

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
ALTERNATIVE CIGARETTES, INC.,)	FILE NO. 992-3022
a corporation, and)	
)	
JOSEPH PANDOLFINO,)	AGREEMENT CONTAINING
individually and as an officer)	CONSENT ORDER
of the corporation.)	
)	
)	

The Federal Trade Commission has conducted an investigation of certain acts and practices of Alternative Cigarettes, Inc., a corporation, and Joseph Pandolfino, individually and as an officer of the corporation (“proposed respondents”). Proposed respondents are willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between Alternative Cigarettes, Inc., by its duly authorized officers, and Joseph Pandolfino, individually and as an officer of the corporation, and counsel for the Federal Trade Commission that:

- 1.a. Proposed respondent Alternative Cigarettes, Inc., is a New York corporation with its principal office or place of business at 125 Virgil Avenue, Buffalo, New York 14216.
- 1.b. Proposed respondent Joseph Pandolfino is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of Alternative Cigarettes, Inc.
2. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true.
3. Proposed respondents waive:
 - a. Any further procedural steps;

- b. The requirement that the Commission’s decision contain a statement of findings of fact and conclusions of law; and
- c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of thirty (30) days and information about it publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.

5. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission’s Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and decision and order to proposed respondents’ address as stated in the agreement by any means specified in Section 4.4 of the Commission’s Rules shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the order. No agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

6. Proposed respondents have read the draft complaint and consent order. They understand that they may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

ORDER

DEFINITIONS

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

- 1. “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.

2. Unless otherwise specified, “respondents” shall mean Alternative Cigarettes, Inc., a corporation, its successors and assigns and its officers; Joseph Pandolfino, individually and as an officer of the corporation; and each of the above’s agents, representatives, and employees.

3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. “Advertisement” shall mean any written or verbal statement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of any product, including but not limited to a statement, illustration or depiction in or on a brochure, newspaper, magazine, free standing insert, pamphlet, leaflet, circular, mailer, book insert, letter, coupon, catalog, poster, chart, billboard, transit advertisement, point of purchase display, specialty or utilitarian item, sponsorship material, package insert, film, slide, or the Internet or other computer network or system.

5. “Tobacco product” shall mean cigarettes, cigars, cigarillos, little cigars, smokeless tobacco, cigarette tobacco, pipe tobacco, and any other product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product.

6. “Herbal smoking product” shall mean cigarettes, cigars, cigarillos, little cigars and any other product made or derived from plant material other than tobacco, that is intended for human smoking, including any component, part, or accessory of an herbal smoking product.

7. “Clearly and prominently” shall mean:

- a. With regard to advertisements for tobacco and herbal smoking products, in black type on a solid white background, or in white type on a solid red background, or in any other color combination that would provide an equivalent or greater degree of print contrast as objectively determined by densitometer or comparable measurements of the type and the background color. In advertisements, the color of the ruled rectangle shall be the same color as that of the type; and
- b. i. With regard to advertisements for tobacco products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than 40% of the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than 50% of the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than 40% of the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than 50% of the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- ii. With regard to advertisements for herbal smoking products, centered, both horizontally and vertically, in a ruled rectangle. The area enclosed by the rectangle shall be no less than the size of the area enclosed by the ruled rectangle surrounding the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333. The width of the rule forming the rectangle shall be no less than the width of the rule required for the health warnings for tobacco cigarettes mandated by 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the area enclosed by the ruled rectangle shall be no less than the area required for health warnings for tobacco cigarettes by such amended, modified, or superseding law, and the width of the rule forming the rectangle shall be no less than the width of any surrounding rule required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- c. In the same type style and type size as that required for health warnings for tobacco cigarettes pursuant to 15 U.S.C. § 1333.

Provided that, if, at any time after this order becomes final, 15 U.S.C. § 1333 is amended, modified, or superseded by any other law, the type style and type size of the disclosure shall be the same as the type style and type size required for health warnings for tobacco cigarettes by such amended, modified, or superseding law; and

- d. In a clear and prominent location but not immediately next to other written or textual matter or any rectangular designs, elements, or similar geometric forms, including but not limited to any warning statement required under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, or the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401 *et seq.* In addition, the disclosure shall not be positioned in the margin of a print advertisement. A disclosure shall be deemed “not immediately next to” other geometric or textual matter if the distance between the disclosure and the other matter is as great as the distance between the outside left edge of the rule of the

rectangle enclosing the health warning required by 15 U. S. C. § 1333 and the top left point of the letter “S” in the word “SURGEON” in that health warning; and

- e. For audiovisual or audio advertisements, including but not limited to advertisements on videotapes, cassettes, discs, or the Internet; promotional films or filmstrips; and promotional audiotapes or other types of sound recordings, the disclosure shall appear on the screen at the end of the advertisement in the format described above for a length of time and in such a manner that it is easily legible and shall be announced simultaneously at the end of the advertisement in a manner that is clearly audible.

Provided, however, that in any advertisement that does not contain a visual component, the disclosure need not appear in visual format, and in any advertisement that does not contain an audio component, the disclosure need not be announced in audio format.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Pure Cigarettes, Glory Cigarettes, or any other tobacco product in or affecting commerce, shall display in advertisements as specified below, clearly and prominently, the following disclosures (including the line breaks, punctuation, bold font and capitalization illustrated):

In cigarette advertisements:

No additives in our tobacco
does **NOT** mean a safer cigarette.

In advertisements for any other tobacco product:

No additives in our tobacco
does **NOT** mean safer.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement that, through the use of such phrases as “no additives,” “100% tobacco,” “additive-free,” “pure tobacco,” “does not contain additives,” “no chemicals,” “no flavorings,” “no preservatives,” or substantially similar terms, represents that a tobacco product has no additives, chemicals, flavorings or preservatives.

Provided, that the above disclosures shall not be required in any cigarette advertisement that is not required to bear a health warning pursuant to 15 U.S.C. § 1333.

Provided further, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such cigarette or other tobacco product poses materially lower health risks than other cigarettes or other products of the same type.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases “no additives,” “100% tobacco,” “additive-free,” “pure tobacco,” “does not contain additives,” “no chemicals,” “no flavorings,” “no preservatives,” or substantially similar terms, that a tobacco product has no additives, chemicals, flavorings or preservatives, where such representation is accompanied by the disclosure mandated by this provision.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Herbal Gold cigarettes, Magic cigarettes, or any other herbal smoking product in or affecting commerce, shall display in advertisements and on packaging as specified below, clearly and prominently, the following disclosure (including the line breaks, punctuation and capitalization illustrated):

In advertisements and on packaging for herbal cigarettes:

Herbal cigarettes are dangerous to your health.
They produce tar and carbon monoxide.

In advertisements and on packaging for other herbal smoking products:

Smoking this product is dangerous to your health.
It produces tar and carbon monoxide.

These disclosures shall be displayed beginning no later than thirty (30) days after the date of service of this order in any advertisement and on any package that, through the use of such phrases as “no nicotine,” “nicotine-free,” “no tobacco,” “tobacco-free,” “herbal,” or substantially similar terms, represents that an herbal smoking product has no tobacco or nicotine.

Provided, that the above disclosures shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that such herbal smoking products do not pose any material health risks.

Nothing contrary to, inconsistent with, or in mitigation of any disclosure provided for in this part shall be used in any advertisement. *Provided, however*, that this provision shall not prohibit respondents from truthfully representing, through the use of such phrases as “no nicotine,” “nicotine-free,” “no tobacco,” “tobacco-free,” “herbal,” or substantially similar terms, that an herbal smoking product has no nicotine or tobacco, where such representation is accompanied by the disclosure mandated by this provision.

III.

IT IS FURTHER ORDERED that respondents, 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 herbal smoking product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That such product does not present the health risks associated with smoking tobacco cigarettes; or
- B. About the health risks associated with the use of such product,

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that respondents shall:

- A. Provide, within forty-five (45) days after the date of service of this order, an exact copy of the notice attached hereto as Attachment A to each retailer, distributor, or other purchaser for resale to whom respondents have supplied Pure or Glory tobacco cigarettes, or Herbal Gold or Magic herbal cigarettes, since January 1, 1998. Respondents shall send the notice by first class mail. The mailing shall not include any other documents.
- B. Discontinue dealing with any retailer, distributor, or other purchaser for resale once respondents have actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has continued to use or disseminate:

- (1) any of respondents' advertisements for any of respondents' tobacco products that:
 - a) represents, through the use of such phrases as "no additives," "100% tobacco," "additive-free," "pure tobacco," "does not contain additives," "no chemicals," "no flavorings," "no preservatives," or substantially similar terms, that the tobacco products have no additives, chemicals, flavorings or preservatives; and
 - b) does not include the disclosure specified in Part I of this order; or
- (2) any of respondents' advertisements for any of respondents' herbal smoking products that:
 - a) represents, through the use of such phrases as "no nicotine," "nicotine-free," "no tobacco," "tobacco-free," "herbal," or substantially similar terms, that the herbal smoking products have no tobacco; and
 - b) does not include the disclosure specified in Part II of this order;

unless, upon notification by respondents, such retailer, distributor, or other purchaser for resale immediately ceases using or disseminating such advertisements. If, after such notification, respondents obtain actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such retailer, distributor, or other purchaser for resale has not permanently ceased using or disseminating such advertisements, respondents must immediately and permanently discontinue dealing with such retailer, distributor, or other purchaser for resale.

- C. For five (5) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:
 - (1) copies of all notification letters sent to retailers, distributors, or other purchasers for resale pursuant to subparagraph A of this part; and
 - (2) copies of all communications with retailers, distributors, or other purchasers for resale pursuant to subparagraph B of this part.

V.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and packaging containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns, and respondent Joseph Pandolfino shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

VII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to the sale of any of its tobacco products or herbal smoking products for which the composition or formula has been changed in such a manner as may affect compliance obligations arising under this order, including but not limited to the addition of any additives to any variety of such products. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

IX.

IT IS FURTHER ORDERED that respondent Joseph Pandolfino, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that respondent Alternative Cigarettes, Inc., and its successors and assigns shall, within sixty (60) days after the date of 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 they have complied with this order.

XI.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not effect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed this _____ day of _____, 1999

ALTERNATIVE CIGARETTES, INC.

By: _____
JOSEPH PANDOLFINO
President

JOSEPH PANDOLFINO, individually
and as an officer of the corporation

MATTHEW D. GOLD
Counsel for the
Federal Trade Commission

LINDA K. BADGER
Counsel for the
Federal Trade Commission

APPROVED:

JEFFREY KLURFELD
Regional Director
San Francisco Regional Office

ATTACHMENT A

[To be printed on Alternative Cigarettes, Inc., letterhead]

[date]

Dear [retailer, distributor, or other purchaser for resale]:

This letter is to inform you that Alternative Cigarettes, Inc., recently settled a lawsuit with the Federal Trade Commission (“FTC”) concerning certain claims we made for our Pure, Glory, Herbal Gold and Magic tobacco and herbal cigarettes which the FTC has challenged as deceptive. Although we do not admit the FTC’s allegations, we have agreed to notify our distributors, wholesalers and others who sell our cigarettes to consumers to stop using or distributing advertisements containing those claims.

The FTC Settlement

The FTC claimed that we made unsubstantiated claims that smoking Pure and Glory tobacco cigarettes, because they contain no additives, chemicals, flavorings or preservatives, is less hazardous to a smoker’s health than smoking otherwise comparable cigarettes that contain additives, chemicals, flavorings or preservatives. We have agreed to include the following disclosure in certain ads for Pure and Glory tobacco cigarettes:

No additives in our tobacco
does **NOT** mean a safer cigarette.

The FTC also alleged that the company made misrepresentations that smoking Herbal Gold and Magic herbal cigarettes does not pose the health risks associated with smoking tobacco cigarettes. Although Herbal Gold and Magic herbal cigarettes do not contain nicotine, their smoke, like the smoke from tobacco cigarettes, contains numerous carcinogens and toxins, including tar and carbon monoxide. We have agreed to include the following disclosure in certain ads and on certain packaging for Herbal Gold and Magic herbal cigarettes:

Herbal cigarettes are dangerous to your health.
They produce tar and carbon monoxide.

Our Notification Obligations

In addition to our obligations discussed above, we have also agreed to request that you discontinue using, relying on or distributing any Pure, Glory, Herbal Gold and Magic advertisement or promotional material currently in your possession that does not contain one of the above disclosures. We also ask that you notify any of your retail or wholesale customers who may have such materials to discontinue using them. These materials may contain claims that the FTC has alleged to be false or unsubstantiated. If you continue to use those materials, we are

required by the FTC settlement to stop doing business with you. You should also avoid making any of the representations challenged by the FTC, as described in this letter.

If you have any questions, you may call us at (xxx) xxx-xxxx. We apologize for any inconvenience this may cause you and thank you for your assistance.

Sincerely,

Joseph Pandolfino, President
Alternative Cigarettes, Inc.