

Complaint

102 F.T.C.

IN THE MATTER OF

MONTE PROULX

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3124. Complaint, Nov. 3, 1983—Decision, Nov. 3, 1983

This consent order requires Monte Proulx to, among other things, cease disseminating advertisements which represent that the "Extra Margin Emergency Escape Mask" provides protection from carbon monoxide gas; will permit a person to breathe normally, or for an express amount of time; or has been endorsed or approved by any municipal, state or federal agency, unless such claims are true and are substantiated by competent and reliable scientific evidence. Any representation that an emergency escape mask will protect a person from the hazards associated with fire must be accompanied by the statement, "The mask does not filter carbon monoxide—a lethal gas associated with fire." Additionally, should he continue to market any emergency escape mask in its current packaging, he is required to affix to such packaging a permanent adhesive label advising users of the mask's inability to filter out lethal carbon monoxide gas. Further, respondent must retain documentation substantiating or contradicting advertising claims for a period of three years; notify the Commission of any change in his business status; and provide all present and future sales, advertising and policy-making personnel with a copy of the order and an acknowledgement form.

Appearances

For the Commission: *Wendy Kloner.*

For the respondent: *Pro se.*

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 Monte Proulx, an individual, hereinafter sometimes referred to as respondent, has violated the provisions of 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. Respondent Monte Proulx is an individual; his address is 50300 Highway 245, Badger, California.

PAR. 2. Respondent is now, and for sometime past has been, engaged in the purchasing, offering for sale, sale and distribution to the public of the "Extra Margin Emergency Escape Mask", an over-the-head

mask with a built-in air filter. The mask is manufactured under the name Nakagawa Escape Mask by Nihon Saibohgu Company, Ltd., of Japan.

PAR. 3. In the course and conduct of his said business, respondent is now causing, and for sometime in the past has caused, the Extra Margin Emergency Escape Mask, when sold, to be shipped from his place of business to purchasers thereof located in the various States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said Extra Margin Emergency Escape Mask in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, and for the purpose of inducing the purchase of the Extra Margin Emergency Escape Mask, respondent has at all times mentioned herein made numerous statements, orally and in writing, in various promotional and advertising materials prepared and/or disseminated by respondent for use in selling respondent's product. Illustrative and typical but not inclusive of the statements employed as aforesaid are the following:

(1) The Extra Margin Emergency Escape Mask "provides filtered breathing for up to 20 minutes or more in dense, poisonous smoke."

(2) "With the Extra Margin Emergency Escape Mask you breathe safely even in choking smoke."

(3) The Extra Margin Emergency Escape Mask enables you to "breathe normally for 20 minutes."

(4) The Extra Margin Emergency Escape Mask "protects your nose, throat and lungs from noxious gases and low concentrations of lethal gases most frequently associated with fires—hydrogen chloride, hydrogen cyanide and carbon monoxide."

(5) Tests by a chemical testing laboratory "re-confirm the device's excellent gas-filtering capabilities and lifesaving value in a fire disaster."

(6) "Tested and Approved! In the U.S. and Canada, the mask has undergone vigorous testing by fire officials."

(7) "The filtering system was evaluated by an independent chemical testing lab, approved by OSHA and the California State Health Department."

PAR. 5. Through the use of the aforesaid statements, and others of similar import and meaning not expressly set out herein, respondent has represented and continues to represent, directly or by implication, that:

(1) The Extra Margin Emergency Escape Mask provides twenty (20) minutes escape time in the event of fire.

(2) The Extra Margin Emergency Escape Mask screens lethal gases associated with fire, including carbon monoxide.

(3) The Extra Margin Emergency Escape Mask permits normal breathing in the event of fire.

(4) The Extra Margin Emergency Escape Mask has been endorsed or approved by state and federal government agencies.

PAR. 6. In truth and in fact:

(1) The Extra Margin Emergency Escape Mask does not provide twenty (20) minutes escape time in the event of fire. The mask user can be overcome by gases associated with fire in less than twenty (20) minutes.

(2) The Extra Margin Emergency Escape Mask is incapable of screening out carbon monoxide.

(3) The Extra Margin Emergency Escape Mask does not permit normal breathing. The mask's filter creates inhalation and exhalation breathing resistance.

(4) The Extra Margin Emergency Escape Mask has not been endorsed or approved by any state or federal agency.

Therefore, the statements and representations set forth in Paragraphs Four and Five were and are unfair, false, misleading and deceptive.

PAR. 7. In the course and conduct of his business, respondent has represented in promotional literature and in the product's packaging the asserted advantages of the Extra Margin Emergency Escape Mask but has failed to disclose that the mask does not filter carbon monoxide, a lethal gas associated with fire.

PAR. 8. In light of the representations described in Paragraphs Four and Five, respondent's failure to disclose the facts described in Paragraph Seven is misleading in a material respect in that the disclosure of these facts to consumers would be likely to affect their purchase decisions. Therefore, failure to disclose these material facts renders the sales and packaging materials referred to in Paragraph Seven unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of his business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondent.

PAR. 10. The use by respondent of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, and his failure to disclose the aforesaid material facts has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and rep-

representations were, and are, true and complete, and to induce purchases of substantial quantities of respondent's products by reason of said erroneous and mistaken beliefs.

PAR. 11. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Monte Proulx is an individual whose address is 50300 Highway 245, Badger, California.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

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

(1) *The Extra Margin Emergency Escape Mask* shall mean the over-the-head vinyl mask with a built-in mouthpiece and filter manufactured by Nihon Saibohgu Company, Ltd., of Japan.

(2) *Competent and reliable scientific test* shall mean a test in which persons with skill and expert knowledge in the field to which the test pertains conduct the test and evaluate its results in an objective manner using testing, evaluation, and analytical procedures that ensure accurate and reliable results.

I

It is ordered, That respondent Monte Proulx, an individual, his agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Extra Margin Emergency Escape Mask or any other emergency escape mask, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Disseminating, or causing or permitting the dissemination of, any advertisement or other representation, express or implied, that an emergency escape mask provides protection from carbon monoxide gas unless at the time the representation is made, the representation is true and respondent possesses and relies upon a competent and reliable scientific test substantiating the representation.

2. Disseminating, or causing or permitting the dissemination of, any advertisement or other representation, express or implied, that an emergency escape mask provides twenty (20) minutes of breathable air or that an emergency escape mask provides any express amount of time of breathable air unless at the time the representation is made, the representation is true and respondent possesses and relies upon a competent and reliable scientific test substantiating the representation.

3. Disseminating, or causing or permitting the dissemination of, any advertisement or other representation, express or implied, that an emergency escape mask permits normal breathing unless at the time the representation is made, the representation is true and respondent possesses and relies upon a competent and reliable scientific test substantiating the representation.

4. Disseminating, or causing or permitting the dissemination of, any advertisement or other representation, express or implied, that

an emergency escape mask has been endorsed or approved by any municipal, state or federal agency unless at the time the representation is made, respondent possesses and relies upon a reasonable basis for the claim consisting of a verified statement from the agency that endorsed or approved the mask. When referring to any test conducted by or on behalf of the aforesaid agency as a basis for the agency's endorsement or approval, the results of such test must be fairly and accurately disclosed in conjunction with the representation or claim.

II

It is further ordered, That respondent Monte Proulx, an individual, his agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Extra Margin Emergency Escape Mask or any other emergency escape mask, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that an emergency escape mask protects the user from the hazards associated with fire without disclosing in close conjunction therewith the following statement in print at least as large as the print in which the representation is made, with nothing to the contrary or in mitigation of this statement:

The mask does not filter carbon monoxide—a lethal gas associated with fire.

III

It is further ordered, That should respondent Monte Proulx, an individual, his agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, continue to market the Extra Margin Emergency Escape Mask, or any other emergency escape mask, in its current packaging, the respondent shall affix a white permanent-adhesive label to all its current packaging. This label shall remove all references on the current packaging relating to the emergency escape mask's ability to provide protection from carbon monoxide and its effectiveness for up to twenty (20) minutes. The first line of this label shall state "The mask does not filter carbon monoxide—a lethal gas associated with fire". As shown in Attachment A of this Order, this sentence shall appear on the label in ten-point bold type.

IV

It is further ordered, That respondent distribute a copy of this Order to all present and future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this Order and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

V

It is further ordered, That respondent, for a period of three years after respondent last disseminates the advertisements for products covered by this Order, shall retain all test results, data, and other documents or information on which he relied for his representations or any documentation which contradicts, qualifies or calls into serious question any claim included in such advertisement which were in his possession during either their creation or dissemination. Such records may be inspected by the staff of the Commission upon reasonable notice.

VI

It is further ordered, That respondent promptly notify the Commission of the discontinuation of his present business or employment. In addition, for a period of five (5) years from the date of service of this Order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the offering for sale, sale or distribution of emergency escape masks or of his affiliation with a new business or employment in which his duties and responsibilities involve the offering for sale, sale or distribution of emergency gas masks. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this Order.

VII

It is further ordered, That the respondent shall within sixty (60) days after service upon him of this Order, file with the Commission a report, in writing, setting forth in detail, the manner and form in which he has complied with this Order.

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Decision and Order

ATTACHMENT A

THE MASK DOES NOT FILTER
CARBON MONOXIDE—A LETHAL
GAS ASSOCIATED WITH FIRE.

Interlocutory Order

102 F.T.C.

IN THE MATTER OF
CHAMPION SPARK PLUG COMPANY

Docket 9141. Interlocutory Order, Nov. 10, 1983

ORDER GRANTING IN PART RESPONDENT'S MOTION TO STRIKE

Respondent has moved to strike a footnote and a sentence of text from complaint counsel's appeal brief. Complaint counsel have filed a reply. Respondent has offered a further reply, and has filed a motion under Rule 3.22 for leave to file the reply.

The footnote and the sentence appear in a paragraph in which complaint counsel argue that evidence of a post-acquisition drop in market share is entitled to little weight because an acquiring firm may exercise restraint pending challenge of the acquisition. They support their argument by citation to legal authority and to record evidence. In addition, their argument contains the disputed sentence, which reads, "Furthermore, it is likely that Champion did not fully promote Anco pending the conclusion of this litigation."

The disputed footnote appears as authority for the disputed sentence. The footnote quotes an article in a June 6, 1983, trade publication. The article in turn purports to quote an Anco spokesman, stating that Anco will conduct a more aggressive marketing strategy after the pending litigation is completed. The spokesman is neither named nor otherwise identified in the quoted passage.

Respondent objects that this material is improper, extra-record hearsay. Respondent also asserts that the use of this material violates an order of the Administrative Law Judge, which set December 31, 1980 as the cut-off date for all discovery and record evidence.

Complaint counsel respond that the material was not introduced as evidence about respondent's own behavior. Rather, they assert, it was non-evidentiary material, used to illustrate a generally accepted proposition concerning post-acquisition behavior. As to the ALJ's order setting a cut-off date, complaint counsel assert that the material merely makes the point that post-acquisition data was probably manipulated as a matter of course. Thus, they argue, the date of the article is irrelevant, and the article can be cited without violating the order.

The disputed sentence will not be stricken from complaint counsel's brief. The sentence is a portion of complaint counsel's general argument about post-acquisition behavior, during a period when an acquisition is under challenge.

However, the disputed footnote will be stricken from the brief.