

IN THE MATTER OF

EXHART ENVIRONMENTAL SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3384. Complaint, June 2, 1992--Decision, June 2, 1992*

This consent order prohibits, among other things, a California-based company and its owners from representing that their electronic devices can eliminate, reduce the number of, or prevent the reentry of rodents unless they can substantiate such representations, and also prohibits them from stating that the devices are EPA-approved or waterproof, if that is not the case. In addition, the agreement requires the respondents to send a letter to all catalogue companies with which they have done business since January 1, 1990, informing them of the requirements of the order.

Appearances

For the Commission: *Eileen Harrington and David M. Torok.*

For the respondents: *Ronald Gold, Murphy & Gold, Calabasas, CA.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Exhart Environmental Systems, Inc. ("Exhart"), a corporation, and Isaac Weiser and Margaret Weiser, individually and as officers of said corporation (hereinafter collectively referred to as "respondents"), have 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 as follows:

PARAGRAPH 1. Respondent Exhart Environmental Systems, Inc. is a California corporation with its office and principal place of business at 21525 Strathern Street, Canoga Park, California.

PAR. 2. Respondents Isaac Weiser and Margaret Weiser are officers of Exhart. At all times relevant to this complaint, both Isaac Weiser and Margaret Weiser formulated, directed and controlled the business acts and practices of Exhart. Their business address is the same as that of respondent Exhart.

PAR. 3. Respondents are now and for some time in the past have been engaged in the promotion, manufacture, distribution, marketing, advertising and sale of various rodent control devices known as "Go'pher It," "Go'pher It II," "Molex" or "Gopher Buster" (hereinafter referred to as "products"). These products are purported to repel rodents from a specified area and prevent them from reappearing.

PAR. 4. In the course and conduct of their business, respondents cause, and in the past have caused, said products to be transported from their place of business for sale to purchasers located in various states and territories of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. In the further course and conduct of their business, respondents have at all times mentioned herein made numerous statements in writing, in various product packaging materials, instruction sheets and promotional materials prepared and/or disseminated by respondents for use in selling respondents' products. Illustrative and typical, but not inclusive, of the statements employed as aforesaid are the following:

- (a) "[A]n effective means to rid the yard and garden of Gophers, Ground Squirrels, Moles and other burrowing rodents."
- (b) "When placed in the ground, the electronic stake vibrates and emits a noise in 15 second intervals causing underground dwellers within a 40-50 ft. diameter to flee."
- (c) "Proven effective against burrowing rodents for up to a 50 foot diameter."
- (d) "Not only expels existing population, but keeps new ones out."
- (e) "Keep burrowing rodents out of your yard and garden forever."

(f) "Covers an area up to 100 feet in diameter."

PAR. 6. Through the use of the statements referred to in paragraph five, and others contained in product packaging and promotional materials, instruction sheets and advertisements not specifically set forth herein, respondents have represented, directly or by implication, that the products:

- (a) Are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents generally;
- (b) Are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents in a given area; and
- (c) Are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents for a given time period.

PAR. 7. Through the use of the statements and representations referred to in paragraphs five and six, and others not expressly set out therein, respondents have represented, directly or by implication, that at the time they made the statements and representations in paragraphs five and six, they possessed and relied upon a reasonable basis for those statements and representations.

PAR. 8. In truth and in fact, at the time respondents made such statements and representations, they did not possess and rely upon a reasonable basis for them. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. In the further course and conduct of their business, respondents have, at all times mentioned herein, disseminated and caused to be disseminated advertisements and promotional materials for their products in which respondents have represented that their products were "E.P.A. approved" and "waterproof."

PAR. 10. In truth and in fact, respondents' products were not E.P.A. approved and were not waterproof. Therefore, the representations set forth in paragraph nine were, and are, false and misleading.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

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 the 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission Rules; and

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, 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 Exhart Environmental Systems, Inc. is a California corporation with its office and principal place of business located at 21525 Strathern Street, in the City of Canoga Park, State of California.

2. Respondents Isaac Weiser and Margaret Weiser are officers of Exhart Environmental Systems, Inc. Both Isaac Weiser and Margaret Weiser formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

3. 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

For the purposes of this order, the following definition shall apply:

"*Rodent control device*" means the "Go'pher It," "Go'pher It II," "Molex," "Gopher Buster" or any other substantially similar device or implement intended to repel, mitigate, control, or eliminate rodents.

I.

It is ordered, That respondents Exhart Environmental Systems Inc., a corporation, its successors and assigns and its officers: Isaac Weiser and Margaret Weiser, individually and as officers of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, marketing, offering for sale, sale or distribution of any rodent control device in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, as amended, do forthwith cease and desist from making any representation, directly or by implication, that any such rodent control device:

- (1) Is an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents generally;
- (2) Is an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents in a given area; or
- (3) Is an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents for a given time period,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of this order, for any

experiment, analysis, research, study, survey, or other evidence to be deemed "competent and reliable," it shall be conducted and evaluated in an objective manner by persons recognized according to professional standards as being qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondents Exhart Environmental Systems, Inc., a corporation, its successors and assigns and its officers: Isaac Weiser and Margaret Weiser, individually and as officers of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, marketing, offering for sale, sale or distribution of any rodent control device in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, that any such rodent control device (1) is waterproof; or (2) is approved by the Environmental Protection Agency.

III.

It is further ordered, That respondents Exhart Environmental Systems, Inc., a corporation, its successors and assigns and its officers; Isaac Weiser and Margaret Weiser, individually and as officers of said corporation; and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, marketing, offering for sale, sale or distribution of any rodent control device or any other pest control device in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, do forthwith cease and desist from representing in any manner, directly or by implication, any performance characteristic relating to the ability of such product to eliminate, reduce the number of, or prevent the reentry of rodents or any other pests unless, at the time of making such representation, respondents possess and

rely upon competent and reliable evidence that substantiates the representation. For purposes of this order, for any experiment, analysis, research, study, survey, or other evidence to be deemed "competent and reliable," it shall be conducted and evaluated in an objective manner by persons recognized according to professional standards as being qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

IV.

It is further ordered, That respondents Exhart Environmental Systems, Inc., Isaac Weiser and Margaret Weiser shall distribute a copy of this order to each present and future officer, agent, representative and employee having sales, advertising or policy making responsibilities for any rodent control device, and shall secure from each such individual a signed statement acknowledging receipt of this order.

V.

It is further ordered, That respondents Exhart Environmental Systems, Inc., Isaac Weiser and Margaret Weiser shall, within seven days after the date of service of this order, send to each catalogue company with which they have done business since January 1, 1990, a copy of Appendix A to this order.

VI.

It is further ordered, That respondents Exhart Environmental Systems, Inc., its successors and assigns, Isaac Weiser, and Margaret Weiser shall maintain for three (3) years following the date of the last dissemination of each representation, and upon request shall make available to the Federal Trade Commission for inspection and copying:

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

B. All experiment results, test reports, studies, surveys or other evidence in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation.

VII.

It is further ordered, That respondents Exhart Environmental Systems, Inc., its successors and assigns, Isaac Weiser, and Margaret Weiser shall maintain for three (3) years after the date this order becomes final, and upon request shall make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part V of this order including, but not limited to, copies of all notices sent to catalogue companies.

VIII.

It is further ordered, That respondents Isaac Weiser and Margaret Weiser shall, for a period of ten (10) years after the date this order becomes final, promptly notify the Commission of any discontinuance of their present business or employment and of their affiliation with any new business or employment whose activities or responsibilities include the advertising, marketing, offering for sale, sale or distribution of rodent control devices or pest control devices. Such notice shall include their new business address and a statement of the nature of the business or employment in which they are newly engaged as well as a description of their duties and responsibilities in connection with that business or employment.

IX.

It is further ordered, That respondents Exhart Environmental Systems, Inc., its successors and assigns, Isaac Weiser, and Margaret Weiser shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as 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 which may affect compliance obligations arising out of the order.

X.

It is further ordered, That respondents Exhart Environmental Systems, Inc., Isaac Weiser, and Margaret Weiser shall, within ninety (90) days after the date this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

APPENDIX A

[To Be Printed on Exhart Letterhead]

Dear [name of catalogue company]:

Exhart Environmental Systems, Inc. ("Exhart") has entered into a consent agreement with the Federal Trade Commission ("FTC") to stop making certain representations about the effectiveness of the Go'pher It and similar rodent control devices unless at the time of making such representation we have competent and reliable scientific evidence that substantiates the representation. According to the FTC complaint, Exhart does not possess substantiating evidence for the following representations:

- (1) That the Go'pher It, Go'pher It II, Molex or Gopher Buster (hereinafter referred to as "devices") are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents generally;
- (2) That these devices are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents in a given area;
- (3) That these devices are an effective or proven means to eliminate, reduce the number of, or prevent the reentry of rodents for a given time period.

The FTC also has alleged that representations that these devices are waterproof or are approved by the Environmental Protection Agency are false and misleading.

The devices covered by this agreement include the Go'pher It, Go'pher It II, Molex or Gopher Buster. Exhart previously has supplied you with promotional materials or advertising copy that make the above representations. You should cease using or relying on these materials as the basis for your own advertising unless and until we have provided you with substantiation or have provided new materials or advertising copy that comply with the consent agreement. You should also be aware that the FTC has taken the position that these representations are deceptive and misleading and that their continued dissemination may be a violation of the FTC Act.

Sincerely,

Isaac Weiser, President
Exhart Environmental Systems, Inc.

IN THE MATTER OF

HAROLD A. HONICKMAN, ET AL.

AMENDING ORDER IN REGARD TO ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9233. Consent Order, July 25, 1991--Amending Order, July 20, 1992*

This order reopens the proceeding and amends the Commission's consent order issued on July 25, 1991, (114 FTC 427) by deleting the ninety-day reporting requirement in the first clause of paragraph V(A), and by correcting the syntax of paragraph III(A)(2).

ORDER AMENDING CONSENT ORDER
ISSUED ON JULY 25, 1991

On July 25, 1991, the Commission issued its consent order in Docket No. 9233. The order became final on August 5, 1991. 16 CFR 2.41(c) (1992).

Paragraph II of the order sets forth a ten-year prior approval requirement for certain proposed acquisitions of bottling operations by respondents.¹ Paragraph V(A) of the order now requires, among other things, that respondents file reports of compliance every ninety days until they comply with the provisions of paragraph II. However, in addition, paragraph V(B) of the order, consistent with the Commission's general practice respecting prior approval provisions in Commission orders, requires that respondents file annual reports concerning their compliance with paragraph II. The Commission believes that its interests in monitoring the respondents' compliance with paragraph II of the order are adequately protected by the annual report requirement in paragraph V(B) of the order, and that it is

¹ Respondents may make a bottling operation acquisition under certain circumstances without invoking the paragraph II prior approval requirement if they satisfy the conditions of paragraph III of the order. That paragraph requires the respondents to notify the Commission at least thirty days prior to the acquisition and then to divest any existing Honickman bottling operation in a specific geographic area.