

IN THE MATTER OF

SUN COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3381. Complaint, May 6, 1992--Decision, May 6, 1992*

This consent order prohibits, among other things, Sunoco from making any representation concerning the superiority of Ultra octane gasoline in providing engine power or acceleration for any automobile, unless the respondents possess competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *Joel Winston and Marianna R. Watts.*

For the respondents: *Richard B. Herzog, Pepper, Hamilton & Scheetz, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Sun Company, Inc., and Sun Refining and Marketing Company, corporations, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Sun Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania. Respondent's office and principal place of business is located at 100 Matsonford Road, Radnor, PA.

Respondent Sun Refining and Marketing Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania. Respondent's office

and principal place of business is located at Tenn Penn Center, 1801 Market Street, Philadelphia, PA. It is a wholly-owned subsidiary of Sun Company, Inc.

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

PAR. 3. Respondents advertise, offer for sale, sell, and distribute gasoline and other petroleum products, including SUNOCO ULTRA 93.5 and 94 gasolines.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements for SUNOCO ULTRA 93.5 and 94 gasolines, including but not necessarily limited to the attached Exhibits A-C. The aforesaid advertisements contain the following statements:

1. AnnCR: When your car's your baby . . . Sing: Nothin's too good for my baby. So nothin' but Ultra . . . Nothin' but Ultra. AnnCR: . . . treat it to the power of Sunoco Ultra 93.5. Man: Fill it up. Ultra. AnnCR: No other major brand can match it. Sunoco Ultra 93.5 . . . (Complaint Exhibit A.)

2. Susan: So, we went to Mobil, then another station, then another. I said, "Michael, why don't you just get any gasoline?" He said, "My baby would never forgive me." Mary: His baby? Susan: His car. Mary: How can you forgive yourself for going out with him? Susan: Then I said, "Is there really a difference between 94 and a lower octane?" And Michael said, "That's why they made it 94, baby." ANNCR: Only Sunoco has Ultra 94. No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane - the highest octane under the sun. (Complaint Exhibit B.)

3. AnnCR: What's so special about Sunoco Ultra 94? No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane - the highest octane under the sun. . . Don't waste your time going anywhere else. Come to Sunoco and fill up with Ultra 94 - for maximum power and performance. Remember, there's only one 94. Sunoco Ultra. (Complaint Exhibit C.)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that SUNOCO ULTRA 93.5 and 94 gasolines provide superior engine power and acceleration, that would be significant to consumers, for automobiles generally as compared to any other gasoline.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A-C, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time respondents made the representation set forth in paragraph five respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph six was, and is, false and misleading.

PAR. 8. The dissemination by respondents of the aforesaid false and misleading representation, as herein alleged, constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Owen dissenting.

EXHIBIT A

TELEVISION: AS RECORDED

CLIENT: Sun Refining & Marketing Co.	CODE NO. SUGS-5063
PRODUCT: Sunoco Ultra/Credit Card	DATE: 5/4/90
(MARKETS: CEDAR RAPIDS, DES MOINES, DAVENPORT)	LENGTH: 30 AIRDATE: 5/21-6/17
TITLE: "U-Turn Credit Card Promo"	JOB NO.: 03925-01306
VIDEO	AUDIO
OPEN ON A MAN GETTING INTO RED SPORTSCAR SEEN FROM ABOVE THROUGH A WINDOWPANE. CAR DOOR SLAMS AND WE SEE THE CAR DRIVE DOWN THE ROAD. WS OF RED CAR SPEEDING AROUND A CORNER. CU MAN IN CAR TURNS HIS HEAD AND NOTICES SUNOCO GAS STATION	ANNCR: When your car's your baby... SING: Nothin's too good for my baby So nothin' but Ultra... Nothin but Ultra.
THE CAR STOPS SHORT AND TURNS AROUND	ANNCR: ...treat it to the power of Sunoco Ultra 93.5
SUNROOF OPENS AND MAN LOOKS UP SUN SHINES THROUGH THE LOGO ON THE PUMP. CAR IS FILLED UP BY LIT PUMP. MAN DRIVES DOWN THE ROAD INTO THE SUN SPLASH OF SUN ON SCREEN	MAN: Fill it up. Ultra. ANNCR: No other major brand can match it. Sunoco Ultra 93.5
CRAWL WITH SUN IN THE BACKGROUND.	ANNCR: And now until June 30th, participating dealers will accept most gasoline credit cards and make it easy to get a Sunoco card. At Sunoco, you pay one price, cash or credit.
SUPER: SUNOCO ULTRA 93.5 OCTANE	SFX: Music continues to :30 seconds.
BLACK	

EXHIBIT B

RADIO: AS RECORDED

CLIENT: Sun Refining and Marketing Co. CODE: SU-90-2274

PRODUCT: Ultra Gasoline - 94 LENGTH: 60 DATE: 4/2/90

TITLE: Michael/Flint, New York. Version 1. JOB #: 03925-01296

MARY : So how was your date with Michael last night?
SUSAN: We ran out of gas.
MARY : Ohhh. That good.
SUSAN: First we went to an Amoco station. But they didn't have 94 .
MARY : 94 what?
SUSAN: 94 octane gasoline.
MARY: So?
SUSAN: So, we went to Mobil, then another station, then another. I said, "Michael, why don't you just get any gasoline?" He said, "My baby would never forgive me."
MARY : His baby?
SUSAN: His car.
MARY : How can you forgive yourself for going out with him?
SUSAN: Then I said, "Is there really a difference between 94 and a lower octane?" And Michael said, "That's why they made it 94, baby."
ANNCR: Only Sunoco has Ultra 94. No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane - the highest octane under the sun.
SUSAN: Finally, I said, "Look Michael, both of us want to be fed, now. Who's more important?"
ANNCR: If you want to take good care of your baby, give it Sunoco Ultra 94.
MARY : So where'd he take you?
SUSAN: Never make a man choose between you and his car.

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EXHIBIT C

RADIO: AS RECORDED

CLIENT: Sun Refining and Marketing Co.

CODE #: SU-90-2265

PRODUCT: Ultra Gasoline - 94

LEGTH: 60. DATE: 4/2/90.

TITLE: Gas Attendants/New York, Flint. Version 1

JOB #: 03925-01296

SFX : CAR PULLING INTO GAS STATION. BELL RINGS.
ATTENDANT: What'll it be?
DRIVER: Fill up to the top with 94.
ATTENDANT: 94? (Ha Ha) This is Amoco.
SFX : TIRES SCREECH OUT
ANNCR: There's only one 94 octane gasoline - Sunoco Ultra 94.
SFX: BELL RINGS.
DRIVER: Do you have any 94 octane?
ATTENDANT 2: Sir, we've got 87, 92 and a little half and half could be nice...but 94? We don't have anything that high.
SFX: TIRES SCREECH.
ANNCR: What's so special about Sunoco Ultra 94? No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane - the highest octane under the sun.
DRIVER: Got any 94 octane?
ATTENDANT 3: What're ya, some kind of wise guy? Mobil doesn't make 94 octane.
SFX: TIRES SCREECH.
ANNCR: And Sunoco Ultra 94 has a special detergency to keep your intake system clean.
SFX: BELL RINGS.
DRIVER: 94?
SUN ATTENDANT: No . . . problem. Sunoco Ultra 94.
DRIVER: Don't waste your time going anywhere else. Come to Sunoco and fill up with Ultra 94 - for maximum power and performance. Remember, there's only one 94. Sunoco Ultra.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents 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 respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents 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 respondents of facts, other than jurisdictional facts, or of violations of law as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules.

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Sun Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 100 Matsonford Road, Radnor, Pennsylvania.

Respondent Sun Refining and Marketing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal

place of business located at 1801 Market Street, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

PART I.

It is ordered, That respondents Sun Company, Inc., and Sun Refining and Marketing Company, corporations, their successor and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, packaging, offering for sale, sale or distribution of SUNOCO ULTRA 93.5 and 94 gasolines or any other gasoline in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, about:

(1) The superiority of ULTRA 93.5 and 94 in providing engine power or acceleration for any automobile; or

(2) The relative or absolute attributes or performance of any gasoline with respect to vehicle engine power, acceleration, or any other performance characteristic,

unless at the time of making such representation, respondents possess and rely upon a reasonable basis consisting of competent and reliable scientific evidence which substantiates the representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean tests, experiments, analysis, research, studies, or other evidence based on the expertise of professionals in the relevant area conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

Provided that, nothing in this order shall prohibit respondents from truthfully representing the numerical octane rating of any gasoline.

PART II.

It is further ordered, That for three (3) years after the date of the last dissemination of the representation to which they pertain, respondents shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All tests, reports, studies or surveys in respondents' possession or control that contradict any representation of respondents covered by this order.

PART III.

It is further ordered, That respondents shall forthwith distribute a copy of this order to all operating divisions, subsidiaries, franchisees, officers, managerial employees, and all of their employees or agents engaged in the preparation and placement of advertisements or promotional materials covered by this order and shall obtain from each such employee a signed statement acknowledging receipt of the order.

PART IV.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation(s) such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation(s) that may affect compliance obligations under this order.

PART V.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order and at such other times as the Commission may require, file with the Commission a report, in

writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Owen dissenting.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

Deciding whether to issue a consent order involves weighing, among other factors, the potential benefits of securing stronger relief, against the costs and risks inherent in further negotiation and possible litigation. Pinpointing where the correct balance lies is often a formidable challenge, and people who share a dedication to tough law enforcement may reasonably disagree as to where it appropriately falls. In this matter, I believe that the relief obtained is grossly insufficient in light of the respondents' past conduct, and because the total consumer injury arising from the claims involved may be very costly.

Accordingly, I dissent from the Commission's decision to issue this consent order.

This is the second time that respondents have tangled with the Commission over ads linking octane and automobile engine performance. In 1974, the Commission ordered respondents' corporate predecessor, Sun Oil Co., to cease and desist from making false performance and uniqueness claims for its gasoline.¹ Since these respondents have a history of self-proclamation as the industry's octane king, I am skeptical that a second, mere "go and do no more" order will have much useful deterrent effect.

Securing stronger relief is certainly called for when there are indications that consumer injury is particularly significant. Consumer injury due to misperceptions about the relation between octane and performance, and the resultant "overbuying" of octane, may be very great. A report released last year by the U.S. General Accounting Office,² though cautioning that the existing evidence is not conclusive, suggested that consumers may be spending hundreds of

¹ 84 FTC 247 (1974).

² U.S. General Accounting Office, Gasoline Marketing: Premium Gasoline Overbuying May Be Occurring, but Extent Unknown, Report to the Chairman, Subcommittee on Antitrust, Monopolies and Business Rights, Committee on Judiciary, U.S. Senate, February, 1991.

millions of dollars, or more, yearly on unnecessary purchases of higher octane gasolines. Such dollar figures may not be surprising in view of the huge size of the gasoline market. In addition, recognizing the widespread nature of consumer misunderstanding about octane and performance, the Commission recently issued a "Facts for Consumers" bulletin, with the cooperation of the American Automobile Association, to help consumers select the octane grade most appropriate for their needs. I suspect, however, that this admirable effort represents only a small corrective to the consumer misperceptions that ads such as Sunoco's have not merely taken advantage of, but have strongly reinforced.

Based on these considerations, I conclude that the public interest would have been better served if the remedy in this matter had provided stronger incentives to insure compliance with the FTC Act, or had provided other relief that would truly benefit consumers. Query why in this instance, unlike others,³ the Commission is content to have consumer enlightenment financed with taxpayers' dollars, rather than with the ill-gotten gains of a company that the Commission has found reason to believe has violated the FTC Act -- more than once.

³ *United States v. Sears, Roebuck and Co.*, Civil Action No. 89-3383 TAF (DCC 1989); *American Life Nutrition, Inc., et al.*, FTC Docket No. C-3310.

CONCURRING STATEMENT OF COMMISSIONER DENNIS A. YAO

I agree with much of Commissioner Owen's dissenting view that some type of stronger relief is called for in this matter. There is some reason to believe that consumer misperception about the value of high octane gasoline in improving automobile performance will persist after the advertisements in question are withdrawn and thus that an order requiring Sun to place advertisements which correct past misleading advertising might be needed here.¹ In my view, however, the arguments in favor of ordering such corrective advertising as an appropriate and workable remedy for this case are not sufficiently supported. Nevertheless, an alternative remedy such as a consumer education program, in which a company is required to provide to consumers educational materials about the relative value of certain characteristics of goods,² may be appropriate for cases such as this one, particularly in light of Sun's involvement in a previous deceptive advertising campaign concerning the value of high octane gasoline.³ Although the Commission is not ordering such relief here, consumers would often benefit from educational materials provided by firms which have repeatedly engaged in deceptive advertising.

¹ See, e.g., *Warner-Lambert Co.*, 86 FTC 1398 (1975), *aff'd as modified*, 562 F.2d 749 (DC Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

² See, e.g., *United States v. Sears, Roebuck & Co.*, Civil Action No. 89-3383 TAF (DCC 1989).

³ *Sun Oil Co.*, 84 FTC 247 (1974).

IN THE MATTER OF

RMED INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3382. Complaint, May 14, 1992--Decision, May 14, 1992*

This consent order prohibits, among other things, a Colorado-based company, that makes "TenderCare" disposable diapers, and its president from making degradability claims in the future unless they possess competent scientific evidence to substantiate such claims.

Appearances

For the Commission: *Michael Dershowitz and Georgianna A. Forbes.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents RMED International, Inc., a corporation, and Edward Reiss, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent RMED International, Inc. ("RMED") is a Colorado corporation with its office and principal place of business located at 675 Industrial Drive, Delta, Colorado.

Respondent Edward Reiss is an officer of the corporate respondent named herein. He formulates, directs, and controls the acts and practices of the corporate respondent. His business address is the same as that of the corporation.