

Complaint

IN THE MATTER OF

KMART CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4263; File No. 082 3186
Complaint, July 15, 2009 - Decision, July 15, 2009

This consent order addresses Kmart Corporation's marketing and sale of American Fare paper plates. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondents products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim

Participants

For the *Commission*: Michael J. Davis and Laura Schneider.

For the *Respondents*: Charulata Pagar, Manatt, Phelps & Philips.

COMPLAINT

The Federal Trade Commission, having reason to believe that Kmart Corporation ("respondent"), has violated provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.

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2. 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.

3. Respondent advertises, labels, offers for sale, sells, and/or distributes goods under the brand name American Fare to the public throughout the United States, including American Fare paper plates. Respondent advertises and offers these goods for sale through print ads and in its Kmart retail outlets throughout the United States.

4. To induce consumers to purchase American Fare paper plates, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondent prominently states or has stated that American Fare plates are “biodegradable.” Respondent does not define, describe, or qualify such biodegradability.

5. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

VIOLATIONS OF SECTION 5 OF THE FTC ACT**FALSE OR MISLEADING REPRESENTATIONS**

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.

7. In truth and in fact, American Fare paper plates will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total

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municipal solid waste is disposed of by methods that do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

8. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

UNSUBSTANTIATED REPRESENTATIONS

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

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

11. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission, on this fifteenth day of July, 2009, has issued this complaint against respondent.

By the Commission.

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Exhibit A

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“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 complaint that 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, 15 U.S.C. § 45 *et seq.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in the complaint, or that any of 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 has reason to believe that the Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.
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.

Decision and Order

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “Respondent” shall mean Kmart Corporation, a corporation, and its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “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.
- D. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- E. “Product or package” means any paper product or disposable tableware product, or package containing such product, that is (a) offered for sale, sold, or distributed by respondent, under the American Fare brand name or any other brand name of respondent; or (b) sold or distributed by third parties under private labeling agreements with respondent.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising,

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promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent Kmart Corporation, 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- 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 upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and

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- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

III.

IT IS FURTHER ORDERED that respondent Kmart Corporation, and its successors and assigns, shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* 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 Kmart Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in respondent or any business entity that respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; 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 business or corporate name or address. *Provided, however,* that, with respect to any proposed change 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

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V.

IT IS FURTHER ORDERED that respondent Kmart Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VI.

This order will terminate on July 15, 2029, or twenty (20) years from the most recent date that the United States or the 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 orders 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.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kmart Corporation, a corporation (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for reception 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 agreements proposed order.

This matter involves Kmart's marketing and sale of American Fare paper plates with shrink-wrap packaging that prominently states “biodegradable” without qualification on the front of the wrapper. According to the FTC complaint, respondent represented that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondent's biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for the paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondent failed to have substantiation for its biodegradable claim. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondent from making a representation that certain of its products are degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondent from making any other environmental benefit claim about such products, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent

Analysis to Aid Public Comment

and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Parts II through V require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VI 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. 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

KELLOGG COMPANYCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4262; File No. 082 3145
Complaint, July 27, 2009 - Decision, July 27, 2009

This consent order addresses respondent's, Kellogg Company, product called "Frosted Mini-Wheats." According to the complaint, the respondent, a producer of cereal and convenience foods, violated Section 5 of the FTC Act by making false and misleading representations that eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because the clinical study referred to in respondent's advertisements showed roughly only half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. And, only one in seven kids who ate the cereal improved their attentiveness by 18% or more. The consent order prevents respondent from engaging in similar acts and practices in the future by prohibiting representation, unless the representation is true and non-misleading. In addition to filing compliance reports to the FTC, the Respondent must possess and maintain competent and reliable scientific evidence for its claims.

Participants

For the *Commission*: Kial S. Young

For the *Respondents*: Richard J. Leighton and Richard F. Mann, Keller and Heckman LLP

COMPLAINT

The Federal Trade Commission, having reason to believe that Kellogg Company, 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 Kellogg Company is a Delaware corporation with its principal office or place of business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan, 49016.