

Modifying Order

108 F.T.C.

IN THE MATTER OF

THE J.B. WILLIAMS COMPANY, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2037. Consent Order, Sept. 9, 1971—Modifying Order, Aug. 20, 1986*

The Federal Trade Commission has modified a 1971 order with respondents (79 F.T.C. 410) by terminating a perpetual obligation that the company submit advertising and labeling to the FTC at six month intervals to demonstrate compliance with the order. The FTC concluded that it was in the public interest to relieve respondents of the costs of compliance with this provision.

ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDER
ISSUED ON SEPTEMBER 9, 1971

On February 19, 1986, Beecham, Inc., on behalf of itself and its wholly-owned subsidiary, J.B. Williams Company, Inc., petitioned the Commission to reopen the proceeding in Docket No. C-2037 and modify the order against J.B. Williams issued by the Commission on September 9, 1971. Pursuant to Section 2.51 of the Commission's Rules of Practice, Beecham's petition was placed on the public record for comment. No comments were received.

Summary of Order

The order prohibits certain product effectiveness representations in advertising the product, "Proslim", or "any other purported weight reducing or weight control product".

In addition, the order prohibits the dissemination of any advertising which, in any manner, makes reference to scientific or medical tests or studies as substantiating any representation or claim as to the effectiveness or performance of any consumer product, unless such scientific tests or studies do, in fact, substantiate such representation or claim. The order further imposes the continuing obligation on the respondent to submit to the Commission samples of all advertising and labeling every six months to show continued compliance.

*Request That Provision Requiring Substantiation
For Product Claims Be Set Aside*

Beecham first requests that Part II of the order, which requires substantiation for product claims, be deleted from the order on the basis of changed conditions of fact and public interest considerations.

Beecham bases its request that Part II be deleted from the order

primarily on changed conditions of fact. First, it states that the weight control products that were the subject of the order are no longer being manufactured, advertised or sold. Secondly, it states that J.B. Williams, the "bad actor" involved in the conduct leading to the order, no longer effectively exists. Therefore, Beecham argues that, since the products that were the subject of the order and the transgressor whose conduct led to the order no longer effectively exist, it is in the public interest to eliminate such a fencing-in provision.

In support of its argument that these changed conditions of fact require that Part II be deleted from the order, Beecham cites cases involving appellate review of orders with fencing-in provisions and competition cases where the Commission removed fencing-in provisions from orders because changing market conditions rendered the fencing-in provisions unnecessary. Beecham, however, fails to cite authority for the relief that it is requesting.

The Commission rejects Beecham's argument that the discontinuance of the products that were the subject of the complaint or that corporate personnel changes are changed conditions of fact requiring that the order be modified by deleting Part II from the order. The sale and advertising of weight control products may be resumed. More importantly, Part II is applicable to "any consumer product", not just to weight control preparations. In its April 11, 1984 letter to Beecham denying its prior petition to vacate this order in its entirety, along with others, the Commission rejected Beecham's argument that corporate personnel changes is a sufficient changed condition of fact to justify the relief requested in that petition. No new arguments have been advanced that would establish that this changed condition of fact warrants the modification requested herein. Furthermore, Beecham has cited no authority for its argument that the two asserted factual changes taken together, rather than considered separately, warrant the deletion of a fencing-in provision of an order.

Part II of the order is a limited and reasonable substantiation provision that should not impose unnecessary burdens on Beecham, and Beecham has not shown that it does impose such burdens. Simply stated, Part II merely requires that medical tests or studies do, in fact, substantiate effectiveness or performance claims if Beecham makes reference in advertising to such medical tests or studies. If Beecham does not have medical tests or studies to substantiate such claims, it may not make reference to such medical tests or studies. *See Pfizer, Inc.*, 81 F.T.C. 23 (1972).

*Request That, If Part II Is Not Deleted From Order,
It Be Qualified By The Addition Of A Second Paragraph.*

If the Commission declines to delete Part II from the order, Beecham asks that the following paragraph be inserted in the order as the second paragraph in Part II of the order:

Provided, however, That such scientific or medical tests or studies shall be deemed to substantiate any such representation or claim where competent scientific or medical persons retained or employed by respondent have a reasonable good faith belief that such substantiation in fact exists regardless of whether some other scientific or medical person or persons may or do have a belief to the contrary.

The request that the order be modified to place the above paragraph in the order is based on changed conditions of law and public interest considerations. Beecham says that Commission law was changed with *Pfizer, Inc., supra*, in 1972. It argues that Part II of the order may be interpreted by staff acting unreasonably as an "absolute basis" standard, rather than a "reasonable basis" standard. An "absolute basis" standard, according to Beecham, may require that its substantiation be "free from all uncertainties or good faith differences among competent scientists, medical personnel and other experts."

Beecham further argues that the substantiation standard in Part II is ambiguous and that it is "fundamentally unfair" not to provide Beecham with clear guidance on the applicable standard which must be met under Part II.

Arguing that the public interest requires that the order be reopened and modified by the addition of its proposed paragraph, Beecham cites *General Motors Corporation*, 104 F.T.C. 511 (1984), as an order which was modified "to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions." The *General Motors* approach is equally appropriate here, Beecham argues, "[to] eliminate the ambiguities in the advertising substantiation standards applicable under the Proslim order and to permit Beecham to make representations for which it has a reasonable basis and which consumers may wish to hear."

The Commission does not view Part II of the order as imposing on Beecham an "absolute basis" standard requiring unanimity of all scientists and medical personnel. If Beecham refers to medical tests or studies in its advertising, such tests or studies must substantiate such claim. The ultimate determination of whether Beecham's substantiation does, in fact, substantiate its claim is not made by staff, but it is made by the district court in an enforcement action. On the other hand, the paragraph that Beecham wishes to be placed in the order would, in the Commission's opinion, create an absolute stan-

dard. It would establish that the "reasonable good faith belief that such substantiation exists" possessed by "competent scientific or medical persons retained or employed" by Beecham is absolute "regardless of whether some other scientific or medical person or persons may or do have a belief to the contrary." There is no justification for the substantiation standard proposed by Beecham.

As to the public interest argument, the Commission has found that Beecham has failed to demonstrate that the public interest requires modification. The current situation is not comparable to the factual situation in *General Motors*. In *General Motors*, the modification was considered to be in the public interest because it permitted the flow of information to consumers concerning normal and ordinary handling characteristics of General Motors' vehicles which would have been impossible under the order.

Request That Product Coverage Be Limited

If the Commission declines to delete Part II from the order, Beecham requests that product coverage in Part II be limited to:

Products intended for consumer use which are (a) sold under a trademark in use by J.B. Williams at the time that J.B. Williams was acquired by Beecham, (b) sold for the same uses as J.B. Williams sold such preparations at such time and (c) composed of substantially the same constituents as were in such products at such time.

The petition notes that the Commission's letter to Beecham of April 11, 1984, denying its request that this order and three other orders be set aside, also advised Beecham that it is bound by this order and the other J.B. Williams orders with respect to its advertising of the J.B. Williams consumer products. Changes in the products make it imperative, according to Beecham, that the Commission provide a more specific definition of which products are J.B. Williams consumer products and which are Beecham consumer products.

The reformulation of Beecham products is said to be a changed condition of fact requiring the product coverage modifications. With reformulations, Beecham asserts that it becomes increasingly difficult to determine whether any such product is still a "preparation of substantially similar composition" or possesses "substantially similar properties" to the old product.

Next, the integration of the J.B. Williams manufacturing facilities with those of Beecham is stated to be a changed condition of fact. Since a J.B. Williams product may be manufactured at a Beecham facility, and a Beecham product may be manufactured at a J.B. Williams facility, Beecham says that the products may be confused.

A final changed condition of fact, according to Beecham, is the

dismissal of almost all J.B. Williams management personnel after Beecham's acquisition of that company. None of those responsible for the illegal conduct prohibited by the Proslim order are currently employed by Beecham.

Beecham also argues that adoption of the product coverage modifications is in the public interest "as giving Beecham guidance on precisely which products are and are not" J.B. Williams consumer products "covered by the order."

The changed conditions of fact and public interest considerations recited in the petition do not justify the relief requested. Product reformulations, the integration of J.B. Williams manufacturing facilities with those of Beecham, management turnover, and the development of new products do not, in the opinion of the Commission, render J.B. Williams consumer products less identifiable. The Commission has previously determined that the order in Docket No. C-2037 only governs the advertising of J.B. Williams' consumer products. J.B. Williams' products and Beecham products are clearly distinguishable. J.B. Williams products would include any products manufactured by J.B. Williams at the time of the acquisition, and modifications thereto, sold and promoted under the same or substantially similar brand names, and any derivative products, *e.g.*, Sominex II, Geritol Complete, etc. However, to the extent that identification of J.B. Williams products is an issue, a determination may be made on a case-by-case basis.

Request That Perpetual Reporting Requirement Be Eliminated

The last modification requested by Beecham would delete from Part IV of the order a requirement that samples of all advertising, labels and labeling for weight control products and all advertisements for any consumer product that refer to scientific or medical tests or studies must be submitted every six months to demonstrate compliance with the order.

Upon consideration of Beecham's petition and other relevant information, the Commission now finds that the public interest warrants reopening the proceeding and modifying Part IV of the order. The record demonstrates that termination of the perpetual periodic obligation to submit advertising and labeling to the Commission to relieve respondent of compliance costs is in the public interest.

It is therefore ordered, That this matter be, and hereby is reopened and that the last paragraph of Part IV of the Commission's order be, and hereby is modified to read as follows:

It is further ordered, That respondents submit to the Commission

labels and labeling, for "Proslim" or "Proslim 7 Day Reducing" wafers, diet drink mix, or any other purported weight reducing or weight control product, and all advertisements for any consumer product which in any manner make reference to scientific or medical tests or studies as allegedly substantiating any representation or claim as to the effectiveness or performance of any such product, to show the manner of compliance with this order.

Complaint

108 F.T.C.

IN THE MATTER OF

SAGA INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3196. Complaint, Aug. 20, 1986—Decision, Aug. 20, 1986*

This consent order, among other things, requires a Compton, Calif. manufacturer and seller of ultrasonic pest-control devices to refund the full purchase price of its "Home Free" pest-control product to any consumer who bought the device after Dec. 31, 1983. Additionally, respondent is required to provide signs for retailers to post about the availability of refunds and advertise their availability through newspaper ads. Further, respondent is prohibited from making any performance or efficacy claims about any ultrasonic pest-control product unless it possesses and relies upon competent and reliable evidence that substantiates its claims.

Appearances

For the Commission: *Harrison J. Sheppard.*

For the respondents: *Vicki E. Baer, Holme, Roberts & Owen, Denver, Colo.*

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 Saga International, Inc., a corporation, 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 Saga International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 1220 West Walnut Street, Compton, California.

PAR. 2. Respondent, at all times mentioned herein, has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent, advertises, offers for sale, sells and distributes ultrasonic pest control devices under the brand name of "Home Free".