

# FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

AMERADA HESS CORPORATION, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket C-2456. Consent Order, Sept. 18, 1973--Set Aside Order, Jan. 3, 1995*

This order reopens a 1973 consent order (83 FTC 487) -- which required that the Clarco Pipe Line be divested and prohibited Amerada, VGS Corporation and Clarco Pipe Line Company from acquiring assets related to the transportation or refining of crude oil produced in either Mississippi or Alabama without prior Commission approval -- and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires setting aside competition orders in effect for more than 20 years.

## ORDER REOPENING PROCEEDING AND SETTING ASIDE ORDER

On September 12, 1994, Amerada Hess Corporation ("Amerada Hess") filed a Request to Reopen and Vacate Order ("Request") in this matter.<sup>1</sup> Amerada Hess requests that the Commission set aside the 1973 consent order in this matter, pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Commission's July 22, 1994, Statement of Policy with Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment with Respect to Duration of Consumer Protection Orders ("Sunset Policy Statement").<sup>2</sup>

Leon Hess, also a respondent in this matter, joined in Amerada Hess' Request, by letter dated September 21, 1994. Southland Oil Company, successor to respondent VGS Corporation, filed a Statement in Support of Request to Reopen and Vacate Order on October 21, 1994. In addition, on October 20, 1994, Hunt Refining Company, the purchaser of assets from respondent Clarco Pipe Line Company, filed a petition requesting, among other things, that the Commission reopen the proceeding and vacate the order as to Hunt

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<sup>1</sup> See *Amerada Hess Corp.*, 83 FTC 487 (1973).

<sup>2</sup> The Sunset Policy Statement is published at 59 Fed. Reg. 45,286 (Sept. 1, 1994).

("Petition"). Amerada Hess' Request, Hunt's Petition and the information supplied by Leon Hess and Southland Oil Company were placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51.<sup>3</sup> No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."<sup>4</sup>

The Commission's order in Docket No. C-2456 was issued on September 18, 1973, and has been in effect for more than twenty-one years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-2456.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened;

*It is further ordered*, That the Commission's order in Docket No. C-2456 be, and it hereby is, set aside, as of the effective date of this order.

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<sup>3</sup> The fifth respondent named in the order died in 1989.

<sup>4</sup> Sunset Policy Statement, 59 Fed. Reg. at 45,289.

## IN THE MATTER OF

## THE AMERICAN TOBACCO COMPANY

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

*Docket C-3547. Complaint, Jan. 3, 1995--Decision, Jan. 3, 1995*

This consent order prohibits, among other things, a Connecticut-based company from disseminating advertising, for Carlton or any other cigarettes, that represents that consumers will get less tar or nicotine by smoking any number of cigarettes of any of its brands than by smoking one or more cigarettes of any other brand, unless such representations are both true and substantiated by competent and reliable scientific evidence.

*Appearances*

For the Commission: *Shira D. Modell.*

For the respondent: *Daniel O'Neill* and *Thomas Beazon, Chadbourne & Park, New York, N.Y.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that The American Tobacco Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent The American Tobacco Company is a Delaware corporation, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut.

PAR. 2. Respondent has manufactured, labelled, promoted, offered for sale, sold, and distributed cigarettes, including Carlton brand cigarettes, to consumers.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for its Carlton brand cigarettes, including, but not necessarily limited to, the attached Exhibits A-C,

which depict ten packs of Carlton brand cigarettes and single packs of other brands of cigarettes, with the tar and nicotine ratings for Carlton and the other brands of cigarettes under each pack. Exhibits A-C contain the following statements:

A. "10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit A.)

B. "A WHOLE CARTON OF CARLTON HAS LESS TAR THAN 1 PACK OF THESE BRANDS." (Exhibit B.)

C. "10 to 1. 10 packs of Carlton have less tar than 1 pack of these brands." (Exhibit C.)

PAR. 5. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads, which are rated as having more than 10 mg. of tar.

PAR. 6. In truth and in fact, consumers will not necessarily get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads. Although the cigarettes depicted are rated as having more than 10 mg. of tar, those ratings are obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the presentation of the tar of its Carlton product as a numerical multiple, fraction or ratio of the tar of other brands of cigarettes, and/or the visual depiction of ten packs or a carton of Carlton cigarettes versus one pack of the other brands in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated that representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

Exhibit A

1 mg. tar, 0.1 mg. nic.

**10 packs of Carlton  
have less tar than 1 pack  
of these brands.**

16 mg. tar 1.1 mg. nic.	14 mg. tar 1.0 mg. nic.	16 mg. tar 1.1 mg. nic.	12 mg. tar 0.9 mg. nic.	17 mg. tar 1.3 mg. nic.

*U.S. Gov't. Test Method confirms of all king soft packs:*

***Carlton is lowest.***

*U.S. News 1-27-92*

**SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.**

Long filter, 6 mg. tar, 0.9 mg. nic. per cigarette. Based on an average of 20 cigarettes per pack. For more information, call 1-800-4-A-TOBACCO.

© The American Tobacco Co. 1992

Complaint

EXHIBIT B

1 mg. tar, 0.1 mg. nic.



**LOWEST SOFT PACK**

# Carlton

CARLTON IS LOWEST



**A whole carton of  
Carlton has less tar than  
just 1 pack of these  
brands.**



16 mg. tar 1.1 mg. nic.	15 mg. tar 1.1 mg. nic.	18 mg. tar 1.5 mg. nic.	12 mg. tar 0.9 mg. nic.	17 mg. tar 1.2 mg. nic.
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*U.S. Gov't. Test Method confirms of all king soft packs:*

***Carlton is lowest  
in tar and nicotine.***

**SURGEON GENERAL'S WARNING: Quitting Smoking  
Now Greatly Reduces Serious Risks to Your Health.**

1 mg. tar, 0.1 mg. nicotine  
Lowest of all brands: Ultra Carlton: less than 0.5 mg. tar,  
less than 0.05 mg. nicotine av. per cigarette by FTC method.

EXHIBIT C

EXHIBIT C

**10 to 1**

1 mg. tar, 0.1 mg. nic.

Car Carlton Car Carlton Car Carlton Car Carlton ton ton

Car Carlton Car Carlton Carlton Carlton ton ton

**10 packs of Carlton have less tar than 1 pack of these brands.**

15 mg. tar 14 mg. tar 17 mg. tar 12 mg. tar 16 mg. tar  
 1.1 mg. nic. 1.0 mg. nic. 1.4 mg. nic. 0.9 mg. nic. 1.1 mg. nic.

*U.S. Gov't. Test Method confirms of all king soft packs:*  
**Carlton is lowest**  
*in tar and nicotine.*

© The American Tobacco Co. 1963.

**SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.**

1 mg. tar, 0.1 mg. nicotine.  
 1 mg. tar, 0.1 mg. nicotine.

## 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 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 respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 a 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 The American Tobacco Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 281 Tresser Boulevard, Stamford, Connecticut.

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 respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes, and/or the visual depiction of ten packs or a carton of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. of tar than by smoking a single pack of any other brand of cigarettes that is rated as having more than 10 mg. of tar. For purposes of this order, the term "cigarette" shall be as defined in Section 1332 (1) of Title 15 of the United States Code.

## II.

*It is further ordered,* That respondent, The American Tobacco Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale or distribution of any cigarette in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, through the presentation of the tar or nicotine ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar or nicotine ratings of any other brand of cigarettes, and/or the visual depiction of more than one pack of any of respondent's brands versus one pack of any other brand, directly or by implication, that consumers will get less tar or nicotine by smoking any number of cigarettes (or packs or cartons of cigarettes) of any of respondent's

brands than by smoking one or more cigarettes (or packs or cartons of cigarettes) of any other brand, unless such representation is true and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in any objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### III.

*It is further ordered,* That presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's brand is "low," "lower," or "lowest" in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and shall not, in and of itself, be deemed to violate paragraph I or II of this order where no more than a single cigarette or pack of respondent's brand is visually depicted versus a single cigarette or pack of any other brand.

### IV.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respondent or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## V.

*It is further ordered,* That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

## VI.

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

## VII.

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

IN THE MATTER OF  
CREATIVE AEROSOL CORP.

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

*Docket C-3548. Complaint, Jan. 13, 1995--Decision, Jan. 13, 1995*

This consent order prohibits, among other things, a New Jersey manufacturer of children's bath soap from representing that certain products or packaging will not harm the environment or atmosphere, or that any product or package offers any environmental benefit, unless it possess competent and reliable evidence that substantiates the representation. The consent order also prohibits the respondent from misrepresenting the extent to which any product or packaging is capable of being recycled, or the availability of recycling collection programs.

*Appearances*

For the Commission: *Michael Dershowitz* and *Michael Ostheimer*.

For the respondent: *James Mulligan*, President, Freehold, N.J.

COMPLAINT

The Federal Trade Commission, having reason to believe that Creative Aerosol Corp., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Creative Aerosol Corp. is a New Jersey corporation with its principal office or place of business at 71 West Main Street, Freehold, New Jersey.

PAR. 2. Respondent has advertised, labeled, offered for sale, sold, and distributed foam soap products, including Funny Color Foam, and other products to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. The product pictured in the attached Exhibit A contains the volatile organic compounds ("VOCs") isobutane and propane. The product was reformulated by substituting chlorodifluoromethane (HCFC-22) for isobutane and propane. The product pictured in the attached Exhibit B contains chlorodifluoromethane (HCFC-22), a hydrochlorofluorocarbon. The product is sold in an aluminum aerosol can. The can has a plastic cap which is made from high-density polyethylene. There is no indication on the cap of the type(s) of plastic resin from which it is made.

PAR. 5. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny Color Foam, including but not necessarily limited to the attached Exhibit A.

The aforesaid product labeling (Exhibit A) includes the following statements:

ENVIRONMENTALLY SAFE  
Contains no fluorocarbons.  
Non-Irritant • Non-Toxic

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Funny Color Foam does not contain any ingredients that harm or damage the environment.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the product labeling attached as Exhibit A, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph six, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph six, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny

Color Foam, including but not necessarily limited to the attached Exhibit B.

The aforesaid product labeling (Exhibit B) includes the following statement:

NO FLUOROCARBONS

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the product labeling attached as Exhibit B, respondent has represented, directly or by implication, that because Funny Color Foam contains no fluorocarbons, it will not deplete the earth's ozone layer or otherwise harm or damage the atmosphere.

PAR. 11. In truth and in fact, Funny Color Foam contains the harmful ozone-depleting ingredient chlorodifluoromethane (HCFC-22), which harms or causes damage to the atmosphere by contributing to the depletion of the earth's ozone layer. Therefore, the representation set forth in paragraph ten was, and is, false and misleading.

PAR. 12. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for Funny Color Foam, including but not necessarily limited to the attached Exhibits A and B.

The aforesaid product labeling (Exhibit A) includes the following statements and depiction:

RECYCLABLE



CAN & CAP

The aforesaid product labeling (Exhibit B) includes the following statement:

RECYCLABLE WHERE  
FACILITIES EXIST

PAR. 13. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the product labeling attached as Exhibits A and B, respondent has represented, directly or by

implication, that Funny Color Foam's aluminum aerosol can is recyclable.

PAR. 14. In truth and in fact, while the aluminum aerosol can is capable of being recycled, the vast majority of consumers cannot recycle it because there are virtually no collection facilities that accept aluminum aerosol cans for recycling. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements and depictions contained in the advertisements referred to in paragraph twelve, including but not necessarily limited to the advertisement attached as Exhibit A, respondent has represented, directly or by implication, that Funny Color Foam's plastic cap is recyclable.

PAR. 16. In truth and in fact, while the plastic cap is capable of being recycled, the vast majority of consumers cannot recycle it because there are only a few collection facilities nationwide that accept the high-density polyethylene cap for recycling. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine and twelve, including but not necessarily limited to the product labeling attached as Exhibits A and B, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs ten, thirteen and fifteen, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 18. In truth and in fact, at the time it made the representations set forth in paragraphs ten, thirteen and fifteen, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seventeen was, and is, false and misleading.

PAR. 19. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A



Exhibit A

Complaint

119 F.T.C.

EXHIBIT B



Exhibit B

## 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 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 respondent with violation of the Federal Trade Commission Act; and

The respondent 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 complaint, a statement that the signing of the 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 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 Creative Aerosol Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 71 West Main Street, in the City of Freehold, State of New Jersey.

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

## DEFINITIONS

For purposes of this order, the following definitions shall apply:

"*Volatile Organic Compound*" ("VOC") means any compound of carbon which participates in atmospheric photochemical reactions as defined by the U.S. Environmental Protection Agency at 40 CFR 51.100(s), and as subsequently amended. When the final rule was promulgated, 57 Fed. Reg. 3941 (February 3, 1992), the EPA definition excluded carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and certain listed compounds that EPA has determined are of negligible photochemical reactivity.

"*Class I ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride, and 1,1,1-trichloroethane.

"*Class II ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

"*Product or package*" means any product or package that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the Funny Color Foam brand name or any other brand name of respondent, its successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

"*Competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using

procedures generally accepted in the profession to yield accurate and reliable results.

I.

*It is ordered,* That respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package containing any volatile organic compound, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, through the use of such terms as "environmentally safe," "environmentally safe, contains no fluorocarbons," or any other term or expression, that any such product or package will not harm the environment, or through the use of such terms as "no fluorocarbons," or any other term or expression, that any such product or package will not harm the atmosphere, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

II.

*It is furthered ordered,* That respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package containing any Class I or Class II ozone-depleting substance, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any such product or package contains "no fluorocarbons" or representing, in any manner, directly or by implication, that any such product or package will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere or otherwise harm the atmosphere.

## III.

A. *It is further ordered*, That respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication the extent to which:

1. Any such product or package is capable of being recycled; or,
2. Recycling collection programs for such product or package are available.

B. Provided, however, respondent will not be in violation of Part III(A)(2) of this order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any high-density polyethylene cap or aluminum aerosol can, if it truthfully represents that such packaging is recyclable, provided that:

1. Respondent discloses clearly, prominently, and in close proximity to such representation:

(a.) In regard to any high-density polyethylene cap, that it is recyclable in the few communities with recycling collection programs for high-density polyethylene caps; and in regard to any aluminum aerosol can, that such packaging is recyclable in the few communities with recycling collection programs for aluminum aerosol cans; or

(b.) The approximate number of U.S. communities with recycling collection programs for such high-density polyethylene cap or aluminum aerosol can; or

(c.) The approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such high-density polyethylene cap or aluminum aerosol can are available; and

2. In addition, in the case of a high-density polyethylene cap, such cap itself bears a clear identification of the specific plastic resin(s) from which it is made.

For purposes of this order, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

#### IV.

*It is further ordered,* That respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any such product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

#### V.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

▪ A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## VI.

*It is further ordered,* That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

## VII.

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

## VIII.

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

IN THE MATTER OF  
RN NUTRITION, ET AL.

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

*Docket C-3549. Complaint, Jan. 13, 1995--Decision, Jan. 13, 1995*

This consent order prohibits, among other things, the California marketers of the calcium supplement product, BoneRestore, from making unsubstantiated claims that any food, drug, or food or dietary supplement products will treat or cure any disease or condition; prohibits the respondents from using the name BoneRestore in a misleading way; and restricts the use of testimonial endorsements that do not represent typical results.

*Appearances*

For the Commission: *Phoebe D. Morse* and *Barbara E. Bolton*.  
For the respondents: *Andrew J. Strenio, Jr., Hunton & Williams*,  
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition ("respondents"), 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. Respondent RN Nutrition is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office or place of business at 3402-M West MacArthur, Santa Ana, California.

Respondent George Page Rank is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition, including the acts and practices alleged in

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this complaint. His business address is 3402-M West MacArthur, Santa Ana, California.

Respondent James W. Nugent is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition, including the acts and practices alleged in this complaint. His business address is 3402-M West MacArthur, Santa Ana, California.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed an orally-ingested product containing microcrystalline hydroxyapatite ("MCHC"), minerals and protein, under the name BoneRestore (hereinafter "MCHC" or "BoneRestore"). BoneRestore is a food and/or drug, as the terms "food" and "drug" are defined in Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for BoneRestore, including but not necessarily limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements:

1. Clinical tests by the world-famous Royal Free Hospital show ... Natural BONE-RESTORE from Europe builds bone better than estrogen or calcium (with NO bad side effects!) (Exhibit A).

2. And some doctors feel MCHC could very well be the ultimate answer for people who want to stop bone loss and build strong bones, without the risk of drugs. (Exhibit A).

3. According to 7 clinical studies MCHC does...different things that help people with weak or weakening bones:

(1) MCHC seems to have the unique ability to slow down or stop bone loss dead in its tracks!

\* \* \*

[D]ue to MCHC, it's possible to slow down or even halt bone loss. Even if you're already suffering from osteoporosis!

(2) Unlike estrogen and calcium, MCHC has been clinically shown to actually build new bone!

\* \* \*

[S]cientific studies have shown that with MCHC you may not only be able to stop bone loss: you may actually be able to build new bone! (Exhibit A).

4. Increase in bone. "In September my bone densitometry test showed bone loss. It was then that I started using BoneRestore. I had been using calcium, and it was obviously not working at all. Well, to my doctor's and my surprise, the latest bone test, performed in December (only two months on your product) showed an actual increase in the bone...." (Exhibit A: Consumer Testimonial).

5. Osteoporosis healed. "Don't let anyone tell you osteoporosis can't be healed. Two weeks ago I went to my doctor for a check-up. Well, two days later he gave me the results of my tests. He said that they showed no new bone deterioration (osteoporosis) and that healing was taking place. Now I can run and I've been caught dancing a little. BoneRestore is my friend for life." (Exhibit A: Consumer Testimonial).

6. You see, in addition to the clinical studies mentioned above, 7 other scientific studies and papers have been done that confirm BoneRestore with MCHC is amazingly effective at halting bone loss and building bones. Here's a brief description of these reports:

1. Significant bone gain.
  2. Restored bone.
  3. Eliminated pain.
  4. Nearly twice as much absorption.
  5. 95% of back pain eliminated.
  6. No fractures.
  7. Significantly prevents osteoporosis.
- (Exhibit A).

7. Natural BONE RESTORE from Europe builds bone 4 times better than calcium alone! (Exhibit B).

8. Help slow down or stop bone loss and perhaps even rebuild bones safely -- with this revolutionary product from Europe. (Exhibit B).

9. Breakthrough technology means more of these nutrients actually get absorbed. Clinical tests prove it works better than calcium. (Exhibit B).

10. We recommend it especially for women and men over 40 as a safe, proven way to fight bone loss and in some cases restore bone. (Exhibit B).

11. Straightened up 10 degrees. "I don't often write testimonials, but I do want to tell you how pleased I am with the results of BoneRestore. My head was protruding from my neck at shoulder height. Now after taking it, it has come up at least 10 degrees if not more. After being told to "straighten up" since my sub-teens, I feel it has done remarkably. Thank you for a wonderful product!" (Exhibit B: Consumer Testimonial).

12. Really helped back. "My husband and I both are taking BoneRestore and it has really helped our backs. I have arthritis in my back and since I've been taking it I feel so much better. I can work better. Thank you so much." (Exhibit B: Consumer Testimonial).

PAR. 5. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that BoneRestore or MCHC:

1. Builds new bone, builds strong bones, increases bone and causes significant bone gain;
2. Builds bone better than estrogen or other forms of calcium;
3. Slows or stops bone loss;
4. Helps persons who suffer from weak or weakening bones;
5. Prevents and heals osteoporosis;
6. Rebuilds and restores lost bone;
7. Eliminates pain associated with bone ailments;
8. Is absorbed by the body better than other forms of calcium;
9. Prevents bone fractures; and
10. Straightens spinal curvatures.

PAR. 6. Through the use of statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 7. In truth and in fact, at the time they made the representations set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in the advertisements and promotional materials for BoneRestore reflect the typical or ordinary experiences of members of the public who have used the product.

PAR. 9. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and

promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph eight, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 10. In truth and in fact, at the time they made the representation set forth in paragraph eight, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph nine, was, and is, false and misleading.

PAR. 11. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that scientific research, including clinical tests, scientific papers and/or scientific studies, proves that the use of BoneRestore or MCHC:

- 
1. Builds bone better than estrogen or better than other forms of calcium;
  2. Builds new bone, builds strong bones, and causes significant bone gain;
  3. Slows or stops bone loss associated with bone ailments;
  4. Restores lost bone;
  5. Eliminates pain associated with bone ailments;
  6. Is absorbed by the body better than other forms of calcium;
  7. Prevents fractures;
  8. Prevents osteoporosis; and
  9. Helps persons who suffer from weak or weakening bones.

PAR. 12. In truth and in fact, the representations set forth in paragraph eleven have not been proven by scientific research, including clinical tests, scientific papers and/or scientific studies. Therefore, the representations set forth in paragraph eleven were, and are, false and misleading.

PAR. 13. Through the use of the trade name of the product, BoneRestore, including but not necessarily limited to its use in the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A

and B, respondents have represented, directly or by implication, that the product restores, builds or increases bone.

PAR. 14. Through the use of the trade name of the product, BoneRestore, including but not necessarily limited to its use in the statements contained in the advertisements and promotional materials referred to in paragraph four, including but not necessarily limited to the advertisements and promotional materials attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph thirteen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.



Complaint

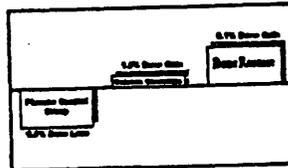
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EXHIBIT B

R & N  
EXHIBIT B

## Natural BONE RESTORE from Europe builds bones 4 times better than calcium alone! —

% Change in Bone Mass



In a clinical test at famous Royal Free Hospital in London, people taking the placebo kept losing bone; those taking calcium stopped bone loss but gained only insignificant amounts of bone; whereas those taking BoneRestore showed a 6.1% gain in bone.

**H**elp slow down or stop bone loss and perhaps even rebuild bones safely — with this revolutionary product from Europe. Not a drug, not merely calcium or ordinary bone meal. It contains dozens of nutrients your bones need, in one easy-to-use tablet. Breakthrough technology means more of these nutrients actually get absorbed. Clinical tests prove it works better than calcium. In fact, researchers at the famous Royal Free Hospital in London did a controlled test on women with primary biliary cirrhosis. According to *The British Medical Journal*, those women always have

osteoporosis. Women who took the placebo kept on losing bone — but women who took BoneRestore not only stopped bone loss; they had a NET GAIN in their bones of 6.1%! (*American Journal of Clinical Nutrition*, 34: Sept. 87, pp. 426-430)

After 12 years of successful use in Europe, Bone Restore is now available in the U.S. We recommend it especially for women and men over 40 as a safe, proven way to fight bone loss and in some cases restore bone.

**Straightened up 10".** "I don't often write testimonials, but I do want to tell you how pleased I am with the results of BoneRestore. My head was protruding from my neck at shoulder height. Now after taking it, it has come up at least 10" if not more. After being told to "straighten up" since my sub-teens, I feel it has done remarkably. Thank you for a wonderful product!"  
— Gladys Byham, TX

**Pain in knees and neck almost gone.** "I am very impressed with BoneRestore. At 78 years of age my neck hurt so that each step was one jar too much. It will be two weeks since I started and the pain is almost gone. Along with that relief came an unexpected release from stiff swollen knees of long standing. I expect to be doing deep knee bends shortly with caution."  
— Helene Dawson, CA

**Truly a miracle.** "This is truly a miracle. I injured the sacrum in my back in November of 1988. I have suffered excruciating pain every day since, i.e. for nearly two years. Last year I went to a doctor who discovered I had osteoporosis. I was sure I was doomed. But thanks to your sending me BoneRestore so promptly the pain started going away within 2 weeks. May God Bless you." — Vallerie Hebert, LA

**Really helped back.** "My husband and I both are taking BoneRestore and it has really helped our backs. I have arthritis in my back and since I've been taking it I feel so much better. I can work better. Thank you so much."  
— P.B., Chapel Hill NC

**BoneRestore did so much good.** "I am 83 years old. I had two heart attacks. I tried BoneRestore recently. It did me so much good. Every bone in my body was hurting at that time. I am ordering more bottles."  
— A.B. Berwyn IL

**Bone Restore:**  
240 Tablets.....~~39.95~~

**Holiday Sale....31.45**

**3 bottles: 89.85**  
**SAVE \$15**

## R & N ASSOCIATES HOLIDAY CATALOG 1991

## 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 Boston Regional Office 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 attorney, 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 respondents have 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, and having duly considered the comments received, 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 RN Nutrition is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office or place of business at 3402-M West MacArthur, Santa Ana, California.
2. Respondent George Page Rank is an individual who has been, and is now, a general partner of RN Nutrition. As such, he formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition. His business address is 3402-M West MacArthur, Santa Ana, California.
3. Respondent James W. Nugent is an individual who has been, and is now, a general partner of RN Nutrition. As such, he

formulates, or participates in the formulation of, directs and controls the acts and practices of RN Nutrition. His business address is 3402-M West MacArthur, Santa Ana, California.

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

## ORDER

### I.

*It is ordered*, That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that such product:

1. Builds new bone, builds strong bones, increases bone and causes significant bone gain;
2. Builds bone better than estrogen or other forms of calcium;
3. Slows or stops bone loss;
4. Helps persons who suffer from weak or weakening bones;
5. Prevents and heals osteoporosis;
6. Rebuilds bone and restores lost bone;
7. Eliminates pain associated with bone ailments;
8. Is absorbed by the body better than other forms of calcium;
9. Prevents bone fractures;
10. Straightens spinal curvatures; and
11. Provides any benefit in the prevention, treatment, or cure of osteoporosis, arthritis, back pain, or any other bone ailment or condition;

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

## II.

*It is further ordered,* That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 CFR 255.0(b)) of the product represents the typical or ordinary experience of members of the public who use the product, unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

## III.

*It is further ordered,* That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or

distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "BoneRestore," or any other name, in a manner that represents, directly or by implication, that such product has the ability to restore, build, or increase bone unless, at the time of making the representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation that it restores, builds, or increases bone. This provision does not otherwise affect respondents' ability to use the trade name "BoneRestore," or any other brand name, to make a qualified representation that is substantiated by competent and reliable scientific evidence.

#### IV.

*It is further ordered,* That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

#### V.

*It is further ordered,* That RN Nutrition, a limited partnership, and George Page Rank and James W. Nugent, individually and as co-partners, trading and doing business as RN Nutrition, or under any other name, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with

the labeling, advertising, promotion, offering for sale, sale, or distribution of BoneRestore or any food or dietary supplement, food, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such product will treat, cure, alleviate the symptoms, prevent, or reduce the risk of developing any disease, disorder, or condition, unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

#### VI.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

#### VII.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

#### VIII.

*It is further ordered,* That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call

into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IX.

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to all principals and managers and to all personnel, agents, licensees and distributors, engaged in the preparation or placement of advertisements or promotional materials covered by this order and shall obtain from each such employee, agent, licensee and distributor a signed statement acknowledging receipt of the order.

X.

*It is further ordered,* That for a period of five (5) years from the date of entry of this order, respondents George Page Rank and James W. Nugent shall provide written notice to the Federal Trade Commission within thirty (30) days of:

- A. Any change in his business or employment that may affect compliance obligations arising out of this order;
- B. The discontinuance of his business or employment; and
- C. His affiliation with any new business or employment; each such notice to include his business address and telephone number, home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XI.

*It is further ordered,* That respondents shall, within sixty (60) days after service upon them 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.

IN THE MATTER OF

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.

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

*Docket C-2858. Consent Order, Jan. 6, 1977--Modifying Order, Jan. 17, 1995*

This order reopens a 1977 consent order (89 FTC 15) that settled allegations that the respondents deceptively advertised that sugar derived from Hawaiian sugar cane is different from or superior to other sugars, particularly those derived from beets. This order modifies the consent order so that the respondents may make claims about objective differences in granulated white sugars with respect to health, safety, nutritional quality, or purity, as long as they have competent and reliable evidence to substantiate such claims. The Commission found that the public interest warranted reopening and modifying the 1977 order.

ORDER REOPENING THE PROCEEDING AND  
MODIFYING CEASE AND DESIST ORDER

On July 20, 1994, the California and Hawaiian Sugar Company ("C&H") filed a request to reopen the proceeding in Docket No. C-2858, *California & Hawaiian Sugar Co.*, 89 FTC 15 (1977), and to set aside or modify the order issued ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. The Request was placed on the public record for 30 days for comment. C&H submitted additional material in support of its Request on September 12, 1994, November 16, 1994, and January 6, 1995.

I. THE ORDER

The Commission issued the complaint and its final decision and order in Docket No. C-2858 on January 6, 1977. The complaint alleged that C&H and its advertising agency misrepresented that there are differences in granulated sugars and that C&H sugar derived from Hawaiian sugar cane is different from and superior to other sugars in quality and purity. The complaint also alleged that the respondents failed to specify any consumer use of C&H sugar for

which C&H sugar is significantly different from, or superior to, other sugar. Finally, the complaint alleged that the respondents misrepresented that the failure of competitors to disclose the origin of their sugar is a material fact from which consumers could infer that the competing sugar comes from an inferior source.

Part 1(A)(i) of the order prohibits C&H from representing that:

there are differences in granulated sugars, or that C&H granulated sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless: (a) such represented difference or superiority relates to a consumer use of such sugar which is specified in the advertisement, (b) the difference or superiority is substantiated by competent and reliable evidence prior to making the representation, and (c) such substantiation includes competent and reliable evidence that the difference or superiority is discernible to or of benefit to the class of consumers to whom the representation is directed.

Part 1 (A)(ii), however, permits C&H to use the phrase "pure cane sugar from Hawaii" in any context where the quality of C&H sugar is not expressly or implicitly compared with the quality of any other sugar. Part 1 (A)(iii) of the order also states that an advertisement will not be deemed to contain an implied comparison as long as it does not make a representation regarding any competitor's sugar or a representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitors' sugar. Part 1 (B) prohibits C&H from representing that competitors do not disclose the source or origin of their sugar, unless C&H specifies a consumer use of sugar with respect to which C&H sugar is different from such competing sugar and the difference is substantiated.

## II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the FTC Act provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent "makes a satisfactory showing that changed conditions of law or fact" require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a petition to reopen identifies significant changes in circumstances and demonstrates that such changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. S. Rep. No. 500, 96th Cong., 2d Sess. 9

(1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified.<sup>1</sup> If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman* Transportation standard to FTC order).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require

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<sup>1</sup> The legislative history of amended Section 5(b), S. Rep. No. 500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. Generally, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983), at 2 (unpublished) ("Damon Letter"); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart, Esq. (June 5, 1986); *see Reader's Digest Ass'n, Inc.*, Docket Nos. C-626 and C-2075, 111 FTC 758-59 (1989) (reopening justified if "respondent demonstrates that the order impedes competition"). *See also Damon Corp.*, Docket No. 2916, 101 FTC 689, 692 (1983) (reopening in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order").<sup>2</sup>

When a satisfactory showing of affirmative need is made, the Commission has balanced the reasons favoring the requested modification against any reasons not to make the modification. *Damon Letter* at 2; *accord Reader's Digest Ass'n*, 111 FTC at 759; *see, e.g., Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) ¶ 22,239 (Mar. 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

### III. PETITIONER'S REQUEST

#### A. *C&H States Reopening Required by Changes in Law*

C&H believes that changes in law and Commission policy since issuance of the order and consideration of the public interest warrant its reopening. C&H does not state that changed facts require that the order be modified or set aside. Because we also conclude that reopening the order is in the public interest, we do not address the respondent's views regarding a change of law.

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<sup>2</sup> *Cf. Service Corp. Int'l*, Docket No. 9071, (May 12, 1994), 59 Fed. Reg. 37,045 (July 20, 1994); *Tarra Hall Clothes, Inc.*, Docket No. C-2797 (Oct. 27, 1992), 57 Fed. Reg. 54,598 (Nov. 19, 1992). *Cf. United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

*B. C&H Argues Reopening Warranted in the Public Interest*

C&H asserts that the public interest supports reopening the order. The company states that its share of the consumer granulated white sugar market in its primary market west-of-Chicago declined from approximately 36% in 1980 to 29% in 1993. In addition, on page 4 of its submission of January 6, 1995, C&H states, "Beginning in the late 1980's, American Crystal Sugar Company has been running an aggressive advertising program in the Upper Midwest focusing on the (unsubstantiated) claimed superiority of American Crystal granulated sugar."<sup>3</sup> The claims in this campaign were similar to those barred under the C&H order, and C&H states that these advertisements were largely responsible for C&H's precipitous loss of market share in areas affected by the campaign.

Specifically, whereas the C&H and American Crystal shares were approximately equal in 1988 in Minneapolis at a little over 30% apiece, American Crystal today possesses a 55% share in this area versus an 18% share for C&H. This drop in share for C&H marked a reversal of an upward trend the company had experienced throughout the 1980's; its share of sales in Minneapolis had risen from about 12% in 1981 to about 32% in 1988. American Crystal's share, in contrast, had fluctuated between 35% and 25% until its 1988 advertising campaign, after which its share rose to 55%. See Affidavit of Thomas J. Wilson, Vice President, Grocery Sales and Marketing, C&H, appended to submission of January 6, 1995, and Exhibit D thereto. In Milwaukee, also in the Upper Midwest, C&H's share of sales had risen from about 10% in 1981 to about 24% in 1984, where it remained until 1988 and then began a gradual decline to about 16%. American Crystal, which in 1981 had only about a 2% share, increased that to about 25% in 1985. Following the introduction of its advertising campaign in the late 1980's, its share increased to about 30%. *Id.*, Exhibit D. The Affidavit details similar shifts occurring at about the same time in Dallas, where Imperial-Holly, another C&H competitor, had mounted a similar campaign. *Id.*

These assertions also find support in the Wilson Affidavit and its exhibits. C&H's request included some comparative advertisements

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<sup>3</sup> Memorandum of C&H Sugar Co. to Federal Trade Commission at 4 (Jan. 6, 1995).

from other companies,<sup>4</sup> including Imperial-Holly, the competitor that successfully increased its share of the Dallas market, at least in part, at the expense of C&H. *See also* Request, Exhibits K-O.<sup>5</sup>

C&H states that these facts show that the order has not simply limited its ability to make comparative superiority claims touting its "pure cane sugar from Hawaii" over granulated sugar made from beets or granulated cane sugar from sources other than Hawaii, but that it also precludes it from making claims that generally would be considered "puffery."<sup>6</sup> C&H states that the order has precluded the company from defending its product against claims of this same nature disseminated by its competitors. Therefore, C&H contends, the order improperly discriminates among competitors and places C&H at an undue competitive disadvantage.

### *C. Reopening Warranted in the Public Interest*

The Commission believes that C&H has made a showing sufficient to warrant reopening the order in the public interest. We do not intend to suggest that a respondent may obtain reopening of an order merely by showing that its conduct is restricted while that of its competitors not under order is not limited. For example, the costs of complying with a disclosure requirement to cure past deception ordinarily will not warrant reopening, even though the cost of making the disclosure falls only on the petitioner. *See Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 760 (1992) (reopening not warranted simply because "it is no longer convenient to live with the terms of the consent order"). In this instance, however, the product being advertised is fungible, and the nature of

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<sup>4</sup> For example, an ad for Crystal Sugar shows a taste test with a grandmotherly spokesperson affirming that "It's not the same." An ad for Holly Sugar describes "Sugar that made everything taste better . . . A Sweet Little Secret Born in the Hills of Colorado." Imperial Sugar Company's advertisement features a consumer who says, "I'm here as a baking expert to tell you that Imperial Sugar is the finest sugar made." An ad for Dixie Crystal Sugar informs consumers that there is "no other sugar that stirs up, cooks up, bakes up better than Dixie Crystal" and that "the difference is crystal clear." Florida Crystal Sugar Company advertises its "minimally processed . . . Unbleached Cane Sugar" and informs consumers that "they'll love the difference! Smart & Sweet. Naturally."

<sup>5</sup> Although the dates of the advertisements included in these exhibits are in the 1990's, we understand that earlier versions of similar advertising materials were disseminated in the late 1980's as C&H asserts.

<sup>6</sup> The term "puffery" as used by the Commission here generally includes representations that ordinary consumers do not take literally, expressions of opinion not made as a representation of fact, subjective claims (taste, feel, appearance, smell) and hyperbole that are not capable of objective measurement. Deception Policy Statement, 103 FTC 110, 181 & n.42 (1984) (citing *Pfizer, Inc.*, 81 FTC 23, 64 (1972)).

competitive harm shown is related to this homogeneity as discussed below.

As alleged in the complaint accompanying the order and recognized both by C&H and the United States Beet Sugar Association ("USBSA"), which opposed the request for modification, white granulated sugar is a homogeneous product consisting of 99.9% sucrose. The remaining .1% comprises sulfites and other residue in trace amounts.<sup>7</sup> Although objective claims of differences among such products would be difficult, if not impossible, to substantiate, it does not follow that the Commission should continue to ban comparative claims that are subjective, or product source or origin claims that appeal to the peculiarities of consumer preference as long as the advertising claims do not imply without substantiation material differences in the health, safety, nutritional quality, or purity of the product. Indeed, the Commission, in the past, has found that the origin of products may be material to consumers. *See Leonard F. Porter*, 88 FTC 546, 628 (1974) ("some substantial group [of consumers] would, all things being equal, prefer authentic Eskimo-crafted gifts and souvenir items to non-native made imports from other parts of the United States"). *Cf. FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) ("the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance").

C&H states that the order improperly discriminates among competitors, since other companies freely make claims that C&H is prohibited from making under the order, or that it may make only under certain conditions. For example, C&H arguably cannot include in its advertising a subjective testimonial claim such as "I love C&H the best," or "C&H tastes best," without having to substantiate that consumers can typically and ordinarily discern the difference between C&H and other granulated sugars. The material in the Wilson Affidavit and its exhibits supports a conclusion that the order,

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<sup>7</sup> As C&H states in its request to reopen, "[T]here are some minor physiological differences between cane and beet sugars; the most important one being the photosynthesis carbon pathway, C<sub>3</sub> for beet and C<sub>4</sub> for cane. This distinction is responsible for the different constituent elements found in the final products in very trace amounts. Sugar refined from sugar beets will have traces (parts per million) of raffinose and betaine (a non-saccharide). Sugar refined from sugar cane will have traces (parts per million) of reducing sugars and high molecular weight polysaccharides . . . . C&H has no intention of basing an advertising campaign on minor physiological differences between granulated sugars or different methods used in the refining process." Request at 13. *See also* Opposition of the USBSA to Revised Request and Restated Petition of C&H to Modify or Vacate Consent Order at 4-5.

by restricting these sorts of claims, is impeding rather than encouraging competition. The effect of the competing advertising campaigns of companies, such as American Crystal, in Minneapolis and Milwaukee and of Imperial-Holly in Dallas, is to take advantage of C&H's inability to counter claims that either constitute puffery or relate to the source or origin of the product, or are other claims that should be substantiated.

Therefore, the Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the request. Having reopened the order, the Commission will consider whether the order should be modified.

#### IV. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE C&H ORDER

C&H states that the public interest justifies setting aside the order, or modifying its terms. It asserts that consumers have a constitutional right to receive uncensored truthful information and that market efficiency requires that consumers be given access to truthful information. Neither of these assertions supports setting aside the order.

The Commission believes, however, that the public interest warrants modification of the order to permit C&H to make limited comparative claims. This modification is justified on the narrow facts of this matter. In particular, the homogeneous nature of the product means that there are few truthful, nondeceptive comparisons that can be made among competing products. In order to promote their brands, sugar refiners must rely on the sort of subjective endorsement claims described above, or objective product source and origin claims that may appeal to individual consumer preferences. These are precisely the kinds of claims prohibited by the existing order. We believe, therefore, that these facts suggest strongly that the order as currently structured inhibits competition in the granulated sugar industry. See *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

The order against C&H was intended to protect consumers from misleading claims about the alleged superiority or difference of C&H sugar, not to stifle the respondent's ability to participate in healthy competition on the basis of truthful, nondeceptive advertising. We

are persuaded, therefore, that modification to permit puffery is warranted. The order will permit truthful and nondeceptive product source or product origin claims and claims of health, safety, nutritional quality, or purity, if supported by a reasonable basis consistent with the Commission's Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 30,999 (Aug. 2, 1984), *appended to Thompson Medical Co.*, 104 FTC 648, 639 (1984).

The Commission denies the request that the order be set aside in its entirety, because C&H has not demonstrated why it should not continue to be required to substantiate objective product claims. The Commission also denies the request that the order be modified by adding to paragraph I(B) a safe harbor allowing C&H to advertise that its competitors do not disclose the source or origin of their sugar, unless the advertisement claims that C&H sugar is different from other sugar with regard to health, safety, nutritional quality, or purity, although the modification ordered, the Commission believes, addresses the thrust of C&H's request.

Specifically, the Commission modifies the order by deleting Parts I(A) (i) (a) and (c) as requested by C&H and by amending paragraph I(B) of the original order to permit the company to represent truthfully that (1) C&H's granulated white sugar is derived from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as such claims do not represent directly or by implication that C&H's granulated white sugar is superior to, or different from, sugar derived from sugar beets or derived from sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity. This modification will limit the order so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors, or truthful, nondeceptive product source or origin claims while continuing to bar C&H from making deceptive comparative claims regarding health, safety, nutritional quality, or purity.

In addition, the Commission adds the word "objective" in paragraph I to clarify that the substantiation requirement applies to "objective" differences in granulated white sugars. The duty to substantiate will apply to such claims of differences and also to claims relating to health, safety, nutritional quality, or purity of any competitor's granulated sugar product. The words "granulated" and

"white" have been added to new paragraph 1(C) and throughout this order to clarify that the order does not apply to brown sugar.<sup>8</sup> Finally, the phrase "health, safety, nutritional quality and purity" has been added in the provisions originally appearing as paragraphs 1 (A) (i), (ii) and (iii), consistent with the Request.

These modifications differ in part from those sought by C&H. The Request, however, sought in the alternative that the Commission grant "such other relief as it may deem fitting and just." Inasmuch as the Commission understands the thrust of the Request to achieve a modification that is less restrictive of the company's ability to make comparative advertising claims concerning the source and origin of various brands of granulated white sugar, the Commission believes this modification accomplishes that goal.

#### V. CONCLUSION

The Commission concludes that the order in this matter should be reopened and modified. Accordingly,

*It is therefore ordered*, That the proceeding is hereby reopened and the order issued on January 6, 1977, is hereby modified to read as follows:

#### ORDER

*It is ordered*, That respondents California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of granulated white

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<sup>8</sup> The Commission's action here is consistent with its approach in *Firestone Tire & Rubber Co.*, 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973), in which the Commission issued an advisory opinion interpreting an order it previously issued that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. 112 FTC 609 (1989). The Commission determined that the provision "was not intended to apply to all representations regarding tire safety," and that it did not apply to generalized claims such as "Quality you can trust," and "Because so much is riding on your tires." *Id.* Instead, the provision applied to claims relating to a "specific, objectively verifiable tire characteristic" such as "Tests show our tires are 30% less likely to blow out on the highway" or "the indestructible tire." *Id.* at 610. Similarly, in this case, the complaint challenged quality and purity claims, but the order was not so limited. Here, therefore, as in *Firestone*, when the order is interpreted in light of the complaint, the resulting modification is consistent with the Commission's original intentions.

sugar packaged for retail consumption, forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mail or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication, that there are objective differences with respect to health, safety, nutritional quality, or purity in granulated white sugars, including that C&H granulated white sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless the difference or superiority is substantiated by competent and reliable evidence prior to making the representation.

A. Provided, however, that it shall not be a violation of this order to use the phrase "pure cane sugar from Hawaii" as a means of identifying the geographic origin and type of granulated white sugar marketed under the C&H brand name in any context wherein the quality of the sugar marketed under the C&H brand is not expressly or implicitly compared with the health, safety, nutritional quality, or purity of any other sugar. Where an advertisement contains the phrase "pure cane sugar from Hawaii" and a depiction of C&H sugar, without any representation referring to the health, safety, nutritional quality, or purity of any competitor's sugar product, or any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitive brands of sugar, the advertisement will not be deemed to contain an implied comparison.

B. It is further provided, that if an advertisement makes a positive or absolute and truthful representation concerning C&H sugar without any representation concerning the health, safety, nutritional quality, or purity of any competitor's sugar product, or without any representation that C&H sugar possesses a depicted characteristic or quality related to health, safety, nutritional quality, or purity to a degree different from competitors' brands of sugar, the advertisement will not be deemed to contain an implied comparison under this order.

C. It is further provided, however, that the respondents may truthfully represent that (1) C&H's granulated white sugar is derived

from sugar cane and that other granulated white sugar is, or may be, derived from sugar beets; or (2) the label, advertising or packaging of any brand of granulated white sugar other than C&H does not disclose the source or origin of its sugar, as long as any such claims do not represent, directly or by implication, that C&H's granulated white sugar is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, with respect to health, safety, nutritional quality, or purity.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in paragraph one above.

Provided, however, that it shall not be considered a violation of this order for Foote, Cone & Belding/Honig, Inc., to make what would otherwise be a false or misleading claim or representation concerning the qualities of C&H sugars or competitive sugars if that respondent shows that it neither had any knowledge of the falsity of or misleading character of such representation nor had any reason to know, nor upon reasonable inquiry could have known its false, deceptive or misleading nature.

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

*It is further ordered,* That respondents notify the Commission at least 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, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, 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 Starek and Commissioner Varney concurring in the result.

## CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the result the Commission reaches in modifying the order in this matter -- because I believe the modification to be in the public interest -- but I do not join in the analysis the Commission uses to reach that result. For the first time and without explanation, the Commission extends the application of the so-called "affirmative need threshold" to consumer protection order modifications. Then, as it has in certain competition matters, the Commission drains that threshold of any content by finding, on selective and flimsy evidence, that the order has resulted in "competitive harm."

## I. THE COMMISSION HAS NOT PREVIOUSLY APPLIED THE "AFFIRMATIVE NEED THRESHOLD" TO CONSUMER PROTECTION ORDERS

The majority states that when a petitioner seeks to reopen and modify an order on public interest grounds, "[g]enerally, the [petitioner] must demonstrate as a threshold matter some affirmative need to modify the order," and when a satisfactory showing of affirmative need is made, the Commission balances the reasons favoring the requested modification against any reasons not to make the modification.<sup>1</sup> The Commission cites as precedent an unpublished letter to counsel in Damon Corporation.<sup>2</sup> As I noted in my concurring statement in Service Corporation International, this "affirmative need threshold" is not required by any statute, rule of Commission practice, or judicial precedent; nor is it articulated consistently in Commission rulings.<sup>3</sup> Indeed, this is the first time that the Commission has required a petitioner seeking modification of a consumer protection order on public interest grounds to demonstrate affirmative need.<sup>4</sup>

Even in modifications of competition orders, where the affirmative need threshold is cited, the Commission frequently has

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<sup>1</sup> Order Reopening the Proceeding and Modifying Cease and Desist Order at 4.

<sup>2</sup> *Id.* (citing Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 29, 1983) (unpublished)).

<sup>3</sup> Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

<sup>4</sup> *See, e.g.*, Service Corp. Int'l, Docket No. 9071 (Order, May 12, 1994) ("SCI"); Tarra Hall Clothes, Inc., Docket No. C-2797 (Order, October 27, 1992); *Reader's Digest Assoc., Inc.*, 111 FTC 758 (1989); *Encyclopedia Britannica, Inc.*, 111 FTC 1 (1988); *Redman Indus., Inc.*, 110 FTC 636 (1988). Given that SCI and Tarra Hall make no mention either of affirmative need or of Damon, the majority's citation to these cases to support the Damon affirmative need standard is puzzling.

made no attempt to quantify the cost of the order or its impact on the petitioner's viability.<sup>5</sup> For example, the Commission has found a showing of affirmative need based on the fact that the order might cause injury.<sup>6</sup> In at least two antitrust order modifications, the Commission recited the Damon letter's affirmative need standard, but modified the order without finding affirmative need.<sup>7</sup>

Accordingly, the Commission's statement cited above is plainly wrong, and I am perplexed by the Commission's insistence on injecting the Damon letter's affirmative need threshold into this consumer protection order. The Commission offers absolutely no explanation for its departure from established practice.<sup>8</sup> As I stated in SCI, rather than declare a separate affirmative need requirement and then find it satisfied by tenuous showings, the Commission should -- as it did in SCI -- integrate affirmative need and the interest in the repose and finality of Commission orders into the array of costs and benefits that we must weigh under the public interest rubric of Section 2.51.<sup>9</sup> I believe that such an analysis supports the conclusion that the order in this case should be modified.

## II. THE FINDING OF "AFFIRMATIVE NEED" IN THIS CASE DEMONSTRATES THE THRESHOLD'S LACK OF CONTENT

The Commission concludes that C&H has made a satisfactory showing that the public interest warrants reopening the order in this matter for consideration of the merits of the petition.<sup>10</sup> The

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<sup>5</sup> *E.g.*, U.S. Pioneer Elecs. Corp., Docket No. C-2755 (Order, April 8, 1992); *Lenox, Inc.*, 111 FTC 612 (1989); *Liquid Air Corp.*, 111 FTC 135 (1988); *National Tea Co.*, 111 FTC 109 (1988).

<sup>6</sup> *Union Carbide Corp.*, 114 FTC 250 (1991).

<sup>7</sup> *American Medical Assoc.*, Docket No. 9064 (Order, October 10, 1991); *Midcon Corp.*, 111 FTC 100 (1988).

<sup>8</sup> Indeed, that this case spells a departure from the very recent SCI decision is illustrated by Commissioner Azcuenaga's dissenting statement in that matter, which stated that the Commission's order "fail[ed] to apply the correct legal standard under which the Commission addresses petitions to reopen and modify its orders," and "virtually ignore[d] the standard of 'affirmative need' ordinarily applied to petitions to reopen in the public interest." Dissenting Statement of Commissioner Mary L. Azcuenaga in SCI (May 16, 1994), at 1, 5.

<sup>9</sup> Although there appears to be no principled basis for distinguishing between antitrust and consumer protection orders for purposes of modification law, the Commission has tended to apply differing analyses in these areas. If the Commission intends to establish a uniform legal framework for all order modifications, the better approach would be to adopt the integrated cost-benefit analysis employed in consumer protection orders rather than the convoluted framework of the Damon letter.

<sup>10</sup> Order Reopening the Proceeding and Modifying Cease and Desist Order at 6. Although the Commission does not expressly state that C&H has demonstrated affirmative need, from its recitation of the affirmative need standard and its conclusion that the order should be reopened, one may infer a finding of affirmative need.

Commission recites C&H's statement that other sugar refiners advertise that their sugar is better than or different from other sugar and further states that a C&H affidavit and its exhibits support a conclusion that by restricting these sorts of claims, the order is impeding rather than encouraging competition. The Commission notes that the competing advertising campaigns take advantage of C&H's inability to counter claims that constitute puffery, relate to the source or origin of the product, or require substantiation. Accordingly, the Commission concludes that the order should be modified to permit C&H to make limited comparative claims.

In my view, the evidence C&H has proffered falls short of demonstrating that the order has caused it competitive harm. Although C&H has submitted an affidavit with exhibits showing that its share of sales in Minneapolis, Milwaukee, and Dallas declined once competitors began running advertising campaigns in those cities, this evidence does not support a conclusion that the campaigns were the cause (or even a cause) of the decline in C&H's sales or that the Commission's order precluded C&H from competing effectively. With respect to the Dallas market, the affidavit did not indicate what the companies' respective shares were before C&H's competitor began its campaign; C&H's loss of sales could easily have been the extension of a continuing trend. The affidavit presented no evidence to exclude the possibility that changes in price or any other competitive variable may also have been responsible for changes in sales in those three areas. C&H presented no data on any changes in its own advertising during the time period or in its couponing or other incentive policies that may have affected sales. It presented no evidence on the arrival of any other competitors in those areas. Moreover, although C&H's petition noted changes in the Hawaiian cane sugar industry, it did not explain why those changes or other factors may not have also contributed to the purported decline in its sales.

Furthermore, the evidence presented is highly selective: C&H did not present any data from other areas in its west-of-Chicago market where competitors may be advertising, so it is impossible to know the effect, if any, of such advertising on C&H's sales in areas other than Minneapolis, Milwaukee, and Dallas. Indeed, in its opposition to C&H's petition, the U.S. Beet Sugar Association claims that C&H is the leading producer of sugar west of Chicago and asserts that C&H's sales in the nine western states constituting its

primary market increased from 49% in 1985 to 52% in 1993. The sales data submitted by C&H appear to be inconsistent with the data submitted by the Association. Given this conflicting evidence, I cannot conclude that C&H has lost sales since issuance of the order in 1977. In short, although C&H presents some evidence suggesting an association between its competitors' advertising and sales of C&H sugar in three cities, this evidence is not sufficient to conclude that the order's restrictions have been responsible for the decline in C&H's sales.

### III. THE PUBLIC INTEREST WARRANTS MODIFICATION OF THE ORDER

Notwithstanding its failure to demonstrate competitive hardship or a decline in sales due to the order, in my view C&H has made a persuasive case that the order prevents it from making certain nondeceptive, subjective preference claims that are being made by competitors. The Commission has previously held that the public interest can warrant an order modification on fairness grounds. *Tarra Hall Clothes, Inc.*, Docket No. C-2797, slip op. at 9, 10 n.24 (October 27, 1992) ("The Commission also may examine the entirety of circumstances to determine whether intrinsic fairness dictates that an order be modified. ... [M]aintaining a level playing field among competitors, to the extent practicable and justified by the facts, is of concern to the Commission."). In *Tarra Hall*, the Commission modified the order even though the petitioner failed to demonstrate that the order's bond requirement relating to imported wool products imposed a competitive hardship. Likewise, the Commission can modify the C&H order even though C&H has failed to demonstrate competitive hardship or a decline in sales stemming from the order's requirements.<sup>11</sup>

The order's broad scope prohibits C&H from making comparative claims similar to those its competitors are making unless it can demonstrate that consumers discern or benefit from any claimed difference. Because the order limits C&H's ability to combat appealing image advertisements mounted by its competitors, C&H is not competing on a level playing field. C&H's submission on its sales in Minneapolis, Milwaukee, and Dallas provides at least some

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<sup>11</sup> *Tarra Hall* is arguably distinguishable in that the Commission had already modified a similar bond requirement in several other orders imposed on *Tarra Hall*'s competitors. However, the public interest in ensuring a level playing field applies here as well.

support for this proposition. Furthermore, consumers may have an idiosyncratic preference for cane sugar over beet sugar, even if both products are 99.9% sucrose. Indeed, the vigor of the Beet Sugar Association's opposition to the requested modification suggests that this may be the case. Yet the current order prohibits C&H from informing consumers that other brands of sugar come from beet sugar.

Accordingly, I believe the order should be modified so that it does not prohibit the sort of comparative puffery claims disseminated by C&H's competitors or truthful, nondeceptive claims about the source or origin of sugar. Such a modification would be consistent with the Commission's prior interpretations of its orders. For example, the Commission made a similar modification in *General Motors*,<sup>12</sup> in which the order prohibited GM from representing that any automobile is superior in handling to any other automobile (with "handling" defined in a particular way) unless it had a reasonable basis for such representation. GM requested that the order be modified to re-define "handling" and to permit it to advertise specific aspects of the comparative handling of motor vehicles, without having to prove overall handling superiority. The Commission concluded, without any finding of affirmative need, that "to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions, the petitions are in the public interest and should be granted."<sup>13</sup>

Similarly, in *Firestone Tire & Rubber Co.*,<sup>14</sup> the Commission issued an advisory opinion<sup>15</sup> interpreting an order that prohibited any representation "that the respondent's tires will be safe under all conditions of use" and required substantiation for representations regarding safety or performance characteristics of the tires. The Commission determined that the provision "was not intended to apply to all representations regarding tire safety" and that it did not apply to generalized claims such as "Quality you can trust" and "Because so much is riding on your tires."<sup>16</sup> Instead, the provision applied to claims relating to a "specific, objectively verifiable tire

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<sup>12</sup> *General Motors Corp.*, 85 FTC 27 (1975), *modified*, 104 FTC 511 (1984).

<sup>13</sup> 104 FTC at 512. The modified order retained the requirement that GM have a reasonable basis for vehicle handling claims.

<sup>14</sup> 81 FTC 398 (1972), *aff'd*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973).

<sup>15</sup> 112 FTC 609 (1989).

<sup>16</sup> *Id.*

characteristic," such as "[t]ests show our tires are 30%' less likely to blow out on the highway" or "the indestructible tire."<sup>17</sup>

In like manner, the complaint against C&H challenged quality and purity claims, but the order was not so limited. If one interprets the order in light of the complaint, as was done in Firestone, it is appropriate to modify the order to narrow the claims covered from general claims to specific, objectively verifiable claims. The arbitrary application of a demonstrably hollow legal framework is not necessary to reach this result.

Accordingly, I concur in the result, but not in the reasoning, of the Commission's decision to modify the order in Docket No. C-2858.

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<sup>17</sup> *Id.* at 610.

## IN THE MATTER OF

## BEE-SWEET, INC., ET AL.

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

*Docket C-3550. Complaint, Jan. 17, 1995--Decision, Jan. 17, 1995*

This consent order prohibits, among other things, a North Carolina corporation and its officer from representing that bee pollen products are effective as a cure or in mitigating certain conditions and physical ailments, and from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study. In addition, the consent order requires the respondents to notify all sellers of the products, for the last 12 months, about the settlement with the Commission.

*Appearances*

For the Commission: *Ronald Waldman, Michael Bloom and Christian White.*

For the respondents: *Christopher D. Lane, Womble, Carlyle, Sandridge & Rice, Winston-Salem, N.C.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Bee-Sweet, Inc., a corporation, and Benny G. Morgan, individually and as an officer and director 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. Respondent Bee-Sweet, Inc., is a North Carolina corporation, with its principal office or place of business at 10370 North, NC Highway 150, Clemmons, North Carolina.

Respondent Benny G. Morgan is an owner, officer, and director of the corporate respondent. Individually or in concert with others, Benny G. Morgan formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. Respondent Benny G. Morgan's principal

office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents have manufactured, advertised, labelled, offered for sale, sold, and distributed bee pollen, bee propolis, and other products to consumers. These products are "foods" or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for various products containing bee pollen and bee propolis, including but not necessarily limited to the attached Exhibits A-D. These advertisements contain the following statements:

A. "For centuries, people have been using nature's perfect food [bee pollen] as nutritional enhancement or as an aid in the treatment of: Anemia, Sexual Stamina, Back Pain, Allergies, Weight Control, Digestive Problems, Arthritic Symptoms, [and] Pulse Rate Control." (Exhibit A)

B. "Many find bee pollen aids the treatment of: anemia, sexual stamina, back pain, allergies, weight control, digestive problems, arthritic symptoms, pulse rate control." (Exhibit B)

C. "Studies performed by doctors around the world have shown bee pollen to be effective in treating illnesses from allergies to arthritis, anorexia to overweight, fatigue to arteriosclerosis.\*

(\* From 'Pollen in Natural Therapeutics' by Dr. Yves Donadieu from Le Faculte de Medicine de Paris.)" (Exhibit C)

D. "Propolis . . . has shown remarkable healing abilities. This natural antibiotic has been the study of numerous physicians.\*

\* 'Propolis: The Natural Antibiotic by Ray Hill.' " (Exhibit C)

E. "Many doctors now prescribe propolis to help treat illnesses such as sore throats, colds, acne, burns, urinary infections, and more." (Exhibit D)

F. "[P]ropolis is used as an antibiotic by physicians in Europe and Asia, to treat the following conditions: Ulcers, Acne, Tonsilitis [sic], Bleeding, Burns, Sore throats, Urinary infections, [and] Allergies." (Exhibit B)

G. "Doctors find: 15 ulcer patients were treated exclusively with propolis. Only one returned for hospitalization. In the test group using traditional medicine, 11 of 17 returned for hospitalization. A study by Dr. F.K. Feiks, M.D." (Exhibit B)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not

necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that:

A. Consumption of bee pollen is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, and (11) pulse irregularities.

B. Competent and reliable scientific studies have proved that consumption of bee pollen is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, and (6) arteriosclerosis.

C. Bee propolis is an effective antibiotic for human use.

D. Consumption of bee propolis is effective in the mitigation and treatment of numerous diseases and conditions, including: (1) acne, (2) allergies, (3) bleeding, (4) burns, (5) colds, (6) sore throats, (7) tonsillitis, (8) ulcers, and (9) urinary infections.

E. Competent and reliable scientific studies have proved that consumption of bee propolis is effective in the mitigation and treatment of ulcers.

PAR. 6. In truth and in fact:

A. Consumption of bee pollen is not effective in the mitigation or treatment of numerous diseases or conditions including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, or (11) pulse irregularities.

B. Competent and reliable scientific studies have not proved that consumption of bee pollen is effective in the mitigation or treatment of numerous diseases and conditions, including: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, or (6) arteriosclerosis.

C. Bee propolis is not an effective antibiotic for human use.

D. Consumption of bee propolis is not effective in the mitigation or treatment of numerous diseases and conditions including: (1) acne, (2) allergies, (3) bleeding, (4) burns, (5) colds, (6) sore throats, (7) tonsillitis, (8) ulcers, or (9) urinary infections.

E. Competent and reliable scientific studies have not proved that consumption of bee propolis is effective in the mitigation and treatment of ulcers.

Therefore, the representations set forth in paragraph five A. through E. were, and are, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time respondents made the representations set forth in paragraph five, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

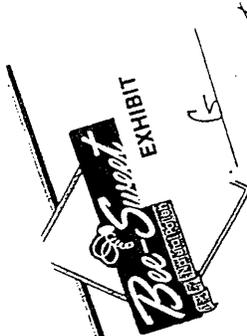




BEE-SWEET, INC., ET AL.

Complaint

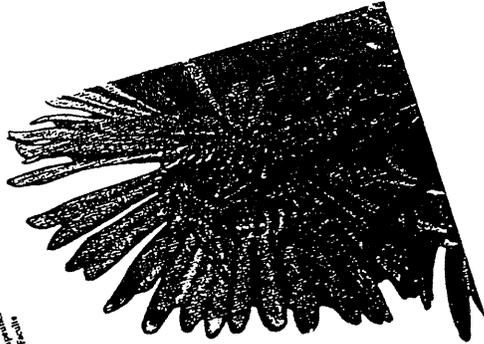
EXHIBIT C



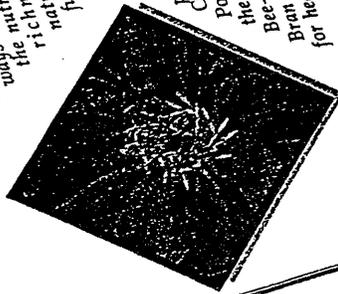
Bee Healthy with Bee-Sweet

Neither a miracle drug nor a magic potion, bee pollen is a natural food substance, packed with vitamins, minerals, Sturites, amino acids and trace around the world performed by doctors to be effective in treating to overweight, fatigue to arteriosclerosis.

From "Pollen" by Dr. Fred C. Moore, M.D., in "The Bee-Sweet" by Dr. Fred C. Moore, M.D., in "The Bee-Sweet" by Dr. Fred C. Moore, M.D.



Buzzing with Velocity  
The makers of Bee-Sweet products are dedicated to bringing you the finest natural products so we're constantly searching for new ways to offer you the richness of nature. Our products from Bee Pollen to Orange polis, Orange Chewable Bee Pollen Tablets, the Grapefruit Diet, Bee-Awake Bran are all formulated for healthful living.



Truck drivers and athletes, with their grueling and hard work, buy our products by the thousands. They are convinced and stamina. Join the people who have started on the road for our health with Bee-Sweet Products. Look for our line of products on sale in restaurants and truck stops across the country.



Robert Moore, Jr.

Not many men get a chance to start life over again after a heart attack, suffering Mr. Moore disabled from a heart attack, shaking, there he blood started to flow, he put food supplements, he had started to grow, he put food supplements, he kept out of two hospitals, he founded Bee-Sweet, he found this secret, he found the healthy benefits to appreciate. To appreciate, he found the healthy benefits to appreciate. To appreciate, he found the healthy benefits to appreciate.

...the makers of Bee-Sweet products are dedicated to bringing you the finest natural products so we're constantly searching for new ways to offer you the richness of nature. Our products from Bee Pollen to Orange polis, Orange Chewable Bee Pollen Tablets, the Grapefruit Diet, Bee-Awake Bran are all formulated for healthful living. Truck drivers and athletes, with their grueling and hard work, buy our products by the thousands. They are convinced and stamina. Join the people who have started on the road for our health with Bee-Sweet Products. Look for our line of products on sale in restaurants and truck stops across the country.



## 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 New York Regional Office 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 respondents have violated the said Act, and that a 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 Bee-Sweet, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office or principal place of business located at 10370 North, NC Highway 150, Clemmons, North Carolina.

Respondent Benny G. Morgan is an officer of said corporation. Individually and in concert with others, he formulates, directs, and controls the acts and practices of corporate respondent. Respondent Benny G. Morgan's business address is 10370 North, NC Highway 150, Clemmons, North Carolina.

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

## ORDER

### DEFINITIONS

For purposes of this order, the following definitions shall apply:

A. "*Bee pollen product*" shall mean any product intended for human consumption or use consisting in whole or in part of bee pollen and/or bee propolis in any form.

B. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

### I.

*It is ordered*, That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any bee pollen product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

A. Consumption of any bee pollen product is effective in the cure or mitigation of: (1) allergies, (2) arthritis, (3) anorexia, (4) obesity, (5) fatigue, (6) arteriosclerosis, (7) anemia, (8) lack of sexual stamina, (9) back pain, (10) digestive disorders, (11) pulse irregularities, (12) acne, (13) bleeding, (14) burns, (15) colds, (16) sore throats, (17) tonsillitis, (18) ulcers, or (19) urinary infections.

B. Any bee pollen product is an effective antibiotic for human use.

## II.

*It is further ordered,* That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or service for human consumption or use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any such product or service for human consumption will have any effect on a user's health or physical condition, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

## III.

*It is further ordered,* That respondents Bee-Sweet, Inc., a corporation, its successors and assigns, and its officer, Benny G. Morgan, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any product or service for human consumption or use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

## IV.

Nothing in this order shall prohibit respondents from making any representation that is specifically permitted in labeling for any bee

pollen product by regulations promulgated by the Food and Drug Administration pursuant to the Nutritional Labeling and Education Act of 1990.

## V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

## VI.

*It is further ordered,* That respondents, or their successors and assigns, within thirty (30) days of the date of service of this order, shall send to each person or company that purchased for resale any bee pollen product from any respondent during the twelve (12) month period preceding the date of issuance of this order, a letter in the form set forth in Appendix I hereto. Each such letter shall be sent via the United States Postal Service, first class mail, postage pre-paid, to the last known address of the intended recipient.

## VII.

*It is further ordered,* That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: .

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

## VIII.

*It is further ordered, That:*

A. Within thirty (30) days of the date of service of this order respondents shall distribute a copy of this order to respondents' officers, agents, representatives, and employees engaged in the marketing or sale of any bee pollen product; and

B. For a period of seven (7) years from the date of service of this order respondents shall distribute a copy of this order to each of respondents' officers, agents, representatives, and employees who become engaged in the marketing or sale of any bee pollen product. Such distribution shall be made within three (3) days of each such person's becoming so engaged.

## IX.

*It is further ordered, That:*

A. Respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, creation or dissolution of a subsidiary, or any other change in the corporation that may affect compliance obligations arising out of this order; and

B. For seven (7) years from the date of service of this order, Benny G. Morgan shall notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his new business or employment the activities of which include the advertising, offering for sale, sale, or distribution of: (1) any bee pollen product or (2) any product or service advertised, offered for sale, sold, or distributed for effect on a user's health or physical condition. Each such notice shall include Benny G. Morgan's new business address and a statement of the nature of the business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with the business or employment.

## X.

*It is further ordered,* That respondents shall, within sixty (60) days of the date of service of this order, file with the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## APPENDIX I

(To be Printed on Bee-Sweet, Inc. Letterhead)

[Date]

Dear Customer,

We at Bee-Sweet have voluntarily entered into an agreement with the Federal Trade Commission ("FTC"). We have agreed to a cease and desist order under which we are writing to each of our purchasers for resale of bee pollen products. The purpose of this letter is to inform you that according to the FTC, health claims previously made by Bee-Sweet for bee pollen products are unsubstantiated by competent and reliable scientific evidence and, according to the FTC, are false.

The FTC order requires that for any representation to be made that a product or service will affect a user's health or physical condition, we must have competent and reliable scientific evidence that substantiates the representation. Bee-Sweet's promotional literature must comply with these FTC requirements.

Sincerely,

Benny G. Morgan  
President  
Bee-Sweet, Inc.

IN THE MATTER OF  
NOTATIONS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3551. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995*

This consent order prohibits, among other things, a Pennsylvania company and its president from misbranding any textile product by mentioning or implying that the product contains a fiber without using the generic fiber name required by the Textile Fiber Products Identification Act and the Federal Trade Commission rules, or by mentioning or implying that it contains a fiber when it, in fact, does not. The respondents also are required to file with the Commission a continuing guaranty applicable to all textile products they handle in the future.

*Appearances*

For the Commission: *Katharine B. Alphin.*

For the respondents: *Debra Klebanoff, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, PA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Notations, Inc., a corporation, and Kurt Erman, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Notations, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and

principal place of business located at 109 Pike Circle, Huntingdon Valley, Pennsylvania.

PAR. 2. Respondent Kurt Erman is sole shareholder and president of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His office and principal place of business are the same as that of respondent Notations, Inc.

PAR. 3. Respondent Notations, Inc., is engaged in the manufacture, importation and sale of women's blouses.

PAR. 4. Respondents have in the past and presently continue to import, sell and introduce into commerce textile fiber products and otherwise have been engaged in commerce with textile fiber products as "commerce" and "textile fiber products" are defined in the Textile Fiber Act and the Rules and Regulations under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," as promulgated by the Federal Trade Commission.

PAR. 5. Certain of said textile products were misbranded by the respondents within the intent and meaning of Sections 3(a), 3(b), 3(c) and 4(a), 15 U.S.C. 70a(a), 70a(b), 70a(c), and 70b(a), of the Textile Fiber Act and Rules 16(c), 17 and 18, 16 CFR 303.16(c), 303.17 and 303.18, thereunder, in that on a hangtag attached to blouses made of 100% polyester, respondents used a trade name, "Micro Silk," thereby supplying non-required information that conflicted with the required disclosure of fiber content. The use of this trade name was false and deceptive, and stated or implied the blouses contained a fiber not present therein. Respondents have, therefore, violated Section 3 of the Textile Fiber Act, 15 U.S.C. 70a, and Rule 2, 16 CFR 303.2. The sections of the Textile Fiber Act and Rules referred to in this paragraph five and paragraph six hereafter are attached hereto as Appendix A and incorporated herein as if fully set forth verbatim.

PAR. 6. The acts and practices of respondents as set forth in paragraph five were, and are, in violation of the Textile Fiber Act and the Rules promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a), as amended.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in

substantial competition in or affecting commerce with corporations, firms and individuals engaged in the importation, manufacture and sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 8. The acts and practices of respondents, as herein alleged, were and are to the prejudice and injury of the public and respondents' competitors. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

#### APPENDIX A

##### TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

###### Misbranding and False Advertising Declared Unlawful 15 U.S.C. 70a.

(a) The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of sections 70 to 70k of this title or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

\* \* \*

Complaint

119 F.T.C.

Misbranding and False Advertising of Textile Fiber Products  
15 U.S.C. 70b.

(a) Except as otherwise provided in sections 70 to 70k of this title, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

\*\*\*

RULES AND REGULATIONS UNDER  
THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACT  
16 CFR 303

Rule 2 - General requirements.  
[16 CFR 303.2]

(a) Each textile fiber product, except those exempted or excluded under section 12 of the Act, shall be labeled or invoiced in conformity with the requirements of the Act and regulations.

(b) Any advertising of textile fiber products subject to the Act shall be in conformity with the requirements of the Act and regulations.

(c) The requirements of the Act and regulations shall not be applicable to products required to be labeled under the Wool Products Labeling Act of 1939 (Pub. L. 76-850, 15 U.S.C. 68, 54 Stat. 1128).

(d) Any person marketing or handling textile fiber products who shall cause or direct a processor or finisher to label, invoice, or otherwise identify any textile fiber product with required information shall be responsible under the Act and regulations for any failure of compliance with the Act and regulations by reason of any statement or omission in such label, invoice, or other means of identification utilized in accordance with his direction: Provided, That nothing herein shall relieve the processor or finisher of any duty or liability to which he may be subject under the Act and regulations.

Rule 16 - Arrangement and disclosure of information on labels.  
[16 CFR 303.16(c)]

(c) Subject to the provisions of Section 303.17 of this part, if non-required information or representations are placed on the label or elsewhere on the product, such non-required information or representation shall be set forth separate and apart from the required information and shall not interfere with, minimize, detract from, or conflict with such required information, nor shall such non-required information in any way be false or deceptive as to fiber content.

Rule 17 - Use of fiber trademarks and generic names on labels.  
[16 CFR 303.17]

(a) A non-deceptive fiber trademark may be used on a label in conjunction with the generic name of the fiber to which it relates. Where such a trademark is placed on a label in conjunction with the required information, the generic name of the fiber must appear in immediate conjunction therewith, and such trademark and generic name must appear in type or lettering of equal size and conspicuousness.

(b) Where a generic name or a fiber trademark is used on any label, whether required or non-required, a full and complete fiber content disclosure shall be made in accordance with the Act and regulations the first time the generic name or fiber trademark appears on the label.

(c) If a fiber trademark is not used in the required information, but is used elsewhere on the label as non-required information, the generic name of the fiber shall accompany the fiber trademark in legible and conspicuous type or lettering the first time the trademark is used.

(d) No fiber trademark or generic name shall be used in non-required information on a label in such a manner as to be false, deceptive, or misleading as to fiber content, or to indicate directly or indirectly that a textile fiber product is composed wholly or in part of a particular fiber, when such is not the case.

Rule 18 - Terms implying fibers not present.  
[16 CFR 303.18, as amended, effective October 25, 1965.]

Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.

#### 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 Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and of the Rules and Regulations Under the Textile Fiber Products Identification Act, 16 CFR 303, hereinafter "Rule(s)," and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*; 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 the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 respondents have violated the said acts and rules, 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 Notations, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 109 Pike Circle, Huntingdon Valley, Pennsylvania.

2. Respondent Kurt Erman is the sole shareholder and president of Notations, Inc. He formulates, directs and controls the policies, acts and practices of said corporation, and his office and principal place of business are the same as Notations, Inc.

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

#### ORDER

##### I.

*It is ordered,* That respondents Notations, Inc., a corporation, its successors and assigns, and its officers, and Kurt Erman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any

corporation, subsidiary, division or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product, as "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, 15 U.S.C. 70, hereinafter "Textile Fiber Act," and the Rules and Regulations under the Textile Fiber Products Identification Act, 16 U.S.C. 303, hereinafter "Rule(s)," do forthwith cease and desist from misbranding or falsely or deceptively advertising any such product by:

A. Mentioning or implying fiber content without using the generic fiber names in a manner consistent with the Textile Fiber Act and the Rules thereunder; and

B. Mentioning or implying fiber content for a fiber that is not present in such textile fiber product.

## II.

*It is further ordered,* That respondents shall forthwith file with the Commission a continuing guaranty applicable to all textile products handled by respondents, in the form prescribed by Rule 38, 16 CFR 303.38.

## III.

*It is further ordered,* That respondent Notations, Inc., shall:

A. For a period of five (5) years after the service of this order, keep copies of each stamp, tag, label or other form of identification that shows information required by the Textile Fiber Act as well as such records as will show the textile fiber products in which each stamp, tag, label or other form of identification was affixed for each product it introduces, manufactures for introduction, sells, advertises, offers for sale or imports; and

B. For a period of five (5) years after the service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, the documents in paragraph

III.A. above and such other documents and materials as shall demonstrate full compliance with this order.

IV.

*It is further ordered,* That respondent Notations, Inc., shall within thirty (30) days after the date of service of this order, provide a copy of this order to each of its current directors and officers, and to each employee, agent and representative having managerial, purchasing, importing, sales, advertising, or policy responsibility with respect to the subject matter of this order.

V.

*It is further ordered,* That respondent, Notations Inc., shall, in writing, notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other such change in the corporation that may affect compliance obligations arising out of the order.

VI.

*It is further ordered,* That, for a period of five (5) years from the date of service of this order, respondent Kurt Erman shall, in writing, notify the Federal Trade Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with a new business or employment, each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment.

VII.

*It is further ordered,* That respondents shall, within sixty (60) days after the date of service of this order, submit a verified report in writing, to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

NEW ENGLAND JUVENILE RETAILERS ASSOCIATION, ET AL.

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

*Docket C-3552. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995*

This consent order prohibits, among other things, a Massachusetts association of retailers from combining, agreeing or conspiring to: fix or maintain prices or the terms of sale for juvenile products; engage in or threaten boycotts in order to influence a manufacturer's decision as to how or to whom it distributes its products; or use coercion by means of actual or threatened refusals to deal in order to compel a juvenile products manufacturer to adopt or refrain from adopting any marketing method for its products. The consent order also requires the dissolution of the association within sixty days and requires the association to send a letter, acknowledging the consent order with the Commission and outlining its terms, to the manufacturers it allegedly threatened to boycott.

*Appearances*

For the Commission: *Phoebe D. Morse, Gary S. Cooper and Mary Lou Steptoe.*

For the respondents: *Arthur Goldberg, Nathanson & Goldberg, Boston, MA. and Robert Colby, Alexandria, VA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named above have violated the provisions of Section 5 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, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent New England Juvenile Retailers Association ("NEJRA") is an unincorporated association of retailers of juvenile products doing business in New England, with an office

and principal place of business located in Boston, Massachusetts. The NEJRA's designated agent is Arthur Goldberg, Esq., c/o Nathanson & Goldberg, 10 Union Wharf, Boston, Massachusetts.

PAR. 2. Respondents Elliot Young ("E. Young") and Susan Young ("S. Young") have done business as and are proprietors of The Baby Place, Inc., a retail store engaged in the sale of juvenile products, with a principal place of business located at 50 Worcester Road, Natick, Massachusetts. Individually or in concert with others, they formulate, direct, control and participate in the acts and practices of The Baby Place, Inc., including the acts and practices of said proprietorship alleged in this complaint. Their principal offices or places of business are the same as that of The Baby Place, Inc.

PAR. 3. Respondent Baby's Room, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office located at 20 Garden Street, Danvers, Massachusetts. Baby's Room, Inc. is engaged in the business of the retail sale of juvenile products.

Respondent Stephen Brass ("Brass") is president of respondent Baby's Room, Inc. Individually or in concert with others, he formulates, directs, controls and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 4. Respondent Baby Specialties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Grove Street, Worcester, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Baby Specialties of Natick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1276 Worcester Road, Natick, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent George Koury ("Koury") is treasurer of respondents Baby Specialties, Inc. and Baby Specialties of Natick, Inc. Individually or in concert with others, he formulates, directs, controls and participates in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this

complaint. His principal office or place of business is 100 Grove Street, Worcester, Massachusetts.

PAR. 5. Respondent Boston Baby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 30 Tower Road, Newton, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Boston Baby of Avon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 15 Stockwell Drive, Avon, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Boston Baby of Hingham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Derby Street, Hingham, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Michael Slobodkin ("M. Slobodkin") is treasurer of respondents Boston Baby, Inc., Boston Baby of Avon, Inc., and Boston Baby of Hingham, Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this complaint. His principal office or place of business is located at 30 Tower Road, Newton, Massachusetts.

PAR. 6. Respondent Chapin Specialties Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1140 Main Street, Springfield, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

Respondent Allan Broverman ("Broverman") is president of respondent Chapin Specialties Co., Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal

office or place of business is the same as that of the corporate respondent.

PAR. 7. Respondent Crib-N-Cradle Juvenile Furniture Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1000 Bald Hill Road, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

Respondent Louis Avarista, Sr. ("Avarista") is president and treasurer of respondent Crib-N-Cradle Juvenile Furniture Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 8. Respondent Cribs And Cradles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Cribs And Cradles, Inc. maintained an office and principal place of business located at 623 Broadway, Route 1, Saugus, Massachusetts, where, until approximately January 1992, it was engaged in the business of the retail sale of juvenile products.

Respondent Robert Newhouse ("Newhouse") is president and treasurer of respondent Cribs And Cradles, Inc. Individually or in concert with others, he formulated, directed, controlled, and participated in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. Mr. Newhouse resides at 34 Garvey Road, Framingham, Massachusetts.

PAR. 9. Respondent Juveniles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Juveniles, Inc. maintained an office and principal place of business located at 8 Bourbon Street, W. Peabody, Massachusetts, where, until approximately May 1, 1991, it was engaged in the business of the retail sale of juvenile products.

Respondent Waltham Slumber Shop, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Waltham Slumber Shop, Inc. maintained an office and principal place of business located at 879 Main Street, Waltham, Massachusetts, where, until approximately

May 1, 1992, it was engaged in the business of the retail sale of juvenile products.

Respondent Timothy Precourt ("Precourt") is president of respondents Juveniles, Inc. and Waltham Slumber Shop, Inc. Individually or in concert with others, he formulated, directed, controlled, and participated in the acts and practices of the corporate respondents, including the acts and practices of said respondents alleged in this complaint. Mr. Precourt resides at 998 Summer Street, Lynnfield, Massachusetts.

PAR. 10. Respondent Normand Poirier is an individual trading and doing business as Norm's Discount, with an office and principal place of business located at 55 Airport Road, Fitchburg, Massachusetts, where he is engaged in the business of the retail sale of juvenile products. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of Norm's Discount, including the acts and practices of said proprietorship alleged in this complaint. His principal office or place of business is the same as that of Norm's Discount.

PAR. 11. Respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 117 Chestnut Street, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

Respondent Henry Ritchotte ("Ritchotte") is manager of the Warwick, Rhode Island, store of respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 12. Respondent Tiny Totland, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 1111 Elm Street, Manchester, New Hampshire, where it is engaged in the business of the retail sale of juvenile products.

Respondent Jack Resnick ("Resnick") is president of respondent Tiny Totland, Inc. Individually or in concert with others, he formulates, directs, controls, and participates in the acts and practices

of the corporate respondent, including the acts and practices of said respondent alleged in this complaint. His principal office or place of business is the same as that of the corporate respondent.

PAR. 13. Respondent Rudolph Mosesso ("R. Mosesso") is an individual whose address is 132 Pine Street, Holbrook, Massachusetts. Mr. Mosesso was president of Welcome Baby Boutique Inc., a corporation that was organized, existed and did business under and by virtue of the laws of the Commonwealth of Massachusetts until approximately April 27, 1993, when it was formally dissolved. While it was in operation, Welcome Baby Boutique Inc. maintained an office and principal place of business located at 1500 Main Street, S. Weymouth, Massachusetts, where it was engaged in the business of the retail sale of juvenile products. Individually or in concert with others, respondent R. Mosesso formulated, directed, controlled, and participated in the acts and practices of Welcome Baby Boutique Inc., including the acts and practices of said corporation alleged in this complaint.

PAR. 14. At all times relevant to this complaint, the corporations and proprietorships named above were members of respondent NEJRA. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, members of respondent NEJRA are or were in competition among themselves and with other retailers of juvenile products in New England.

PAR. 15. Respondent NEJRA is, and has been at all times relevant to this complaint, organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 16. Respondents' general businesses or activities, including the acts and practices described below, are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 17. New Hampshire Buyer's Service, Inc. ("NHBS") operates a mail order catalog through which it sells juvenile products at discount prices up to 20-40 % below juvenile specialty store prices.

PAR. 18. In June 1990, NHBS began distributing its mail order catalog to consumers located in respondent retailers' trade areas. During December 1990, in response to the distribution of the NHBS catalog in their trade areas, the respondents named above met in Braintree, Massachusetts, with counsel present. They discussed the NHBS catalog and the economic impact it was having on their

individual businesses. As a result of this discussion, they agreed to act in concert to restrict the competition they faced from the NHBS catalog. In furtherance of this plan, they agreed to form respondent NEJRA. They also agreed to send letters to certain manufacturers whose products were in the NHBS catalog to complain about the "unfair competition" the catalog posed to their individual businesses.

PAR. 19. Pursuant to the agreements arrived at during the above-referenced meeting, on December 27, 1990, respondents, through their attorney, sent letters to thirteen manufacturers of juvenile products. All but one of these manufacturers distributed their products through the NHBS catalog. The letters directly or impliedly threatened that respondent NEJRA and its individual members would refuse to deal with these manufacturers if they continued to do business with NHBS or with retail stores affiliated with NHBS.

PAR. 20. By engaging in the acts and practices described in paragraphs eighteen and nineteen, respondents have combined or conspired with each other to threaten to boycott juvenile product manufacturers that do business with the NHBS mail order catalog, and otherwise to restrain competition among retailers of juvenile products in the New England area.

PAR. 21. The actions of respondents described in paragraphs eighteen through twenty have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition among members of respondent NEJRA;

B. By restraining competition between respondent NEJRA's members and other retailers of juvenile products, including the NHBS mail order catalog;

C. By restraining the ability of manufacturers of juvenile products to distribute their products through mail order catalogs; and

D. By depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of juvenile products.

PAR. 22. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such

combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondents of appropriate relief.

#### 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 complaint which the Boston Regional Office 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 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 thereafter considered the matter and having determined that it had reason to believe that the respondents have 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 New England Juvenile Retailers Association ("NEJRA") is an unincorporated association of retailers of juvenile products doing business in New England, with an office and principal place of business located in Boston, Massachusetts.

2. Respondents Elliot Young ("E. Young") and Susan Young ("S. Young") have done business as and are proprietors of The Baby Place, Inc., a retail store engaged in the sale of juvenile products. Their principal offices or places of business are 50 Worcester Road, Natick, Massachusetts.

3.(a) Respondent Baby's Room, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office located at 20 Garden Street, Danvers, Massachusetts. Baby's Room, Inc. is engaged in the business of the retail sale of juvenile products.

(b) Respondent Stephen Brass ("Brass") is president of proposed respondent Baby's Room, Inc. His principal office is located at 20 Garden Street, Danvers, Massachusetts.

4.(a) Respondent Baby Specialties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Grove Street, Worcester, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Baby Specialties of Natick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1276 Worcester Road, Natick, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(c) Respondent George Koury ("Koury") is treasurer of proposed respondents Baby Specialties, Inc. and Baby Specialties of Natick, Inc. His principal office or place of business is 100 Grove Street, Worcester, Massachusetts.

5.(a) Respondent Boston Baby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 30 Tower Road, Newton, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Boston Baby of Avon, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 15 Stockwell Drive, Avon, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(c) Respondent Boston Baby of Hingham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 100 Derby Street, Hingham,

Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(d) Respondent Michael Slobodkin ("M. Slobodkin") is treasurer of proposed respondents Boston Baby, Inc., Boston Baby of Avon, Inc., and Boston Baby of Hingham, Inc. His principal office or place of business is located at 30 Tower Road, Newton, Massachusetts.

6.(a) Respondent Chapin Specialties Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 1140 Main Street, Springfield, Massachusetts, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Allan Broverman ("Broverman") is president of proposed respondent Chapin Specialties Co., Inc. His principal office or place of business is 1140 Main Street, Springfield, Massachusetts.

7.(a) Respondent Crib-N-Cradle Juvenile Furniture Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 1000 Bald Hill Road, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Louis Avarista, Sr. ("Avarista") is president and treasurer of proposed respondent Crib-N-Cradle Juvenile Furniture Inc. His principal office or place of business is 1000 Bald Hill Road, Warwick, Rhode Island.

8.(a) Respondent Cribs And Cradles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Cribs And Cradles, Inc. maintained an office and principal place of business located at 623 Broadway, Route 1, Saugus, Massachusetts, where, until approximately January 1992, it was engaged in the business of the retail sale of juvenile products.

(b) Respondent Robert Newhouse ("Newhouse") is president and treasurer of proposed respondent Cribs And Cradles, Inc. Mr. Newhouse resides at 34 Garvey Road, Framingham, Massachusetts.

9.(a) Respondent Juveniles, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Juveniles, Inc. maintained an office and principal place of business located at 8 Bourbon Street, W. Peabody,

Massachusetts, where, until approximately May 1, 1991, it was engaged in the business of the retail sale of juvenile products.

(b) Respondent Waltham Slumber Shop, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts. Waltham Slumber Shop, Inc. maintained an office and principal place of business located at 879 Main Street, Waltham, Massachusetts, where, until approximately May 1, 1992, it was engaged in the business of the retail sale of juvenile products.

(c) Respondent Timothy Precourt ("Precourt") is president of proposed respondents Juveniles, Inc. and Waltham Slumber Shop, Inc. Mr. Precourt resides at 998 Summer Street, Lynnfield, Massachusetts.

10. Respondent Normand Poirier is an individual trading and doing business as Norm's Discount. Mr. Poirier maintains an office and principal place of business located at 55 Airport Road, Fitchburg, Massachusetts, where he is engaged in the business of the retail sale of juvenile products.

11.(a) Respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 117 Chestnut Street, Warwick, Rhode Island, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Henry Ritchotte ("Ritchotte") is manager of the Warwick, Rhode Island, store of proposed respondent Small Wonders Limited, Inc. d/b/a Rooms to Grow. His principal office or place of business is 117 Chestnut Street, Warwick, Rhode Island.

12.(a) Respondent Tiny Totland, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire, with its office and principal place of business located at 1111 Elm Street, Manchester, New Hampshire, where it is engaged in the business of the retail sale of juvenile products.

(b) Respondent Jack Resnick ("Resnick") is president of proposed respondent Tiny Totland, Inc. His principal office or place of business is 1111 Elm Street, Manchester, New Hampshire.

13. Respondent Rudolph Mosesso ("R. Mosesso") is an individual whose address is 132 Pine Street, Holbrook, Massachusetts. Mr. Mosesso was president of Welcome Baby

Boutique Inc., a corporation that was organized, existed and did business under and by virtue of the laws of the Commonwealth of Massachusetts until approximately April 27, 1993, when it was formally dissolved. While it was in operation, Welcome Baby Boutique Inc. maintained an office and principal place of business located at 1500 Main Street, S. Weymouth, Massachusetts, where it was engaged in the business of the retail sale of juvenile products.

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

#### ORDER

For purposes of this order, the following definitions shall apply:

A. "*New England Juvenile Retailers Association*" means New England Juvenile Retailers Association, and its directors, committees, officers, representatives, agents, employees, successors and assigns.

B. "*Retailer respondents*" means the corporate and individual respondents named in paragraphs two through thirteen of the complaint.

C. "*Juvenile products*" means products or accessories to products that are used by or are intended for use by babies, children or juveniles.

#### I.

*It is ordered*, That each retailer respondent, directly or indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue any combination, agreement or understanding, express or implied, with any other retailer respondent(s), or with any competing retailer(s) of juvenile products, to:

A. Fix, maintain, or stabilize prices, or terms or conditions of sale of juvenile products;

B. Take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s); and

C. Coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, or attempt to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s).

Provided that this order shall not be construed to prohibit any individual retailer respondent from becoming or remaining a member of a *bona fide* trade association, buying cooperative, or joint venture, or from participating in any such organization's activities that are lawful under the antitrust laws.

## II.

*It is further ordered*, That the retailer respondents shall dissolve the New England Juvenile Retailers Association within sixty (60) days after the date on which this order becomes final.

## III.

*It is further ordered*, That respondent New England Juvenile Retailers Association shall:

A. Within thirty (30) days after the date on which this order becomes final, and prior to the dissolution provided for in paragraph II of this order, mail to each manufacturer enumerated in "Appendix A" to this order a copy of the Commission's complaint and order in this matter and a letter, on the letterhead of its attorney, Arthur Goldberg, Esq., and signed by each of the respondent retailers, in the form shown as "Appendix B" to this order; and

B. Within sixty (60) days after the date on which this order becomes final, and prior to the dissolution provided for in paragraph II of this order, file a verified written report demonstrating how it has complied with paragraph III.A. of this order.

## IV.

*It is further ordered, That:*

A. Each retailer respondent that is a corporation shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

B. For a period of five (5) years after this order becomes final, each retailer respondent that is an individual shall notify the Commission in writing of each new affiliation with a business or employment, including self-employment, within seven (7) calendar days of such affiliation or employment. Each such notice shall include the individual retailer respondent's current business address and a statement of the nature of the business affiliation or employment which defines his/her duties and responsibilities in connection with such business affiliation or employment.

## V.

*It is further ordered, That,* within ninety (90) days after the date on which this order becomes final, the retailer respondents shall file with the Commission a verified written report setting forth in detail the manner and form in which they have complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission or its staff may, by written notice to the retailer respondents, require.

Commissioner Azcuenaga dissenting.

APPENDIX A

Aprica U.S.A., Inc.  
P.O. Box 25408 - Zip 92825-5408  
1200 Howell Avenue  
Anaheim, CA 92805  
Attn: Douglas W. Dolansky, Executive  
Vice President

Bandaks Emmaljunga Incorporated  
737 South Vinewood Street  
Escondido, CA 92029  
Attn: Sami Bandak, President

Bassett Furniture Industries, Inc.  
P.O. Box 626  
Bassett, VA 24055  
Attn: R. H. Spilman, President

Carlson Children's Products, Inc.  
122 Kirkland Circle  
Oswego, IL 60543  
Attn: Mark Flannery, President

Century Products Company  
9600 Valley View Road  
Macedonia, OH 44056-9989  
Attn: Frank Rumpelton, President

Child Craft Industries, Inc.  
P.O. Box 444  
Salem, IN 47167-0444  
Attn: David E. Branaman, President

COMBI International Corporation  
1401 N. Wood Dale Road  
Wood Dale, IL 60191  
Attn: Takashi Osato, President

Dutalier, Inc.  
298 Chaput St. Pie  
Quebec, CANADA J0H 1W0  
Attn: Pierre Cloutier, President

Graco Children's Products, Inc.  
Rt 23, Main Street  
Elverson, PA 19520  
Attn: Derial Sanders, President

Lambs & Ivy  
5978 Bowcroft Street  
Los Angeles, CA 90016-4302  
Attn: Barbara Laiken, President

Noel Joanna Inc.  
22942 Arroyo Vista  
Rancho Santa Margarita, CA 92688  
Attn: Shirley A. Pepys, President

The Red Calliope & Associates, Inc.  
13003 South Figueroa Street  
Los Angeles, CA 90061  
Attn: Neil Fohrman, President

Simmons Juvenile Products Co.  
613 E. Beacon Avenue  
P.O. Box 287  
New London, WI 54961  
Attn: John Moeller, President

## APPENDIX B

Dear \_\_\_\_\_

As you may be aware, the Federal Trade Commission ("FTC") has been investigating certain activities of the New England Juvenile Retailers Association ("NEJRA") and its member retailers. The NEJRA has voluntarily entered into an agreement with the FTC which resulted in the issuance by the FTC on (date) of a complaint and the entry of a consent order. The order requires that you be sent a copy of the complaint, the order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that NEJRA will be dissolved. In addition, among other things, the retailers that were members of the NEJRA will cease and desist from entering into any agreement or understanding, express or implied, with any other retailer respondent(s), or with any competing retailer(s) of juvenile products, to:

A. Fix, maintain, or stabilize prices, or terms or conditions of sale of juvenile products;

B. Take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s); and

C. Coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, or attempt to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s).

A copy of the complaint and the order are enclosed.

Sincerely,

\_\_\_\_\_  
Arthur Goldberg, Esq.  
Attorney for the NEJRA

Signatures of Members  
Enclosures

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

In these cases, two trade associations complained to manufacturers about free riding by a catalogue seller, and the Commission charges them and the retailer members of one association with directly or impliedly threatening a concerted refusal to deal with the manufacturers. Although the letters of complaint were ill-advised, evidence that the retailers (many of whom were not represented by counsel during our investigation) were committed "to a common scheme designed to achieve an unlawful objective"<sup>1</sup> (*i.e.*, a coercive, concerted refusal to deal) is thin at best. Given the dearth of evidence of unlawful agreement, the arguably procompetitive purpose, and the absence both of market power and of anticompetitive effects, I do not find reason to believe that the challenged conduct unreasonably restrained trade or that the imposition of an order is in the interest of the public. I dissent.

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<sup>1</sup> *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).

Complaint

119 F.T.C.

IN THE MATTER OF

BABY FURNITURE PLUS ASSOCIATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION  
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3553. Complaint, Jan. 18, 1995--Decision, Jan. 18, 1995*

This consent order prohibits, among other things, an Alabama-based buying cooperative and trade association from taking any action on behalf of its members, or encouraging them to take any action, that interferes with a juvenile product manufacturer's decision as to how or to whom to distribute its products. The consent order also prohibits the respondent from coercing -- by means of actual or threatened refusals to deal -- any juvenile products manufacturer to abandon or adopt -- or to refrain from abandoning or adopting -- any marketing method for its products.

*Appearances*

For the Commission: *Phoebe D. Morse* and *Gary S. Cooper*.

For the respondent: *Jack Sanders, Sanders & McDermott*,  
Hampton, N.H.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Baby Furniture Plus Association, Inc., hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 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, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Baby Furniture Plus Association, Inc. ("BFP AI") is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Suite 1, 1020 Montgomery Highway, Birmingham, Alabama.

Respondent is a voluntary association of retailers of juvenile products doing business in approximately twenty-five States.

PAR. 2. Respondent is a corporation organized for the purpose, among others, of serving the interests of its members by associating them into a practical business organization and is engaged in substantial activities that further its members' pecuniary interests. By virtue of its purposes 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. 3. Respondent's members are engaged in the business of the retail sale of juvenile products. Except to the extent that competition has been restrained herein, respondent's members have been and are now in competition with other retailers of juvenile products in various States of the United States.

PAR. 4. The acts and practices of the BFPAL, including those alleged herein, are in commerce or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. New Hampshire Buyer's Service, Inc. ("NHBS") operates a mail order catalog through which it sells juvenile products at discount prices up to 20-40 % below juvenile specialty store prices.

PAR. 6. In June 1990, NHBS began distributing its mail order catalog to consumers located in the trade areas of some of respondent's members. At a general meeting of the membership on April 9, 1991, respondent's administrator circulated a copy of the NHBS catalog to respondent's members. Following a discussion of the NHBS catalog and the economic impact it was having on some of the members' individual businesses, the BFPAL's members agreed to act in concert to restrict the competition that some of the members faced from the NHBS catalog. In furtherance of this plan, the members agreed to send letters to certain manufacturers whose products were in the NHBS catalog to complain about NHBS's price discounting.

PAR. 7. Pursuant to the agreements arrived at during the above-referenced meeting, on April 22, 1991, respondent sent letters to thirty-seven manufacturers of juvenile products. All but two of these manufacturers distributed their products through the NHBS catalog. The letters directly or impliedly threatened that respondent BFPAL and its individual members would refuse to deal with these manufacturers if they continued to do business with NHBS.

PAR. 8. By engaging in the acts and practices described in paragraphs six and seven, respondent has combined or conspired with at least some of its members to threaten to boycott juvenile product manufacturers that do business with the NHBS mail order catalog, and otherwise to restrain competition among retailers of juvenile products in various States of the United States.

PAR. 9. The actions of respondent described in paragraphs six through eight have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. By restraining competition between respondent BFPAI's members and other retailers of juvenile products, including the NHBS mail order catalog;

B. By restraining the ability of manufacturers of juvenile products to distribute their products through mail order catalogs; and

C. By depriving consumers of the benefits of additional price, quality and service competition in connection with the purchase and sale of juvenile products.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondent of appropriate relief.

Commissioner Azcuenaga dissenting.

#### 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 complaint which the Boston 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, by its duly authorized officer, 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 Baby Furniture Plus Association, Inc. is a voluntary association of retailers of juvenile products, and is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Suite 1, 1020 Montgomery Highway, Birmingham, Alabama.

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

For purposes of this order, the following definitions shall apply:

A. "*Baby Furniture Plus Association, Inc.*" means Baby Furniture Plus Association, Inc., and its directors, committees, officers, representatives, agents, employees, successors and assigns.

B. "*Juvenile products*" means products or accessories to products that are used by or are intended for use by babies, children or juveniles.

## I.

*It is ordered*, That BFP AI, directly, indirectly, or through any corporate or other device, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, forthwith cease and desist from:

A. Taking any action, directly or indirectly, on behalf of its members, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s);

B. Coercing, compelling, inducing, or intimidating by means of actual or threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s); and

C. Requesting, urging, recommending or suggesting that BFP AI members take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s).

Provided that this order shall not be construed to prevent BFP AI from engaging in trade association or buying cooperative activities that are lawful under the antitrust laws.

## II.

*It is further ordered*, That BFP AI shall:

A. Distribute by first-class mail a copy of this order and the accompanying complaint to each of BFP AI's members within thirty (30) days after the date on which this order becomes final;

B. For a period of five (5) years after the date on which this order becomes final, provide each new BFP AI member with a copy of this

order and the accompanying complaint at the time the member is accepted for membership; and

C. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail to each manufacturer enumerated in "Appendix A" to this order a copy of the Commission's complaint and order in this matter and a letter, on BFP AI letterhead and signed by BFP AI's president, in the form shown as "Appendix B" to this order.

### III.

*It is further ordered,* That, for a period of five (5) years after this order becomes final, BFP AI shall maintain in its files a copy of the minutes of each meeting of its membership and of each meeting of its board of directors and a copy of all correspondence received from, or sent to, any mail order dealer of juvenile products, any manufacturer of juvenile products, or any association representing manufacturers of juvenile products and that such copies of minutes and correspondence be made available to Commission staff for inspection and copying upon reasonable notice.

### IV.

*It is further ordered,* That, within sixty (60) days after the date on which this order becomes final, BFP AI shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied with this order. Thereafter, additional reports shall be filed at such other times as the Commission or its staff may, by written notice to BFP AI, require.

### V.

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

Commissioner Azcuenaga dissenting.

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## APPENDIX A

A.D.I. Lamps  
P.O. Box 6357  
Phoenix, AZ 85005  
Attn: National Sales Manager

Aprica U.S.A., Inc.  
P.O. Box 25408 - Zip 92825-5408  
1200 Howell Avenue  
Anaheim, CA 92805  
Attn: National Sales Manager

Baby Trend, Inc.  
1928 W. Holt Avenue  
Pomona, CA 91768  
Attn: National Sales Manager

Bandaks Emmaljunga Incorporated  
737 South Vinewood Street  
Escondido, CA 92029  
Attn: National Sales Manager

Bassett Furniture Industries, Inc.  
P.O. Box 626  
Bassett, VA 24055  
Attn: National Sales Manager

Carlson Children's Products, Inc.  
122 Kirkland Circle  
Oswego, IL 60543  
Attn: National Sales Manager

Century Products Company  
9600 Valley View Road  
Macedonia, OH 44056-9989  
Attn: National Sales Manager

Chicco Artsana of America  
200 Fifth Ave., Rm 910  
New York, NY 10010  
Attn: National Sales Manager

Child Craft Industries, Inc.  
P.O. Box 444  
Salem, IN 47167-0444  
Attn: National Sales Manager

Children on the Go  
1670 S. Wolf Road  
Wheeling, IL 60090  
Attn: National Sales Manager

Cosco, Inc.  
2525 State St.  
Columbus, IN 47201  
Attn: National Sales Manager

Dutalier, Inc.  
298 Chaput St. Pie  
Quebec, Canada JOH 1WO  
Attn: National Sales Manager

Evenflo Juvenile Furniture Co.  
1801 Commerce Drive  
Piqua, OH 45356  
Attn: National Sales Manager

FBS, Inc.  
1071 Batesville Rd.  
Greer, SC 29650  
Attn: National Sales Manager

Fisher-Price, Inc.  
636 Girard Ave.  
East Aurora, NY 14052  
Attn: National Sales Manager

Gerry Baby Products  
12520 Grant Drive  
Denver, CO 80233  
Attn: National Sales Manager

Glenna Jean Mfg.  
P.O. Box 2187  
Petersburg, VA 23804  
Attn: National Sales Manager

Graco Children's Products, Inc.  
Rt 23, Main St.  
Elverson, PA 19520  
Attn: National Sales Manager

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Jolly Jumper  
P.O. Box M  
Woonsocket, RI 22895  
Attn: National Sales Manager

Lambs & Ivy  
5978 Bowcroft St.  
Los Angeles, CA 90016  
Attn: National Sales Manager

The Little Tikes Co.  
2180 Barlow Rd.  
Hudson, OH 44236  
Attn: National Sales Manager

Newborne Company  
River Rd.  
Worthington, MA 01098  
Attn: National Sales Manager

Noel Joanna Inc.  
22942 Arroyo Vista  
Rancho Santa Margarita, CA 92688  
Attn: National Sales Manager

Nu-Line  
214 Nu-Line St.  
Suring, WI 54174  
Attn: National Sales Manager

Omron Marshall Products  
600 Barclay Blvd.  
Lincolnshire, IL 60069  
Attn: National Sales Manager

Pansy Ellen Products  
1245 Old Alpharetta Rd.  
Alpharetta, GA 30202  
Attn: National Sales Manager

Perego, USA  
3625 Independence Drive  
Fort Wayne, IN 46808  
Attn: National Sales Manager

Prince Lionheart  
3070 Skyway Dr., Bldg. 502  
Santa Maria, CA 93455  
Attn: National Sales Manager

The Red Calliope & Associates, Inc.  
13003 S. Figueroa St.  
Los Angeles, CA 90061  
Attn: National Sales Manager

Rochelle Furniture  
722 North Market St.  
Duncannon, PA 17020  
Attn: National Sales Manager

Safety 1st, Inc.  
210 Boylston St.  
Chestnut Hill, MA 02167  
Attn: National Sales Manager

Sandbox Industries  
P.O. Box 477  
Tenafly, NJ 07670  
Attn: National Sales Manager

Sassy, Inc.  
1534 College SE  
Grand Rapids, MI 49507  
Attn: National Sales Manager

Simmons Juvenile Products Co.  
613 E. Beacon Avenue  
New London, WI 54961  
Attn: National Sales Manager

Snugli, Inc.  
12520 Grant Drive  
Denver, CO 80233  
Attn: National Sales Manager

Summer Infant Products  
33 Meeting Street  
Cumberland, RI 02864  
Attn: National Sales Manager

Welsh Company  
1535 S. Eighth St.  
St. Louis, MO 63104  
Attn: National Sales Manager

## APPENDIX B

Dear \_\_\_\_\_

As you may be aware, the Federal Trade Commission ("FTC") has been investigating certain activities of the Baby Furniture Plus Association, Inc. ("BFPAI"). The BFPAI has voluntarily entered into an agreement with the FTC which resulted in the issuance by the FTC on (date) of a complaint and the entry of a consent order. The order requires that you be sent a copy of the complaint, the order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that, among other things, the BFPAI will cease and desist from:

A. Taking any action, directly or indirectly, on behalf of its members, including but not limited to any actual or threatened boycott or refusal to deal, that has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s);

B. Coercing, compelling, inducing, or intimidating by means of actual or threatened refusals to deal, or attempting to coerce, compel, induce, or intimidate by means of actual or threatened refusals to deal, any manufacturer of juvenile products into abandoning, adopting or refraining from abandoning or adopting any marketing method, practice or policy with regard to the distribution of its product(s); and

C. Requesting, urging, recommending or suggesting that BFPAI members take any action, directly or indirectly, including but not limited to any actual or threatened boycott or refusal to deal, which has the purpose or effect of interfering with any juvenile product manufacturer's decision as to how or to whom it distributes its product(s).

A copy of the complaint and the order are enclosed.

Sincerely,

\_\_\_\_\_  
President

Enclosures

## DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

In these cases, two trade associations complained to manufacturers about free riding by a catalogue seller, and the Commission charges them and the retailer members of one association with directly or impliedly threatening a concerted refusal to deal with the manufacturers. Although the letters of complaint were ill-advised, evidence that the retailers (many of whom were not represented by counsel during our investigation) were committed "to a common scheme designed to achieve an unlawful objective"<sup>1</sup> (*i.e.*, a coercive, concerted refusal to deal) is thin at best. Given the dearth of evidence of unlawful agreement, the arguably procompetitive purpose, and the absence both of market power and of anticompetitive effects, I do not find reason to believe that the challenged conduct unreasonably restrained trade or that the imposition of an order is in the interest of the public. I dissent.

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<sup>1</sup> *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984).