

Modifying Order

98 F.T.C.

IN THE MATTER OF

COOGA MOOGA, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS.
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2925. Order, Aug. 9, 1978—Modifying Order, Oct. 15, 1981*

In response to the Commission's adoption of the material connection Endorsement Guide, this order reopens the proceeding and modifies the Commission's order issued on August 9, 1978 (43 FR 40804, 92 F.T.C. 310) by deleting the words "any financial interest in the sale of the product or service which is the subject of the endorsement or" from the definition of material connection contained in Paragraph I.D. This modification relieves the petitioners of the obligation of disclosing any financial interest they may have in the sale of an endorsed product.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND
DESIST ORDER

Charles E. "Pat" Boone and Cooga Mooga, Inc., (hereinafter "Petitioners") have filed, pursuant to Rule 2.51 of the Commission's Rules of Practice, a Petition to Reopen, Modify, Alter or Set Aside Parts of Consent Order (hereinafter "Petition"). The Petition seeks the modification or elimination of two provisions of the Commission's Order of August 9, 1978. The Order concerns petitioners' representations as advertisers and as endorsers, and requires them to contribute a pro rata share to a restitution program for purchasers of Acne-Statin, a product endorsed by petitioners.

The first issue raised by the Petition concerns the "material connection" disclosure provision of Paragraph I.D. of the Order. This provision requires petitioners, when they act as endorsers, to disclose "any financial interest in the sale of the product or service which is the subject of the endorsement or any familial connection between the endorser and the advertiser or its advertising agency." Petitioners argue that this provision unfairly discriminates against them because no other celebrity endorser is required to disclose such interest. Petitioners further contend that the Order provision conflicts with the Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising." 16 C.F.R. Part 255 (1980). In addition, they maintain that the material connection disclosure requirement is harmful to small business and infringes petitioners' First Amendment rights.

The Petition does not present any evidence of changed circumstances regarding the familial connection portion of the material

connection definition, nor is there any indication that the modification of this language would be in the public interest. The Commission therefore declines to set aside or alter the requirement that petitioners disclose familial connections with the advertiser or its advertising agency.

The financial interest portion of the material connection definition requires petitioners to disclose any interest in the sale of the endorsed product. This covers situations in which the compensation received by petitioners for the endorsement is related to the volume of sales of the product, i.e., a "share of the action." The Order does not require petitioners to disclose remuneration if it is in the form of a fixed sum in advance of the endorsement, or if it is based upon the extent of the dissemination of the advertisement.

On January 16, 1980, the Commission promulgated its Endorsement Guides. Guide 5, regarding the disclosure of material connections between advertisers and endorsers, provides:

When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit such as an appearance on TV, would be extended to the endorser.

The Commission has determined that under this Guide, advertisers are not required to disclose that celebrity endorsers are compensated for endorsements, regardless of the method of compensation. This is because the Commission believes that the manner in which celebrities are compensated does not materially affect the weight or credibility of an endorsement. The Commission further finds that the adoption of the material connection Endorsement Guide constitutes a change in the law regarding the obligation of celebrity endorsers to disclose their financial interest in the sale of the advertised product. The Commission therefore concludes that petitioners have made a satisfactory showing, as required by Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45, that the section of the definition of material connection pertaining to petitioners' financial interest in the sale of the advertised product should be deleted from the Order.

Petitioners also seek relief from their obligation under the Order

to contribute a pro rata share to the restitution program for purchasers of Acne-Statín. This claim is based on the alleged disparity in the Commission's treatment of petitioners versus other endorsers subject to Commission Orders. The two other Orders cited by petitioners are those against Gordon Cooper and against Harvey Glass, M.D. (C-3004). The factual circumstances of these cases differed substantially, however, from those involved in the instant case; the cases involve disparities in *inter alia*, the volume of sales of the endorsed product and the remuneration received by the endorser. These differences amply justify the differential remedies selected in each case. The *Cooper* and *Glass* Orders do not, therefore, constitute a change in law. Nor do any changes in fact or the public interest warrant the alteration or elimination of petitioners' restitution obligations.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on August 9, 1978, in Docket No. C-2925 is hereby modified by deleting from the definition of material connection contained in Order Paragraph I.D. the words, "any financial interest in the sale of the product or service which is the subject of the endorsement or." Petitioners' request for the modification of Paragraph II of the Order is hereby denied.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

IN THE MATTER OF
GREAT NORTH AMERICAN INDUSTRIES, INC., ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3077. Complaint, Oct. 29, 1981—Decision, Oct. 29, 1981

This consent order requires, among other things, two Gainesville, Texas corporations and a corporate officer to cease representing that substantial fuel economy can be achieved by the use of Teflon oil additives such as "Tephguard." Further, respondents are prohibited from making representations that the use of any automobile retrofit device, fuel or engine oil additive will increase fuel economy, unless substantiated by competent scientific evidence, and accompanied by the disclosure of any limitations on the performance or efficacy of such products. Additionally, the Order bars claims of government approval without written and dated authorization; prohibits misrepresentations concerning the conclusions of product tests or surveys; and requires that consumer endorsements of any product or service reflect typical consumer experiences.

Appearances

For the Commission: *Laurence M. Kahn* and *William Haynes*.

For the respondent: *Jack Paller, Katz, Paller & Land*, Atlanta, Ga., *Marshall Dooley*, Dallas, Tex., and *Donald Higgenbotham*, Austin, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Great North American Industries, Inc., a corporation, Products on the Move, Inc., a corporation, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Great North American Industries, Inc., and Products on the Move, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the