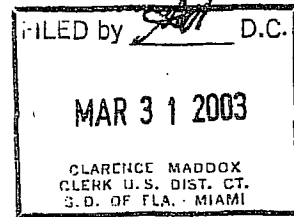


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-7016-CIV-MARTINEZ



FEDERAL TRADE COMMISSION,

Plaintiff

v.

REXALL SUNDOWN, INC.,

Defendant.

X000101

STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION AND SETTLEMENT
OF CLAIMS FOR MONETARY RELIEF

WHEREAS plaintiff, the Federal Trade Commission, has commenced this action by filing the Complaint herein; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law and without defendant admitting liability for any of the matters alleged in the Complaint;

THEREFORE, upon stipulation of plaintiff and defendant, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over all parties. Venue in the Southern District of Florida is proper.
2. The complaint states a claim upon which relief can be granted against the defendant.
3. The activities of defendant are in or affecting commerce, as defined in the FTC Act, 15 U.S.C. § 44.

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4. Defendant waives all rights to seek judicial review or otherwise challenge or contest the validity of the Order. Defendant 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. Each party shall bear its own costs and attorneys' fees.
6. Entry of this Order is in the public interest.
7. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon defendant, and its officers, agents, servants, employees, and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

DEFINITIONS

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

1. Unless otherwise specified, "defendant" shall mean Rexall Sundown, Inc., a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees.
2. "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 have 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.
3. "Cosmetic," "food" or "drug" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
5. "FTC" or "Commission" shall mean the Federal Trade Commission.
6. A requirement that defendant "notify the Commission" or "file with the Commission" shall mean that the defendant shall send the necessary information via first class mail, costs prepaid, to the Associate Director for Advertising Practices, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Attn: *FTC v. Rexall Sundown, Inc.* (S.D. Fla.).
7. The term "including" in this Order shall mean "including, without limitation."

8. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.
9. The term "class action" or "class actions" shall refer to the consolidated class action pending in Los Angeles County, California Superior Court entitled Lindsay Teranchi and JoAnne Levine v. Rexall Sundown, Inc., and the class action pending in West Palm Beach County, Florida, entitled Patricia LaRaia, et al. v. Rexall Sundown, Inc.
10. The term "plaintiffs' class action counsel" shall mean the attorneys approved as co-lead counsel on behalf of plaintiffs in the class actions.

EFFECTIVE DATE AND CONDITIONS

I.

IT IS ORDERED that this Order shall become effective upon its entry by the United States District Court for the Southern District of Florida, except that:

- A. Section VI.A shall become effective upon entry of Final Orders approving the settlement in the class actions.
- B. Section VI.B-K shall become effective when all of the following events have occurred:
 1. Entry of Final Orders approving the settlement in the class actions; and
 2. Expiration of the time for, or exhaustion of, any appeal from Final Orders approving the settlement in the class actions.

The effective date of this Order shall not be delayed or affected in any manner by any unresolved dispute over fees to be paid to plaintiffs' class action counsel.

IT IS FURTHER ORDERED that beginning upon entry of this Order and continuing through such time as Sections VI.B-K become effective, Rexall shall provide the Commission with a full and complete copy of every document (including all attachments) submitted to any court in connection with the class actions. Copies shall be provided to the Commission via overnight mail or facsimile within 24 hours of Rexall receiving or filing such document. In the event that the Commission seeks to intervene in the class actions, Rexall will not object to such intervention by the Commission.

IT IS FURTHER ORDERED that in the event that an appeal of the class action settlement is successful in overturning the class action settlement, the Commission and Rexall shall negotiate in good faith to attempt to jointly agree to a modification of Section VI of this

Order. If, after 90 days, the parties are unable to reach a mutually agreeable resolution, the Commission shall, upon written request by Rexall, return to Rexall all funds that remain in the "redress account" established pursuant to Section VI.A. Once the remaining funds are returned to Rexall, the parties shall be returned to their respective positions in the litigation titled *FTC v. Rexall Sundown, Inc.*, Case No. 00-7016-Civ.-Martinez (S.D. Fla.), as of the date of entry of this Order, with respect to liability for monetary relief. The remainder of this Order will remain in full force and effect. The parties further agree that in the event this action is reinstated by the Commission pursuant to this provision, Rexall's maximum liability for monetary relief shall not exceed \$12 million pursuant to the same terms and conditions as set forth in Section VI, less the costs of notice paid by Rexall pursuant to Section VII.

CONDUCT PROHIBITIONS

II.

IT IS FURTHER ORDERED that defendant, directly or through any corporation, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons and entities in active concert or participation with it who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, promotion, offering for sale, sale, or distribution of Cellasene or any substantially similar product, in or affecting commerce, is hereby permanently restrained and enjoined from making any representation, in any manner, expressly or by implication, that such product eliminates or substantially reduces cellulite, unless, at the time the representation is made, defendant possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that defendant, directly or through any corporation, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees, and all persons and entities in active concert or participation with it 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 drug, dietary supplement or cosmetic, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the effect of such product on cellulite, body fat or weight, unless, at the time the representation is made, defendant possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

IV.

IT IS FURTHER ORDERED that defendant, directly or through any corporation, subsidiary, division, trade name, or other device, and its officers, agents, servants, employees,

and all persons and entities in active concert or participation with it 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 drug, dietary supplement or cosmetic, in or affecting commerce, shall not misrepresent, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

V.

Nothing in this Order shall prohibit defendant from making any representation for any drug that is permitted in the labeling for 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. Nothing in this Order shall prohibit defendant 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.

MONETARY RELIEF

VI.

IT IS FURTHER ORDERED that defendant shall pay to the Federal Trade Commission the sum of up to Twelve Million Dollars (\$12,000,000.00) as follows:

- A. Not later than ten (10) days after the effective date of this provision of the Order, defendant shall deposit by certified check or electronic funds transfer into a redress account to be established by the Federal Trade Commission for the purpose of receiving payments due under the provisions of this Order ("the redress account"), the sum of Eight Million Dollars (\$8,000,000.00), minus any costs of notice that Rexall has previously paid pursuant to Section VII of this Order.
- B. The funds paid by defendant pursuant to Subparagraph A above, together with accrued interest, shall be used by the Federal Trade Commission or its Redress Administrator, to provide refunds to persons who purchased Cellasene in the United States, and to pay any additional costs of notice and/or administration for such a redress program. Payment to such persons represents redress and is intended to be compensatory in nature, and no portion of such payment shall be deemed a payment of any fine, penalty, or punitive assessment. The Redress Administrator shall be selected by the Federal Trade Commission, after consultation with defendant and plaintiffs' class action counsel.
- C. The parameters of the redress program are as follows: Purchasers of Cellasene will be allowed to obtain redress for a maximum of eight boxes of Cellasene, to be valued at \$30 per box. In order to obtain redress, consumers will have to complete a claim form stating

how many boxes of Cellasene they purchased, and where they purchased those boxes. Consumers will not be required to provide proof of purchase, such as empty bottles or receipts, but may be given the option to do so. Consumers will be required to sign a statement that "I declare under the laws of the United States of America that the information in my request for refund is true and correct to the best of my knowledge, that I was not satisfied with Cellasene, and that I have not previously received a refund for my purchase(s) of Cellasene." In order to participate in the redress distribution, a consumer must sign a waiver of rights to make any claim against defendant for the amount of the refund received. The Redress Administrator will have discretion to request additional information from consumers, and to request such submissions be made under penalty of perjury. If valid claims plus costs of notice and administration exceed \$8 million, the Redress Administrator shall, in the exercise of its discretion, request that consumers who claim to have purchased in excess of 6 boxes resubmit claims under penalty of perjury.

- D. Any additional procedures with respect to the administration of the redress program shall be established by the Redress Administrator, after consultation with the Federal Trade Commission, defendant's counsel and plaintiffs' class action counsel.
- E. In the event that funds paid by defendant pursuant to Subparagraph VI.A above, together with accrued interest, less the costs of notice and redress administration, are insufficient to provide full redress to consumers participating in the redress program, defendant shall, within ten (10) days after receiving notice of such insufficiency by the Commission, deposit by certified check or electronic funds transfer into the escrow account established by the Federal Trade Commission for the purpose of receiving payments due under this Order additional monies, not to exceed Four Million Dollars (\$4,000,000.00) to cover the actual remaining costs of redress.
- F. At the conclusion of the claims filing period, the Redress Administrator shall notify the Commission as to how the funds are to be disbursed. Defendant and class plaintiffs' counsel shall also be notified as to how the funds are disbursed, but shall have no right to contest the manner of distribution chosen by the Federal Trade Commission, provided that the manner of distribution chosen by the Commission comports with the terms of this Order.
- G. In the event that funds paid by defendant pursuant to Subparagraphs VI.A and E above, together with accrued interest, less the costs of notice and administration, are insufficient to provide full redress to consumers who participate in the redress program, the funds will be distributed on a *pro rata* basis. The Commission, after consultation with defendant and plaintiffs' class action counsel, shall determine the precise method of making a *pro rata* distribution.
- H. No redress funds shall be disbursed until the expiration of the time for, or exhaustion of, any appeal from the order approving the class action settlement in the class actions, and until expiration of the claims filing period.

- I. In the event of any default on any obligation to make payment under this Paragraph, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment.
- J. Except as provided in Section I hereof, defendant relinquishes all dominion, control and title to the funds paid into the escrow account as well as any interest accrued by these funds, and all legal and equitable title to the funds and any accrued interest. Defendant shall make no claim to or demand for the return of the funds paid into the escrow account, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of defendant, defendant acknowledges that the funds in the escrow account are not part of the debtor's estate, nor does the estate have any claim or interest therein. In the event that direct redress to consumers is wholly or partially impracticable or funds remain in the escrow account after redress is completed, any remaining funds shall be paid out as follows: fifty percent (50%) to the Commission for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the defendant's practices alleged in the complaint or to be deposited in the United States Treasury as disgorgement; and fifty percent (50%) to the plaintiff's class action counsel for use as *cypres* relief in accord with statute and approval by the state courts in the class actions. A maximum of \$50,000.00 shall be payable only out of the *cypres* relief to the San Bernardino County, California District Attorney as reimbursement for the costs associated with investigating and instituting the legal action entitled State of California vs. Rexall Sundown, Inc., Superior Court of San Bernardino County, California, Case No. SCVSS 093311.
- K. Any and all attorneys' fees or litigation expenses incurred in connection with the above-captioned litigation, whether or not ordered by any Court, shall be paid by the party incurring the expense and shall not be credited against the funds deposited in the redress account pursuant to Paragraph A or E. Any and all attorneys' fees or litigation expenses in connection with the class actions, whether or not ordered by any Court, shall be borne as decided by defendant and plaintiffs' class action counsel and shall not be credited against the funds deposited in the escrow account pursuant to Paragraph A or E.

NOTICE

VII.

IT IS FURTHER ORDERED that Rexall will pay for all costs of notice to the class in the class actions. The Redress Administrator, who will be selected by the Commission after consultation with plaintiffs' class action counsel and defendant, shall arrange for publication of notice to the class in the class actions. Notice will be published in major national and regional newspapers, several women's magazines, and posted on the websites of the Redress Administrator and the FTC. Publications will be similar to where Cellasene was advertised, as determined by the Redress Administrator, subject to parties' and state courts approval. Rexall will attempt to

utilize its advertising buying power to obtain reduced publication rates. The costs of notice to be paid pursuant to this Section shall not include any costs for attorney fees.

IT IS FURTHER ORDERED that the Redress Administrator may also use the funds in the redress account established in Section VI.A to pay for administrative costs relating to the development and implementation of the redress program in accordance with this Order and the payment of necessary costs and expenses associated with the redress account.

RECORD KEEPING

VIII.

IT IS FURTHER ORDERED that defendant, for a period of five (5) years after the last date of dissemination of any representation covered by Parts II, III or IV of this Order, shall maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements and promotional materials 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, custody, 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 entities or consumer protection organizations.

MONITORING

IX.

IT IS FURTHER ORDERED that defendant, for a period of five (5) years after the entry of this Order, shall deliver a copy of this Order to all current and future 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. Defendant shall deliver this Order to such current personnel within thirty (30) calendar days after the entry of this Order, and to such future personnel within thirty (30) calendar days after the person assumes such position or responsibilities. Defendant shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after such statement is signed.

X.

IT IS FURTHER ORDERED that defendant shall notify the Commission at least thirty (30) calendar days prior to any change in the corporation 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 corporation; the creation or 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 defendant learns less than thirty (30) calendar days prior to the date such action is to take place, it shall notify the Commission as soon as is practicable after obtaining such knowledge.

XI.

IT IS FURTHER ORDERED that defendant shall, within sixty (60) calendar days after the entry 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 it has complied with this Order.

XII.

IT IS FURTHER ORDERED that the Commission is authorized to monitor the compliance of defendant with this Order by all lawful means, including but not limited to the following means:

- A. The Commission is authorized, without further leave of court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37, including but not limited to the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating the compliance of defendant with this Order.
- B. 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 investigate whether defendant has violated any provision of this Order or Sections 5 or 12 of the FTC Act, 15 U.S.C. §§ 45, 55.

ACKNOWLEDGMENT OF RECEIPT OF ORDER

XIII.

IT IS FURTHER STIPULATED AND ORDERED that, within fifteen days after service of this Order, defendant shall submit to the Commission a truthful sworn statement, in the form shown

on Appendix A, that shall acknowledge receipt of this Order on behalf of defendant.

SCOPE OF ORDER

XIV.

This Order resolves only claims against the defendant and its direct or indirect corporate parents, Transmedia Consultants, Inc., Avrett Free & Ginsburg, DS Simon, George Beraka, M.D., Peter Pugliese, M.D., and Cartrecia Dimaggio, and their respective employees, officers, directors, and shareholders, arising out of or relating to the advertising, marketing, promotion, sale and distribution of Cellasene. This Order does not preclude the Commission from initiating further action or seeking any remedy against any other persons or entities, including without limitation persons or entities who may be subject to portions of this Order by virtue of actions taken in concert or participation with defendant, and persons or entities in any type of indemnification or contractual relationship with defendant.

RETENTION OF JURISDICTION

XV.

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

SO STIPULATED:

WILLIAM E. KOVACIC
General Counsel

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ATTORNEYS FOR DEFENDANT
REXALL SUNDOWN, INC.

DONE AND ORDERED in Chambers in Miami, Florida, this 31 day of
March, 2003.

Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 00-7016-CIV-MARTINEZ

FEDERAL TRADE COMMISSION,

Plaintiff

v.

REXALL SUNDOWN, INC.,

Defendant.

ACKNOWLEDGMENT OF RECEIPT OF ORDER

_____, hereby states and affirms:

1. My name is _____. I am [title] for defendant Rexall Sundown, Inc. I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the matters discussed in this declaration, and if called as a witness, I could and would competently testify as to the matters stated herein.
2. My current business address is _____. My current business telephone number is _____.
3. On [date], I received a copy of the Stipulated Final Order and Settlement of Claims for Monetary Relief signed by the Honorable Judge Martinez, United States District Court Judge for the Southern District of Florida. A true and correct copy of the Order that I received is appended to this Acknowledgment.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on [date] _____, at [city, state] _____, ____.

Name

Title