

IN THE MATTER OF

DEMERT & DOUGHERTY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3456. Complaint, Aug. 17, 1993--Decision Aug. 17, 1993*

This consent order prohibits, among other things, an Illinois-based corporation, that manufactures and sells consumer hair-care products, from making unsubstantiated environmental representations about any product it markets, whether under its own name or a private label.

Appearances

For the Commission: *C. Steven Baker and John C. Hallerud.*

For the respondent: *Mitchell Goldsmith, Shefsky & Froelich, Ltd., Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that DeMert & Dougherty, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated 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 DeMert & Dougherty, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business at Five Westbrook Corporate Center, Suite 900, Westchester, Illinois.

PAR. 2. Respondent is, and has been, engaged in the business of manufacturing, offering for sale, promoting, distributing and advertising certain consumer hair care products to the public,

including All Set Hair Spray, that contain the volatile organic compounds ("VOC's") propane, butane, isobutane and alcohol.

PAR. 3. Respondent's acts or practices, including those alleged in this complaint, are, and have been, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertising, including product labeling, and other promotional materials for respondent's products, including, but not necessarily limited to, the attached Exhibit A.

The product labeling on cans of All Set hair spray has included the following statement:

ENVIRONMENTALLY SAFE

PAR. 5. Through the statement referred to in paragraph four in product labeling, respondent has represented, directly or by implication, that respondent's hair spray products do not contain any ingredients that harm or damage the environment.

PAR. 6. Through the use of the statement contained in the advertising referred to in paragraph four, including but not necessarily limited to the product label attached as Exhibit A, respondent has represented, directly or by implication, that, at the time that it made the representation set forth in paragraph five, it possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 7. In truth and in fact, at the time respondent made the representation set forth in paragraph five, respondent 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. Respondent's acts and practices as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a).

EXHIBIT A

D-3456
B143765

DeMert

ALL
SET
EXTRA

All Set Professional Hair Spray. The professional stylist's choice for better hold. Greater body. Lasting style. Featuring an extra firm formula for extra style. All Set Extra. A filtered clear hair spray with an extra-firm hold. Water-soluble for easy touch-ups. Anti-static to prevent "fly-away" hair. Holds for hours even in damp, humid weather. Set your own style with All Set Extra. Specially formulated with di-Panthenol, a hair-absorbed pro-vitamin. Organic Protein for stronger, healthier looking hair. And a UV Sunscreen for added protection from the sun's harmful rays.

PROFESSIONAL
HAIR SPRAY

EXTRA FIRM HOLD

With di-Panthenol and
Ultra-Violet Sunscreen

ENVIRONMENTALLY SAFE



OFFICIAL HAIR SPRAY

Sold in Salons

0 FL. OZ. (NET WT. 14.79 OZ.)

FORMULATED FOR SALON USE.

DIRECTIONS: Hold can upright 8 to 12 inches from hair and spray to restyle without reshaping use a damp comb.

WARNING: FLAMMABLE. DO NOT USE NEAR FIRE OR FLAME OR WHILE SMOKING. Avoid spraying in eyes. Contents under pressure. Do not puncture or incinerate. Do not store at temperature above 120° F. Use only as directed. Intentional misuse by deliberately concentrating and inhaling the contents can be harmful or fatal. KEEP OUT OF REACH OF CHILDREN.

INGREDIENTS: SD Alcohol 40, Isobutane for Normal Butane, Propene, Vinyl Acetate/Crotonic Acid/Vinyl Resodacarbonate Copolymer, Aminomethyl Propene, Fragrance, PPG-12-PEG-20 Lanolin, PVP, Ethyl Ester of Hydrolyzed Animal Protein, PPG-2, Silicic Acid, Panthenol, Octyl Dimethyl PABA.



DeMert & Dougherty, Inc.
Oak Brook, IL 60521

Made in U.S.A. SDA-B-2098

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 Chicago Regional Office 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, its attorneys, 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, and having duly considered the comment filed thereafter by an interested person 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 DeMert & Dougherty, Inc., is an Illinois corporation with its office and principal place of business at Five Westbrook Corporate Center, Suite 900, Westchester, Illinois.
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

DEFINITIONS

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

1. The term “*Volatile Organic Compound*” (“VOC”) means any compound of carbon which participates in atmospheric photochemical reactions as defined by the U.S. Environmental Protection Agency at 40 CFR 51.100(s), and as subsequently amended. When the final rule was promulgated, 57 Fed. Reg. 3941 (February 3, 1992), the EPA definition excluded carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and certain listed compounds that the EPA has determined are of negligible photochemical reactivity.

2. The term “*product*” means any product that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the “All Set” brand name or any other brand name of respondent, its successors and assigns; and also means any product sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

3. The term “*competent and reliable scientific evidence*” shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent DeMert & Dougherty, Inc., a corporation, its successors and assigns, and its officers, and respondent’s representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion,

offering for sale, sale, or distribution of any product containing any volatile organic compound, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, through the use of such terms as “environmentally safe,” or any other term or expression, that any such product will not harm the atmosphere or the environment, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent DeMert & Dougherty, Inc., a corporation, its successors and assigns, and its officers, and respondent’s representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any product offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That nothing in this order shall prohibit respondent from using any of the terms cited in part I, or similar terms or expressions, or from making representations cited in part II, if necessary to comply with any federal rule, regulation, or law governing the use of such terms in advertising or labeling.

IV.

It is further ordered, That nothing in this order shall prohibit respondent from depleting its inventory of products bearing labeling otherwise prohibited by this order and existing on the date that this order is signed, in the normal course of business, including converting existing inventory to finished goods, provided that no such existing inventory is shipped later than 120 days after the date that this order becomes final; *provided, however,* that nothing in this paragraph shall prohibit respondent from shipping existing inventory of products bearing labeling claims otherwise prohibited by this order, so long as stickers are placed over such claims or the prohibited claims are obscured in some other way; *provided further* that nothing in this paragraph shall create any obligation on behalf of respondent to remove or to obscure labeling claims from products shipped in conformity with this paragraph that are no longer in the possession, custody, or control of respondent.

V.

It is further ordered, That for five years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All materials that were relied upon in disseminating such representation; and
2. All tests, reports, studies, surveys, or other materials in respondent's possession or control that contradict, qualify, or call into question any such representation or the basis relied upon for such representation, including complaints from consumers.

VI.

It is further ordered, That respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation 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 which may affect compliance obligations under this order.

VIII.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, 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 it has complied with this order.

IN THE MATTER OF

INSTITUT MERIEUX S.A.

Docket C-3301. Interlocutory Order, August 17, 1993

ORDER VACATING ORDER TO SHOW CAUSE

On March 9, 1993, the Commission issued an order to show cause why the proceeding in Docket No. C-3301 should not be reopened to modify the August 6, 1990 consent order against respondent Pasteur Merieux Serums et Vaccins S.A., formerly known as Institut Merieux S.A. ("Merieux"), by setting aside the provisions pertaining to respondent's obligation to lease the Connaught Bio Sciences, Inc. rabies vaccine business ("March 9 Order to Show Cause"). By order dated April 23, 1993, the Commission authorized North American Vaccine, Inc. ("North American Vaccine") to file a brief *amicus curiae* presenting its views as to this show cause proceeding. The Commission has received North American Vaccine's brief as well as responsive submissions from Commission counsel and Merieux.

The Commission's March 9 Order to Show Cause was based on its assessment at that time that there did not "appear to be any potential lessee that is interested in the rabies vaccine business or that is likely to receive the necessary governmental approvals" and that "accomplishment of the required lease is, for all practical purposes, a virtual impossibility, despite respondent's good faith efforts to comply with the order." March 9 Order to Show Cause at 2. Subsequently, however, North American Vaccine has come forward to express its interest in leasing the Connaught rabies vaccine business, stating that it is "committed to moving forward with negotiations." North American Vaccine Amicus Brief at 22 (May 21, 1993). Respondent Merieux asserts that North American Vaccine has failed to demonstrate a likelihood that it can acquire and operate Connaught's rabies vaccine business and argues that the consent order should be modified in accordance with the March 9