

Complaint

IN THE MATTER OF

TROPICANA PRODUCTS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4145; File No. 0423154**Complaint, August 19, 2005--Decision, August 19, 2005*

This consent order, among other things, requires Respondent Tropicana Products, Inc., to possess competent and reliable scientific evidence before representing that (1) drinking three glasses of “Healthy Heart” orange juice a day for one month will raise good cholesterol by twenty-one percent and improve the ratio of good to bad cholesterol by sixteen percent; (2) drinking twenty ounces of “Healthy Heart” a day for one month will increase blood folate levels by forty-five percent and decrease homocysteine levels by eleven percent; and (3) drinking two glasses of orange juice a day for eight weeks will lower blood pressure an average of ten points. The consent order also requires the respondent to possess competent and reliable scientific evidence before making certain representations that any food will affect any biological marker or health-related endpoint by any specific amount; blood cholesterol levels, blood folate levels, blood homocysteine levels, or blood pressure; or the risk of developing heart disease, stroke, or cancer. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

Participants

For the Commission: *Karen M. Muoio, Michelle K. Rusk, Mary K. Engle and Margaret A. Patterson.*

For the Respondent: *Steven B. Steinborn, Hogan & Hartson and Anne V. Maher, Kleinfeld Kaplan & Becker*

COMPLAINT

The Federal Trade Commission, having reason to believe that Tropicana Products, 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:

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1. Respondent is a Delaware corporation with its principal office or place of business at 555 Monroe Street, Chicago, Illinois 60661.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed food products to the public, including orange juice sold under the “Tropicana” name.
3. Orange juice is a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
4. 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.
5. Respondent has disseminated or has caused to be disseminated national advertising and promotional materials for its orange juice, including but not limited to the television and print advertisements attached as Exhibits A-C. The advertisements contain the following statements and depictions:
 - A. VISUAL: Carton of Tropicana orange juice with blood pressure gauge attached.

TEXT: Lowering your blood pressure never tasted so good.

VISUAL: Two small glasses of orange juice.

TEXT: A new clinical study shows enjoying two glasses of Tropicana Pure Premium every day can lower your blood pressure an average of ten points.

FINE PRINT: Two 8-oz. glasses daily over 6 weeks resulted in an average reduction of 10 pts. Consult your physician. Results may vary.

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Full page, color print advertisement, *New York Times*, March 20, 2002 (Exhibit A)

B. ON SCREEN: Older man sings and dances around doctor's examining room while drinking Tropicana orange juice. Camera shots alternate between man and various pieces of medical equipment, including blood pressure monitor.

MUSIC: Everybody's smiling. Sunshine day.

VOICEOVER: A new study finds that 2 glasses of great tasting Tropicana Pure Premium every day can significantly lower your blood pressure.

SUPERSCRIPT: Two 8 oz glasses daily over 6 weeks resulted in an average of 10 pt. reduction. Results may vary. Consult your physician on how a healthy diet can help lower your blood pressure.

ON SCREEN: Carton of Tropicana orange juice.

ON SCREEN: Arm on dial of blood pressure gauge lowers from 140 points to below 128 points.

ON SCREEN: Man dances out of doctor's office.

Television advertisement (Exhibit B)

C. TEXT: Over the past few years, researchers have tied America's favorite breakfast beverage to a bonanza of health perks. Besides being fat-, sodium- and cholesterol-free, orange juice has been shown to improve heart health. And there's growing evidence it may have other benefits, including helping to stave off cancer. . . .

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TEXT: Most research on o.j. links a juice habit to healthier hearts. For instance, researchers recently showed that drinking three glasses of Tropicana orange juice a day for four weeks raised HDL, the “good” cholesterol, by 21 percent and improved the ratio of good cholesterol to bad (LDL) cholesterol by 16 percent. . . .

TEXT: Hearts also benefit from folic acid (folate), which lowers levels of a harmful substance called homocysteine. High amounts of this amino acid are associated with increased risk of cardiovascular problems, but drinking orange juice may counter its ill effects. A study from the Medical College of Wisconsin found that drinking 20 ounces of orange juice a day increased blood levels of folate by almost 45 percent and decreased homocysteine by 11 percent. . . .

TEXT: Orange juice also appears to lower blood pressure and stroke risk, which appears to be at least partly due to its high potassium levels. When researchers at the Cleveland Clinic Heart Center asked 24 people to drink two glasses of Tropicana each day for eight weeks, study participants experienced a significant lowering of blood pressure: Systolic blood pressure (the upper number) dropped an average of 10 points.

VISUAL: Orange with wrist heart monitor strapped around it and straw sticking out of it.

Multi-page print advertisement, *Newsweek*,
February 9, 2004 (Exhibit C)

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that

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- A. Drinking three cups of Tropicana orange juice a day for four weeks will raise HDL cholesterol by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;
- B. Drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and decrease homocysteine by 11 percent; and
- C. Drinking two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points.

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that:

- A. A clinical study shows that drinking Tropicana orange juice will reduce the risk of heart disease by substantially raising HDL (good) cholesterol levels and substantially improving the ratio of HDL cholesterol to LDL (bad) cholesterol, including specifically that drinking three cups of Tropicana orange juice a day for four weeks will raise HDL by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;

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- B. A clinical study shows that drinking Tropicana orange juice will reduce the risk of heart disease by substantially increasing the levels of folate in the blood and substantially decreasing the levels of homocysteine in the blood, including specifically that drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and decrease homocysteine by 11 percent; and
 - C. A clinical study shows that drinking Tropicana orange juice will reduce the risk of stroke by substantially lowering blood pressure, including specifically that drinking two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points.
10. In truth and in fact:
- A. A clinical study does not show that drinking Tropicana orange juice will reduce the risk of heart disease by substantially raising HDL (good) cholesterol levels and substantially improving the ratio of HDL cholesterol to LDL (bad) cholesterol, including specifically that drinking three cups of Tropicana orange juice a day for four weeks will raise HDL by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;
 - B. A clinical study does not show that drinking Tropicana orange juice will reduce the risk of heart disease by substantially increasing the levels of folate in the blood and substantially decreasing the levels of homocysteine in the blood, including specifically that drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and decrease homocysteine by 11 percent; and
 - C. A clinical study does not show that drinking Tropicana orange juice will reduce the risk of stroke by substantially lowering blood pressure, including specifically that drinking

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two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points.

Therefore, the making of the representations set forth in Paragraph 9 was, and is, false or misleading.

11. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this 19th day of August, 2005.

Decision and Order

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 respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for Federal Trade 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, 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 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 thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent is a Delaware corporation with its principal office or place of business at 555 Monroe Street, Chicago, Illinois 60661.

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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**DEFINITIONS**

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

1. Unless otherwise specified, “respondent” shall mean Tropicana Products, Inc., 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.
3. “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.
4. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0.
5. “Food” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of orange juice, in or affecting commerce, shall not make any representation, in any manner, expressly or by

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implication, including through the use of endorsements or the product name that:

- A. Drinking three cups of Tropicana orange juice a day for four weeks will raise HDL cholesterol by 21 percent and improve the ratio of HDL to LDL cholesterol by 16 percent;
- B. Drinking 20 ounces of Tropicana orange juice a day will increase blood levels of folate by almost 45 percent and decrease homocysteine by 11 percent; or
- C. Drinking two cups of Tropicana orange juice a day for six or eight weeks will lower systolic blood pressure an average of 10 points;

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product name, that drinking such food will affect any biological marker or health-related endpoint by any specific amount; will affect blood cholesterol levels, blood folate levels, blood homocysteine levels, or blood pressure; or will otherwise affect the risk of developing heart disease, stroke, or cancer; unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Provided, however, that a statement that such product contains a particular nutrient shall not, by itself, be considered a claim for purposes of this Part.

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III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any food, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of endorsements or the product name, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that respondent 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 containing the representation including videotape recordings of all such broadcast advertisements;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and

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other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent 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 managerial 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.

VII.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure 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 learn 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, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

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VIII.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days from 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.

IX.

This order will terminate twenty (20) years from the date of its issuance, 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.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Tropicana Products, Inc.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of Tropicana's "Healthy Heart" orange juice. According to the FTC complaint, Tropicana represented that (1) drinking three glasses of "Healthy Heart" a day for one month will raise good cholesterol by twenty-one percent and improve the ratio of good to bad cholesterol by sixteen percent; (2) drinking twenty ounces of "Healthy Heart" a day for one month will increase blood folate levels by forty-five percent and decrease homocysteine levels by eleven percent; and (3) drinking two glasses of orange juice a day for eight weeks will lower blood pressure an average of ten points. The complaint alleges that these claims are unsubstantiated. Tropicana also represented that the above three claims were clinically proven. The complaint alleges that this claim is false. Although Tropicana refers to three studies in its advertising, the studies are limited and do not support the claims made.

The proposed consent order contains provisions designed to prevent Tropicana from engaging in similar acts and practices in the future.

Part I of the order requires Tropicana to possess competent and reliable scientific evidence before making the three challenged efficacy claims.

Analysis

Part II requires Tropicana to possess competent and reliable scientific evidence before making certain representations that any food will affect: any biological marker or health-related endpoint by any specific amount; blood cholesterol levels, blood folate levels, blood homocysteine levels, or blood pressure; or the risk of developing heart disease, stroke, or cancer. Furthermore, Part II provides that a mere statement that a product contains a particular nutrient will not, by itself, be considered to be a health benefit claim covered by Part II.

Part III of the proposed order prohibits Tropicana from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

Part IV permits any representation for any product that is permitted in labeling for such product pursuant to regulations promulgated by FDA pursuant to the Nutrition Labeling and Education Act of 1990.

Parts V through VIII of the order require Tropicana to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of its current and future personnel for three years; to notify the Commission of changes in corporate structure; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

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IN THE MATTER OF

**CYTODYNE, LLC, EVERGOOD PRODUCTS CORP., AND
MELVIN L. RICH**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4146; File No. 0323144
Complaint, August 23, 2005--Decision, August 23, 2005*

This consent order, among other things, prohibits Respondents Cytodyne, LLC, Evergood Products Corp., and Melvin Rich, from representing that Xenadrine EFX – a dietary supplement marketed for weight loss – or any other product containing green tea extract, bitter orange, or caffeine causes rapid and substantial weight loss or fat loss, and from representing that any weight loss product causes rapid or substantial weight loss without the need to diet or increase exercise. The consent order also prohibits the respondents from representing that any weight loss product, dietary supplement, food, drug, or device causes weight or fat loss, causes permanent or long-term weight loss – or enables users to lose weight or fat without the need to diet or increase exercise – unless the claim is true and respondents possess competent and reliable scientific evidence that substantiates the claim. In addition, the consent order prohibits the respondents from making any other claims about the health benefits, performance, efficacy, safety, or side effects of any such product unless the claim is true and respondents possess competent and reliable scientific evidence that substantiates the claim. The consent order also prohibits the respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study – in connection with the marketing or sale of any weight loss product, dietary supplement, food, drug, or device – and from misrepresenting that the experience described in any user testimonial for any weight loss product, dietary supplement, food, drug, or device represents the actual experience of the endorser as a result of using the product under the circumstances depicted in the endorsement. In addition, the consent order requires the respondents to pay \$100,000 to the Commission.

Participants

For the Commission: *Rona Kelner, Peter B. Miller, Michael F. Ostheimer, Heather Hipsley, Mary K. Engle, and Susan P. Braman.*

For the Respondent: *Jay Geller*