



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 2, 2009

The Honorable Janet T. Mills
Attorney General
State of Maine
6 State House Station
Augusta, Maine 04333

Re: *In the Matter of Constellation Brands, Inc.*
FTC File No. 092-3035, Docket No. C-4266

Dear Attorney General Mills:

Thank you for the comment from you, Attorney General Gansler, and Attorney General Blumenthal regarding the proposed consent order accepted by the Federal Trade Commission ("Commission") in the above-referenced matter. Your comment was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission. You suggest that the Commission should modify the proposed order with Constellation Brands, Inc. ("CBI") to (1) identify what marketing practices would constitute a violation of Parts I and II of the order, including whether it prohibits the use of the Wide Eye trade name; and (2) require the payment of a monetary penalty.

The order addresses the serious consequences of the Wide Eye advertising campaign. Parts I and II of the order prohibit certain deceptive and unsubstantiated representations that are made "in any manner, expressly or by implication, including through the use of a product name or endorsement." The consent agreement also provides that "the complaint may be used in construing the terms of the order." The complaint makes clear that use of the trade name, "Wide Eye," when used in conjunction with phrases like "caffeinated" or "wake up," conveyed the deceptive impression that the named product would keep consumers awake while consuming alcohol. *See* Complaint Exhibits A and D. The Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau ("TTB"), which regulates alcohol labels, has advised us that it requires that alcohol products containing added caffeine bear a disclosure "contains caffeine" on the label. As any Wide Eye label that complied with TTB's requirements would violate the order, the trade name is effectively banned. Indeed, CBI has now surrendered to TTB its

certificates of label approval (“COLA”) for Wide Eye; as a consequence, CBI no longer has authority to bottle and distribute the product.¹

With regard to a monetary penalty, the Commission’s proposed complaint in this matter alleges that CBI’s advertising claims constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Sections 5 and 12 do not authorize the collection of fines or civil penalties based on these allegations. If CBI violates the Commission’s final order, however, it would be liable for civil penalties of up to \$16,000 per violation, pursuant to Section 5(l) of the FTC Act, 15 U.S.C. § 45(l).

After considering your comment, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification. A copy of the final Decision and Order is enclosed for your information. Relevant materials also are available from the Commission’s website at <http://www.ftc.gov>.

It helps the Commission’s analysis to hear from a variety of sources in its work, and we appreciate your interest in this matter.

By direction of the Commission, Commissioner Harbour recused.

Donald S. Clark
Secretary

¹ You also suggest that the CBI order should be modified to require that Wide Eye marketing bear a disclosure that stimulants do not counteract the effects of alcohol consumption. Given CBI’s surrender of the Wide Eye COLAs, it does not appear necessary to address this issue in this case.