



Office of the Secretary

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

October 2, 2009

James Mosher
National Alliance to Prevent Underage Drinking
1875 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20009-5728

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

Dear Mr. Mosher:

Thank you for your comment regarding the proposed consent order accepted by the Federal Trade Commission ("FTC" or "Commission") in the above-captioned 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. The National Alliance to Prevent Underage Drinking ("NAPUD") requests that the FTC reject the order, and instead begin action to ban the premixing of alcohol products with stimulants such as caffeine. In addition, it asserts that the consent order with Constellation Brands, Inc. ("CBI") is insufficient because (1) it does not 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) it does not 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 for Wide Eye; as a consequence, CBI no longer has authority to bottle and distribute the product.

NAPUD also suggests that the Commission should modify the order to require the payment of 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).

Finally, NAPUD asks the FTC to prohibit the premixing of alcohol and stimulants such as caffeine as an unfair and deceptive business practice, citing evidence that these products may pose health and safety risks to users. The Commission's case against CBI addresses the question of whether CBI's advertising was deceptive and, if so, what remedy should apply. Although the Commission is highly concerned about the potential for consumer injury from the over-consumption of beverage alcohol products, the broader question of what kinds of additives and ingredients should be permitted in beverage alcohol products, and at what levels, is more appropriately addressed by the Food and Drug Administration (which is charged with ensuring the safety of food and beverages), in conjunction with TTB (which has responsibility for evaluating alcohol product formulation and issuing a certificate of label approval before an alcohol product may be bottled and distributed).

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