty, the Court shall consider other factors including the defendant's net  
3 worth.)

4 Much of the information relevant to calculating penalties is in the possession of Reynolds,  
5 particularly about the web site and musical events. The People have some information on the  
6 *Rolling Stone* circulation in the State, however. The total paid and verified circulation figures  
7 for the April 2007 of *Rolling Stone* in California is 202,793, according to the magazine publisher  
8 statement, [http://www.srds.com/mediakits/rollingstone/special\\_sections.html](http://www.srds.com/mediakits/rollingstone/special_sections.html). (Ekwall Dec.,  
9 Exhibits 4 and 5.) The *Rolling Stone* anniversary editions were expected to garner 7 percent  
10 more circulation than regular editions. *Id.* Therefore, using a figure of \$100 per violation, the  
11 People suggest that the penalty be no less than \$2.5 million.

#### 12 IV. CONCLUSION

13 Reynolds' use of cartoons in its Farm Rocks promotional campaign for Camel cigarettes is  
14 unlawful. Cartoons are explicitly prohibited by the MSA and Consent Decree. Reynolds'  
15 continued use of cartoons in print ads, web site promotions and events should be immediately  
16 restrained by this Court. Penalties per violation should also be assessed.

17 Dated: December \_\_\_, 2007

18 Respectfully submitted,

19 EDMUND G. BROWN JR.  
20 Attorney General of the State of California  
21 JANET GAARD  
22 Acting Chief Assistant Attorney General  
23 DENNIS ECKHART  
24 Senior Assistant Attorney General  
25 SHARI B. POSNER  
26 Deputy Attorney General

27 \_\_\_\_\_  
28 JEANNE FINBERG  
Deputy Attorney General  
Attorneys for Plaintiff