

Complaint

117 F.T.C.

IN THE MATTER OF

PERSONAL PROTECTIVE ARMOR ASSOCIATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3481. Complaint, Mar. 17, 1994--Decision, Mar. 17, 1994*

This consent order prohibits, among other things, a Maryland-based association for manufacturers of soft body armor (bullet-proof vests) from entering into any agreement with its members that would restrict them from engaging in comparative advertising or offering product-liability insurance, guarantees or warranties on soft body armor, and from placing any restraints on soft body armor advertising, that is not deceptive or false, including restricting information about prices, product availability, and body armor performance characteristics.

Appearances

For the Commission: *Paul J. Nolan and Deborah E. Klein.*

For the respondent: *Richard Feinstein, McKenna & Cuneo,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 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, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Personal Protective Armor Association ("PPAA") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its mailing address at 3623 Falls Road, Baltimore, Maryland.

PAR. 2. Respondent is a trade association of fiber and soft body armor manufacturers founded in 1975. A significant portion of respondent's activities furthers its members' pecuniary interests. By

virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Most of respondent's members are engaged in the business of producing and selling soft body armor. Some are also engaged in the sale of ballistic resistant fibers. Except to the extent that competition has been restrained as herein alleged, most of respondent's members have been and now are in competition among themselves.

PAR. 4. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Consumers of soft body armor, usually federal, state, and local law enforcement agencies, seek various price and non-price terms as part of a competitive bidding process. In selecting a body armor manufacturer, consumers consider factors such as quality of the product, price, and other terms of sale such as products liability insurance and certification that the soft body armor passes applicable performance standards. Advertising, including comparative advertising and advertising of warranties and products liability insurance, enables firms to inform consumers about these factors. Such advertising benefits consumers by increasing the information available to them and promoting competition among soft body armor manufacturers.

PAR. 6. During some periods, from 1986 to the present, PPAA has maintained a policy against comparative advertising, including a policy declaring it unethical for any member to make any representation that another member's vests have failed certification testing. This policy applies even to truthful representations and operates to discourage or prevent a manufacturer from engaging in comparative advertising or otherwise representing that its soft body armor possesses qualities superior to that of other members.

PAR. 7. During some periods, from 1986 to the present, PPAA adopted a policy that its members were to respond uniformly to bids by not offering products liability insurance in competing for contracts from law enforcement agencies. The aim of the respondent was to improve its members' profits by no longer using products liability insurance, or the amount of such insurance, as a tool to win contracts to supply soft body armor.

PAR. 8. In engaging in the acts and practices described above, PPAA has acted as a combination of its members or in conspiracy with some of them.

PAR. 9. The purposes or effects, and the tendency and capacity, of the combination or conspiracy and acts and practices of respondent as described in paragraphs six through eight have been and are to unreasonably restrain competition in one or more of the following ways, among others:

A. Competition in the marketing and sale of soft body armor on the basis of price, service, and quality has been frustrated and restrained;

B. Consumers have been deprived of the benefits of truthful information about the performance of soft body armor; and

C. Consumers have been deprived of the potential value of warranties, including but not limited to products liability insurance, in the purchase of soft body armor.

PAR. 10. The combination or conspiracy and the acts and practices, described herein, constitute unfair methods of competition, or unfair or deceptive acts practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The combination or conspiracy, as herein alleged, is continuing and will continue in the absence of the relief herein requested, unless the Commission enters appropriate relief against the respondent.

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 Competition 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, 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 Personal Protective Armor Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 3623 Falls Road, in the City of Baltimore, State of Maryland.

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

I.

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

A. "*Respondent*" means the Personal Protective Armor Association, its directors, trustees, councils, committees, officers, representatives, delegates, agents, employees, successors, or assigns.

B. "*Soft body armor*" means concealable bullet-resistant vests generally worn by civilians and law enforcement personnel.

II.

It is ordered, That respondent, directly, indirectly, or through any device, in connection with activities in or affecting commerce, as

“commerce” is defined by the Federal Trade Commission Act, as amended, cease and desist from:

A. Entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, or carrying out any agreement between or among respondent’s members, either express or implied, that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against:

1. Engaging in comparative advertising, including, but not limited to prohibiting any member from advertising that any type of soft body armor meets or fails to meet any ballistic resistance standard; or
2. Offering or providing products liability insurance, guarantees, or warranties on soft body armor.

B. Restricting, regulating, impeding, declaring unethical, interfering with, restraining, or advising against the advertising, publishing, or dissemination by any person of the prices, terms, availability, characteristics, or conditions of sale of soft body armor through any means, including, but not limited to, adopting or maintaining any rule or policy that restricts or prohibits a member from:

1. Engaging in comparative advertising, including, but not limited to prohibiting any member from advertising that any type of soft body armor meets or fails to meet any ballistic resistance standard; or
2. Offering or providing products liability insurance, guarantees, or warranties on soft body armor.

Provided, that nothing contained in this paragraph II shall prohibit respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That respondent:

A. Distribute by first-class mail a copy of this order and the complaint to each of its members within thirty (30) days after the date this order becomes final.

B. For a period of five (5) years after the date this order becomes final, provide each new member who joins PPAA with a copy of the order and complaint within thirty (30) days of membership into PPAA.

C. File a verified, written report with the Commission within sixty (60) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to PPAA, require, setting forth in detail the manner and form in which it has complied and is complying with the order.

D. For a period of five (5) years after the date this order becomes final, maintain and make available to Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order.

IV.

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

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to approve the consent order in this matter. The evidence demonstrates that ten companies, representing more than 90% of U.S. sales of protective body armor, engaged in unreasonable restraints of trade in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The agreements here restrain significant dimensions of competitive rivalry among body armor manufacturers. Therefore, they appear likely, absent an efficiency justification, to restrict output. The respondent has not

proffered any efficiency justification for the restraints. Under the standards set forth in Massachusetts Board of Registration in Optometry¹ and its progeny, this “inherently suspect” conduct is appropriately condemned without a full rule of reason analysis.

In my view, however, it may have been appropriate to name as respondents the members of the Personal Protective Armor Association (“PPAA”). This case is not typical of the Commission’s cases challenging anticompetitive conduct of state licensing boards and trade associations. In most such cases, the board or association represents hundreds or thousands of competing entities.² Naming individual members as respondents in such cases is generally impracticable: it may unnecessarily complicate litigation or create intractable problems for settlement negotiations.³ More important, naming members is often unnecessary: the respondent board or association is typically the only (or only effective) means by which the multitude of competitors can reach and enforce an agreement restraining competition.

By contrast, competitors in the relatively concentrated protective body armor industry may be able to collude effectively outside the auspices of the PPAA or any other formal trade association.⁴ If so, the consent order, which names only the PPAA as a respondent, may provide an insufficient remedy. So long as the PPAA is not involved,⁵ the same body armor manufacturers could engage in collusive conduct falling squarely within the core cease and desist provisions of the order without exposure to civil penalties under Section 5(l) of the FTC Act, 15 U.S.C. 45(l).⁶

¹ 110 FTC 549, 604 (1988).

² See, e.g., *American Medical Association*, 94 FTC 701, 702 (1979) (membership consisting of approximately 170,000 medical doctors); *Mass. Board*, 110 FTC at 560 (more than 1350 optometrists subject to the Board’s restraints); *Detroit Auto Dealers Association, Inc.*, 111 FTC 417, 419 (1989) (membership consisting of 231 automobile dealerships).

³ But see *Detroit Auto Dealers*, 111 FTC at 518-21 (addenda to final decision and order) (naming as respondents the association, 17 constituent associations, 96 member dealerships, and 81 individuals); *id.*, Docket No. 9189 (Jan. 26, 1994) (agreement containing consent order with 146 respondents accepted for public comment).

⁴ Thus, unlike in many cases involving association restraints in which the respondent association itself is a critical first mover, the conduct at issue here constitutes archetypal cartel behavior as to which this particular association’s involvement may be merely detail.

⁵ Under the order, respondent PPAA is defined to include any association that can be held to be a legal successor. The evidence does not clearly indicate whether PPAA has any structural, legal, or historical advantage that would impede the creation of a new, non-successor body armor trade association.

⁶ Of course, this conduct would expose these firms to private and state actions for damages under Section 4 of the Clayton Act, 15 U.S.C. 15. Such exposure, however, apparently did not deter the conduct that led to the Commission’s action in this matter.

In determining the optimal scope of any future enforcement actions against anticompetitive restraints facilitated by a trade association, the Commission should consider carefully the extent to which the participation of the particular association is necessary to effect collusion among its members.

Complaint

117 F.T.C.

IN THE MATTER OF

THE HAIRBOW COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3482. Complaint, Mar. 17, 1994--Decision, Mar. 17, 1994*

This consent order prohibits, among other things, the California-based corporations and officers, who purported to sell hairbow kits, from making any material misrepresentations regarding earnings or profits of participants in any work opportunity and from making misrepresentations about the marketplace demand for any product or service for which the respondents are offering a work opportunity. In addition, the order sets a redress payment, however, based upon financial statements submitted by the respondents, the redress payments have been suspended.

*Appearances*For the Commission: *Gerald E. Wright and Jeffrey Klurfeld.*For the respondents: *William Bernheim, Whitaker & Bernheim,*
Dixon, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that Russell J. Osborn, a/k/a Russell J. Osborne and Russell J. Osbourne (hereafter "Russell J. Osborn"), individually, trading and doing business as The Hairbow Company, and as an officer of Rainbow Productions, Inc., and Rainbow Productions, Inc., a corporation ("respondents"), have violated Section 15 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it would be in the public interest alleges:

PARAGRAPH 1. Respondent The Hairbow Company is an unincorporated association, with its principal office and place of business located at 19 Front Street, Danville, California.

Respondent Rainbow Productions, Inc. is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 19 Front Street, Danville, California.