

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CVS PHARMACY, INC., also d/b/a  
CVS/PHARMACY,

Defendant.

STIPULATED FINAL JUDGMENT AND  
ORDER FOR PERMANENT  
INJUNCTION AND OTHER  
EQUITABLE RELIEF

CA09- 420

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed a Complaint for Permanent Injunction and Other Equitable Relief against Defendant CVS Pharmacy, Inc., also d/b/a CVS/pharmacy, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), alleging deceptive acts or practices and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

The Commission and Defendant CVS Pharmacy, Inc., also d/b/a CVS/pharmacy ("CVS"), without CVS admitting or denying liability for any of the conduct alleged in the Complaint, have stipulated to entry of the following agreement for permanent injunction and settlement of claims for monetary relief in settlement of the Commission's allegations against CVS.

The Court, having been presented with this Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief ("Order"), finds as follows:

**FINDINGS**

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over all parties. Venue in the District of Rhode Island is proper.
2. The acts and practices of CVS are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3. The Complaint states a claim upon which relief can be granted under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the Commission has the authority to seek the relief it has requested.

4. CVS waives all rights to seek judicial review or otherwise challenge or contest the validity of this Order. CVS also waives any claim that it may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order.

5. This Order reflects the negotiated agreement of the Commission and CVS.

6. The Commission and CVS stipulate and agree to entry of this Order under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), without trial or final adjudication of any issue of fact or law. By entering into this stipulation, CVS does not admit or deny any of the allegations set forth in the Complaint, other than jurisdictional facts.

7. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law. Nothing in this Order shall have precedential or preclusive effect as to any claim or issue asserted by any third party in any other proceeding.

8. Nothing in this Order obviates the obligation of CVS to comply with Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52.

9. The Commission's action against CVS is an exercise of the Commission's police or regulatory power as a governmental unit.

10. The paragraphs of this Order shall be read as the necessary requirements for compliance and not as alternatives for compliance, and no paragraph serves to modify another paragraph unless expressly so stated.

11. Each party shall bear its own costs and attorneys' fees.

12. Entry of this Order is in the public interest.

**ORDER**

**DEFINITIONS**

1. “Advertising” and “promotion” shall mean any written or verbal statement, illustration or depiction designed to effect a sale or create interest in the purchasing of goods, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, audio program transmitted over a telephone system, program-length commercial (“infomercial”), the Internet, email, press release, video news release, or in any other medium.
2. “Commerce” shall mean as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
3. “Commission” shall mean the Federal Trade Commission.
4. “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.
5. “CVS” shall mean CVS Pharmacy, Inc., also d/b/a CVS/pharmacy, and its successors and assigns.
6. “CVS brand” shall mean any product with the name CVS appearing on the product package or that is manufactured and/or distributed exclusively for sale through CVS retail stores or on its website.

7. "CVS Products" shall mean CVS brand "AirShield" tablets, lozenges, and powders in all flavors and package sizes or any other CVS brand product marketed as a private label version of Airborne for sale at CVS retail stores or on its website.

8. "Covered Product" shall mean CVS Products and any CVS brand food, drug, or dietary supplement for sale at CVS retail stores or on its website, that is represented, expressly or by implication, to prevent or treat colds or flu or boost the immune system.

9. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

10. "Food" and "drug" shall mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

11. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

12. The term "including" in this Order shall mean "including without limitation."

**I.**  
**PROHIBITED REPRESENTATIONS REGARDING**  
**COVERED PRODUCTS**

IT IS HEREBY ORDERED that CVS, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, are hereby permanently restrained and enjoined from making, or assisting

others in making, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation:

- A. That such product:
  - 1. Reduces the risk of or prevents colds;
  - 2. Protects against or helps fight germs;
  - 3. Protects against colds in crowded places such as schools, airplanes, offices, health clubs, theaters, and restaurants; or
  - 4. Boosts the body's immune system thereby providing protection against cold and flu viruses; or
- B. About the benefits, performance, or efficacy of any Covered Product;

unless the representation is true, non-misleading, and, at the time it is made, CVS possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

## II.

### FDA-APPROVED CLAIMS

IT IS FURTHER ORDERED that:

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

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

**III.**

**MONETARY JUDGMENT AND CONSUMER REDRESS**

IT IS FURTHER ORDERED that:

A. Judgment is hereby entered in favor of the Commission and against CVS in the amount of two million, seven hundred and eighty three thousand, forty seven dollars (\$2,783,047), which amount shall be paid to the Commission by electronic funds transfer within ten (10) days of the date of entry of this Order and in accordance with instructions provided by the Commission.

B. In the event of default on any obligation to make payment under this Order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable.

C. All funds paid to the Commission pursuant to this Order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. To the extent such funds are used for a consumer redress program, consumers shall have the right to participate in the program only upon signing a waiver of rights to make any subsequent claim against CVS for the amount of the refund received. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to CVS's practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. CVS shall have no right to challenge

the Commission's choice of remedies under this Section. CVS shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

D. CVS relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. CVS shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.

E. CVS agrees that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this Final Order, including but not limited to a nondischargeability complaint in any bankruptcy case. CVS further stipulates and agrees that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S. C. § 523(a)(2)(A).

F. In accordance with 31 U.S.C § 7701, CVS is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying numbers, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of CVS's relationship with the government.

G. Proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this Order. Nothing in this Order shall have precedential or preclusive effect as to any claim or issue asserted by any third party in any other proceeding.

**IV.**

**COMPLIANCE MONITORING BY CVS**

IT IS FURTHER ORDERED that CVS, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, or distribution of any Covered Product, in or affecting commerce, shall take reasonable steps sufficient to monitor and ensure that all of its employees and agents engaged in sales, order verification, or other customer service functions comply with the provisions of this Order. Such steps shall include adequate monitoring of all advertisements, promotions, sales presentations, and other oral and written communications with customers regarding Covered Products. CVS, at a minimum, shall:

- A. Conduct periodic monitoring of representations concerning any Covered Product made by persons engaged in sales or other customer service functions, including representations made orally or through electronic communications, on behalf of CVS; and
- B. Conduct periodic monitoring of representations made about any Covered Product on all Internet websites operated or maintained by CVS or its agents.

**V.**

**PROVISION OF CUSTOMER LIST AND RETAIL SALES DATA**

IT IS FURTHER ORDERED that CVS shall, no later than twenty (20) days after the date of entry of this Order, deliver to the Commission a list, in the form of a declaration submitted under penalty of perjury in accordance with 28 U.S.C. § 1746, of all consumers who purchased CVS Products directly from CVS on or after July 1, 2005 through November 31, 2008, to the extent that such purchasers can be identified through a diligent search of CVS's records. Such list shall include to the extent available, but not be limited to, each consumer's name and address(es), the CVS product(s) purchased, and available information concerning the purchase



and purchaser. The list shall be submitted to the Commission electronically at DEBrief@ftc.gov in a format to be approved in advance by Commission staff and encrypted with encryption software such as PKZip with the encryption key provided electronically to DEBrief@ftc.gov in a separate communication.

**VI.**

**COMPLIANCE MONITORING BY THE COMMISSION**

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within ten (10) days of receipt of written notice from a representative of the Commission, CVS shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in CVS's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. Obtaining discovery from any person, without further leave of court, using the procedures described in Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and 69; and
2. Posing as consumers, marketers, manufacturers, suppliers, wholesalers, retailers, distributors, or other product-related entities to CVS, its employees, or any other entity managed or controlled in whole or in part by CVS, without the necessity of identification or prior notice; and

C. CVS shall permit representatives of the Commission to interview any officer, director, employee, employer, consultant, independent contractor, representative, or agent who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present, and reasonable advance notice of the interview shall be provided to said person and CVS.

*Provided, however,* that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

## VII.

### COMPLIANCE REPORTING

IT IS FURTHER ORDERED that in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order, CVS shall notify the Commission in writing of any changes in the corporate structure of CVS or any other business entity that CVS directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided that*, with respect to any proposed change in the corporation about which CVS learns less than thirty (30) days prior to the

date such action is to take place, the Commission shall be notified as soon as is practicable after obtaining such knowledge.

B. Sixty (60) days after the date of entry of this Order, CVS shall provide a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which it has complied and is complying with this Order. This report shall include, but not be limited to:

1. A copy of each acknowledgment of receipt of this Order obtained pursuant to Section IX; and
2. Any other changes required to be reported under subsection A of this Section.

C. CVS shall notify the Commission of the filing of a bankruptcy petition by such Defendant within fifteen (15) days of filing.

D. For purposes of this Order, CVS shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Order to the Commission, to the following address:

Associate Director of Enforcement  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Attn: *FTC v. CVS Pharmacy, Inc.* (D.R.I.), Civil Action No. \_

*Provided* that, in lieu of overnight courier, CVS may send such reports or notifications by first-class mail, but only if CVS contemporaneously sends an electronic version of such report or notification to the Commission at [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

E. For purposes of compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with CVS.

### **VIII.**

#### **RECORD-KEEPING PROVISIONS**

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Order, CVS and its agents, employees, officers, and corporations are hereby permanently restrained and enjoined from failing to create and retain the following records:

- A. Accounting records that reflect the cost of Covered Products sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor, who has managerial responsibilities in the advertising, marketing, promotion, offering for sale, sale, or distribution of any Covered Product; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of Covered Products purchased, and description of Covered Products purchased, to the extent such information is obtained in the ordinary course of business;
- D. Complaint and refund requests (whether received directly, indirectly, or through any third party) regarding any Covered Product, including but not limited to reports of adverse incidents claimed to be associated with the use of a Covered Product, and any responses to those complaints or requests;

E. Copies of all advertisements, promotional materials, sales scripts, training materials, websites, or other marketing materials utilized in the advertising, marketing, promotion, offering for sale, sale, or distribution of any Covered Product;

F. All materials that were relied upon in making any representations contained in the materials identified in subsection E of this Section, including all documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any Covered Product, including, but not limited to, all tests, reports, studies, demonstrations, or other evidence that confirm, contradict, qualify, or call into question the efficacy of each such Covered Product, including complaints and other communications with consumers or with governmental or consumer protection agencies;

G. Records accurately reflecting the name, address, and telephone number of each manufacturer or laboratory engaged in the development or creation of any testing obtained for the purpose of manufacturing, labeling, advertising, marketing, promoting, offering for sale, selling, or distributing any Covered Product;

H. Copies of all contracts concerning the manufacturing, labeling, advertising, marketing, promotion, offering for sale, sale, or distribution of any Covered Product; and

I. All records and documents necessary to demonstrate full compliance with each provision of the Order, including but not limited to, copies of acknowledgments of receipt of this Order required by the Sections titled "Distribution of Order" and "Acknowledgement of Receipt of Order" and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

**IX.**

**DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Order, CVS shall deliver copies of the Order as directed below:

A. CVS shall deliver a copy of this Order to (1) all of its principals, officers, directors, and managers; (2) all current or newly hired employees, agents, representatives, consultants, and independent contractors having managerial responsibilities with respect to the subject matter of this Order; and (3) any business entity resulting from any change in structure set forth in Subsection A of the Section titled "Compliance Reporting." For current personnel, delivery shall be within fifteen (15) days of service of this Order upon CVS. For new personnel, delivery shall occur prior to their assuming a position or engaging in conduct related to the subject matter of this Order. For any new business entity resulting from any change in structure set forth in Subsection A of the Section titled "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in structure.

B. CVS shall obtain a signed and dated statement acknowledging receipt of the Order, within forty-five (45) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

**X.**

**ACKNOWLEDGMENT OF RECEIPT OF ORDER**

IT IS FURTHER ORDERED that CVS, within seven (7) business days of receipt of this Order as entered by the Court, shall submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

**XI.**

**RETENTION OF JURISDICTION**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

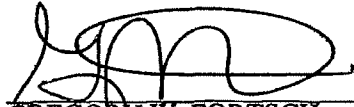
**SO ORDERED:**

*W. S. M. M.*  
Dated: 7/18/09

UNITED STATES DISTRICT JUDGE

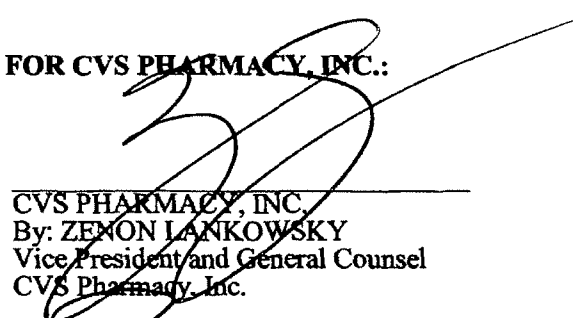
**SO STIPULATED:**

**FOR PLAINTIFF FTC:**

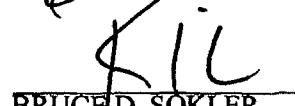


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**FOR CVS PHARMACY, INC.:**



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CVS PHARMACY, INC.  
By: ZENON LANKOWSKY  
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