

IN THE MATTER OF
BECK'S NORTH AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3859. Complaint, March 5, 1999--Decision, March 5, 1999

This consent order, among other things, prohibits a Connecticut-based corporation, that advertises and distributes Beck's Beer, from disseminating advertisements that depicts a person consuming alcohol beverages on a boat while engaging in activities that pose a substantial risk of serious injury from falling overboard.

Participants

For the Commission: *Janet Evans, Richard Kelly, C. Lee Peeler,*
and *Dennis Murphy.*

For the respondent: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Beck's North America, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Beck's North America, Inc. is a Delaware corporation with its principal office or place of business at 57 Old Post Road No. 2, Greenwich, Connecticut.
2. Respondent has advertised, labeled, offered for sale, sold and distributed products to the public, including Beck's Beer. Beck's Beer is a liquid beverage consisting of 5% alcohol by volume (10 proof).
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or caused to be disseminated advertisements for Beck's Beer, including but not necessarily limited to the attached television advertisements, Exhibits A and B. Exhibits A and B depict a number of passengers in various places on a sailing boat at sea. On the deck of the boat is a large bucket of ice, filled with bottles of Beck's Beer. Almost all of the passengers are holding bottles of beer, with one passenger standing precariously on the

bowsprit (a spar extending almost horizontally off the bow of the boat), and others sitting on the edge of the bow; no one is wearing a life jacket.

5. Through the visual depictions described in paragraph four, respondent has depicted boating passengers as drinking Beck's beer while engaged in activities that require a high degree of alertness and coordination to avoid falling overboard. This conduct is inconsistent with the Beer Institute's own Advertising and Marketing Code and may also violate federal and state boating safety laws. The risks associated with such activities while boating are greatly increased by the consumption of alcohol. In the boating environment, even low and moderate blood alcohol levels sufficiently affect coordination and balance to place boat passengers at increased risk of falling overboard and thus drowning, and many persons are unaware of this increased risk. As many as one-half of all boating fatalities are alcohol-related, including an average of 60 recreational boat fatalities annually from falling overboard while drinking. Respondent's depiction of this activity in its advertisements is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. Respondent's practice was an unfair act or practice.

6. The acts and practices of respondent as alleged in this complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Swindle dissenting.

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Complaint

EXHIBIT A-1

Beck's TV Spot #1**Depictions****Verbal**

- | | |
|---|--|
| <ul style="list-style-type: none"> • Ocean with green-sailed schooner in view. | <p>Music starts.</p> |
| <ul style="list-style-type: none"> • Close up on schooner. | <p>Music continues throughout commercial.</p> |
| <ul style="list-style-type: none"> • Close up: unseen people toast with two bottles of Beck's. | <p>Man's voice: "Here's to adventure."</p> |
| <ul style="list-style-type: none"> • Female passenger talking to viewer. Switch to another female passenger, holding a Beck's, riding piggy-back on standing male passenger. She touches the tip of her beer to the beer of another passenger. | <p>Female voice: "Three weeks in the sun . . ." Music continues.</p> |
| <ul style="list-style-type: none"> • Four passengers sitting/leaning on the edge of the bow, most holding beers and a fifth balancing on the bowsprit, waving a beer. | <p>Female voice continues: "on a big German ship."</p> |
| <ul style="list-style-type: none"> • Close up: two Beck's beers being removed from a cooler full of ice on deck. | <p>Male voice: "Sponsored by . . ."</p> |
| <ul style="list-style-type: none"> • Close up: a bottle of Beck's being opened with a bottle opener. | <p>Male voice continues: "Beck's beer."</p> |
| <ul style="list-style-type: none"> • Close up: a male passenger talking to the viewer. | <p>Male voice: "I'm in!"</p> |
| <ul style="list-style-type: none"> • Switch to two passengers sitting near rail, then to three others near the rail, most holding Beck's. | <p>Male voice: "It's totally different!"</p> |
| <ul style="list-style-type: none"> • Close up: male passenger talking. | <p>Male voice: "Like the beer."</p> |
| <ul style="list-style-type: none"> • Close up: hand slamming Beck's bottle on wet surface. | <p>Male narrator's voice: "Beck's . . ."</p> |

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- Close up: glass with Beck's logo filled with foaming beer. Voice continues: "truly distinctive."
- A couple sitting/reclining in boat, lifting Beck's to the viewer. Voice continues: "Totally refreshing."
- Four passengers sitting/reclining in stern, water behind them, holding Beck's, while fifth passenger takes their photo. Female voice: "I wanted a great experience . . ."
- Close up on a female passenger talking to viewer. Voice continues: "I got it!"
- Waves coming up on ship. SUPER: Narrator's voice: "Beck's, America's Favorite German Beer"

BECK'S
America's Favorite German Beer
Imported by DriBeck Importers,
Greenwich, Connecticut

EXHIBIT A-2

Beck's TV Spot #1
(VIDEOTAPE AD)

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Complaint

EXHIBIT B-1

Beck's TV Spot #2

Descriptions	Verbal
• Ocean with green-sailed schooner in view.	Music starts.
• Close ups of schooner, sails.	Music continues throughout rest of commercial.
• Close up of female passenger talking to viewer.	Female voice: "Wanna Have some Fun?"
• Couple playing; switch to three passengers dancing/playing while their photo is taken on upper deck, framed against sky; passengers holding beers in background.	Female voice: "Mix hot music . . ."
• Close up: male passenger talking.	Male voice: "cool people . . ."
• Four passengers sitting/leaning on the edge of the bow, most holding beers, and a fifth balancing on the bowsprit, waving a beer.	Male voice: "a big boat . . ."
• Couple sitting with backs to rail, toasting Beck's.	Male voice: "and a . . ."
• Two Beck's are removed from a cooler filled with ice and beers.	Male voice: "great . . ."
• Bottle of Beck's being opened with a bottle opener.	Male voice: "German Beer."
• Close up: female passenger talking to viewer.	Female voice: "With the right ingredients . . ."
• Scene of couple, blue sky in background, she waves beer; switch to four passengers sitting/reclining in stern, most holding beers.	Voice continues: "nothing's better!"

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- Hand slams bottle of Beck's down on wet surface. Male narrator voice: "Beck's . . ."
 - Close up: glass with Beck's logo filled with foaming beer. Voice continues: "truly distinctive . . ."
 - A couple sitting/reclining in boat, lifting Beck's to the viewer. Voice continues: "totally refreshing . . ."
 - Close up: male passenger talking to viewer. Male voice: "this is just the best!"
 - Close up: waves coming up on ship. Narrator: "Beck's, America's Favorite German Beer"
- SUPER:

BECK'S
America's Favorite German Beer
DriBeck Importers, Greenwich,
Connecticut

EXHIBIT B-2

Beck's TV Spot #2
(VIDEOTAPE AD)

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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent 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 complaint, a statement that the signing of the 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 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 Beck's North America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at 57 Old Post Road No. 2, Greenwich, Connecticut.
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. Unless otherwise specified, "*respondent*" shall mean Beck's North America, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

2. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, shall not broadcast or otherwise disseminate, or assist others to broadcast or otherwise disseminate, the television advertisements attached to the complaint as Exhibits A and B or any other advertisement that depicts a person having consumed or consuming alcohol on a boat while engaging in activities that pose a substantial risk of serious injury from falling overboard or that depicts activities that would violate 46 U.S.C. 2302(c).

II.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials depicting the use or presence of alcoholic beverages on any boat;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify or call into question the representation, or the basis relied on for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

It is further ordered, That respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

VI.

This order will terminate on March 5, 2019, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Commissioner Swindle dissenting.

STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON

The Commission has now voted to accord final approval to the consent agreement with Beck's North America, Inc. ("Beck's") in Docket Number C-3859 on grounds that Beck's disseminated or caused to be disseminated unfair television advertisements. I joined in that vote. I also believe, however, that the advertisements at issue were deceptive. The Commission has defined deceptive advertising as "that which contains a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."¹ In my view, the Beck's television advertisements fit this definition.

¹ See *Cliffdale Associates, Inc.*, 103 FTC 110, 176 (1984) Appeal dismissed sub nom., Kovan v. FTC, No. 84-5337 (11th Cir. Oct. 10, 1984) (Deception Statement).

First, I believe the advertisements imply to reasonable targeted consumers that consuming alcohol while boating is appropriate and/or safe. In fact, the actors begin one advertisement by stating "Wanna have some fun? Mix hot music, cool people, [a] big boat and a great German beer." Unfortunately, the advertisement does not disclose that consuming alcohol while boating poses a heightened danger not only to the boat operator, but also to passengers. It also fails to disclose that such behavior may violate applicable Federal boating laws.² Second, as evidenced by the actors and the language portrayed in the advertisement, I believe that the message is targeted at a youthful audience. Accordingly, it can be justifiably inferred that a reasonable youthful consumer could easily be deceived by not appreciating the danger of imitating the behavior featured in the television advertisements.

For these reasons, I would find that the Beck's advertisements were deceptive as well as unfair under Section 5 of the FTC Act.

STATEMENT OF COMMISSIONER ORSON SWINDLE

In August 1998, the Commission released a proposed complaint against Beck's North America, Inc. in connection with its dissemination of advertisements showing young adults drinking beer on a boat and engaging in dangerous activities, such as standing on the bowsprit. The proposed complaint challenged the ads as unfair acts or practices in or affecting commerce in violation of Section 5 of the FTC Act. At the same time, the Commission also accepted for public comment a consent agreement that would prohibit Beck's from disseminating these specific ads or any others depicting a person consuming alcohol on a boat while engaged in activities that increase the risk of falling overboard or violate federal boating safety laws. Although I voted to accept the consent agreement for comment, I now dissent from the issuance of the complaint and final consent order because, upon further reflection, I conclude that the requirements for unfairness are not met.

I continue to believe that the ads, which are inconsistent with the Beer Institute's Advertising and Marketing Code and may violate

² This problem has become so serious that the U. S. Coast Guard has recently launched a new campaign to better inform the public of the dangers of mixing boating and alcohol.

federal and state boating safety laws, are ill-conceived and unwise. They are, however, directed at young adults who by any reasonable standard should have the ability to exercise their own judgment when undertaking clearly risky activities. In a January 15, 1999, decision, the U.S. Court of Appeals for the D.C. Circuit rejected the view that certain types of advertising claims "have such an awesome impact on consumers as to make it virtually impossible for them to exercise any judgment" *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), 1999 U.S. App. LEXIS 464, at * 16. The court further characterized *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 105 (1990), as rejecting the "paternalistic" assumption that an adult viewing a claim is "no more discriminating than the audience for children's television." 1999 U.S. App. LEXIS 464, at * 16.

An unfair act or practice is one that is likely to cause substantial injury to consumers that is *not reasonably avoidable* by consumers themselves and is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. 45(n). In order for the Beck's advertisements to be unfair, they must be likely to cause consumers substantial injury, such as increasing the likelihood they will fall off a boat and drown, and this injury must be one that consumers cannot reasonably avoid by themselves. Unlike in other unfairness cases, where ads influenced children to engage in unsafe activities, in this case the consumers of Beck's products -- through the exercise of their own adult judgment -- surely can reasonably avoid any injury that they might suffer from the advertisements' depiction of dangerous activity. In other words, a reasonable adult could easily see that the conduct depicted in the ads is rather stupid and dangerous and would conclude that it would be unwise to engage in it.

This case calls attention to the ongoing debate over how far the government should go in trying to protect people from themselves. The Commission is seeking to protect people who may decide to act unreasonably by choosing to put themselves at risk of injury. Government cannot and should not shield people who knowingly choose to expose themselves to such risks.

I dissent.

IN THE MATTER OF
GENERAL SIGNAL POWER SYSTEMS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3860. Complaint, March 11, 1999--Decision, March 11, 1999

This consent order, among other things, prohibits the Wisconsin-based company that manufactures, advertises and sells Uninterruptible Power Supplies ("UPS"), devices that protect computers or other appliances from damage resulting from power outages, from making any representations regarding the ability of its UPS, or similar products, to reduce computer or network downtime, or regarding the extent to which any such product reduces the number of calls for service, unless the company possesses and relies upon competent and reliable evidence to substantiate the claims.

Participants

For the Commission: *Matthew Gold, Linda Badger, and Jeffrey Klurfeld.*

For the respondent: *Donald Mulvihill, Cahill, Gordon & Reindel,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Signal Power Systems, Inc., a corporation ("respondent"), has 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:

1. Respondent General Signal Power Systems, Inc., is a Wisconsin corporation with its principal office or place of business at N. 9246 Highway 80, Necedah, Wisconsin.

2. Respondent, through its division, Best Power, has manufactured, advertised, labeled, offered for sale, sold, and distributed computer products to the public, including the "Patriot" and "Fortress" uninterruptible power systems. Uninterruptible power systems are devices that protect consumer appliances, such as personal computers, from damage resulting from power disturbances or power failures.