

Complaint

IN THE MATTER OF

CONSTELLATION BRANDS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4266; File No. 092 3035
Complaint, October 2, 2009 - Decision, October 2, 2009

This consent order addresses respondent Constellation Brands, Inc., an International producer and marketer of wine, beer, and spirits. The complaint alleged unsubstantiated claims made in advertising for the beverage alcohol product “Wide Eye” schnapps. According to the complaint, the company represented, expressly or by implication, that consumers who drink “Wide Eye” will remain alert when consuming alcohol, but could not substantiate the representation at the time it was made. Therefore, the representation was, and is, in violation of Section 5 of the FTC Act by being false and misleading. The consent order prohibits the company from advertising that consumers who drink its product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Participants

For the *Commission*: Janet M. Evans.

For the *Respondents*: Marc E. Sorini, McDermott, Will & Emery, LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Constellation Brands, Inc. 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 Constellation Brands, Inc. (“respondent”) is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.

Complaint

2. Respondent has advertised, offered for sale, sold, and distributed beverage alcohol products to the public, including Wide Eye, a caffeinated schnapps introduced by the company in 2007. Wide Eye is a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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. To induce customers to purchase Wide Eye, respondent has disseminated, or caused to be disseminated, advertisements, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. Video appearing on www.wideeye.com and vids.myspace.com (Exhibit A, transcript, and Exhibit B, DVD containing ad).

[Music, with alarm sounds, plays in the background.]

CLOSE UP IMAGE OF AN UNIDENTIFIED WOMAN: Come on, take your shot.

ON SCREEN: I am your wake up call. Wide Eye

WOMAN: Take it cold.

ON SCREEN: Finely Distilled Schnapps Combined with Caffeine

WOMAN: Take it crisp.

ON SCREEN: Caffeinated Schnapps is here.
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Take it now.

ON SCREEN: Wide Eye

Complaint

WOMAN: I demand to be served as coldly as your soul.

ON SCREEN: I demand to be served as coldly as your soul. Get Yours @ WideEye.com

WOMAN: Take your shot.

ON SCREEN: Wake Up@WideEye.com

WOMAN: Cold as your soul.

ON SCREEN: Cherry Bomb [product image]

WOMAN: Cold as your soul.

ON SCREEN: Mango Chili [product image]

WOMAN: Cold as your soul.

ON SCREEN: Pomegranate Spice [product image]
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Cold as your soul.

ON SCREEN: Wide Eye. Wake Up@WideEye.com

B. Text on www.wideeye.com (Exhibit C).

3 Rounds of Flavor. Introducing caffeinated schnapps. Wakes up sweet, then goes off like an alarm.

When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life.

C. Print ad (Spin magazine) (Exhibit D).

Complaint

[depiction of a woman boxer holding a bottle of Wide Eye]

This is your wake up call. Caffeinated schnapps is here. Get yours at wideeye.com.

5. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol.

6. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made. Therefore, the representation set forth in Paragraph 6 was, and is, false and misleading.

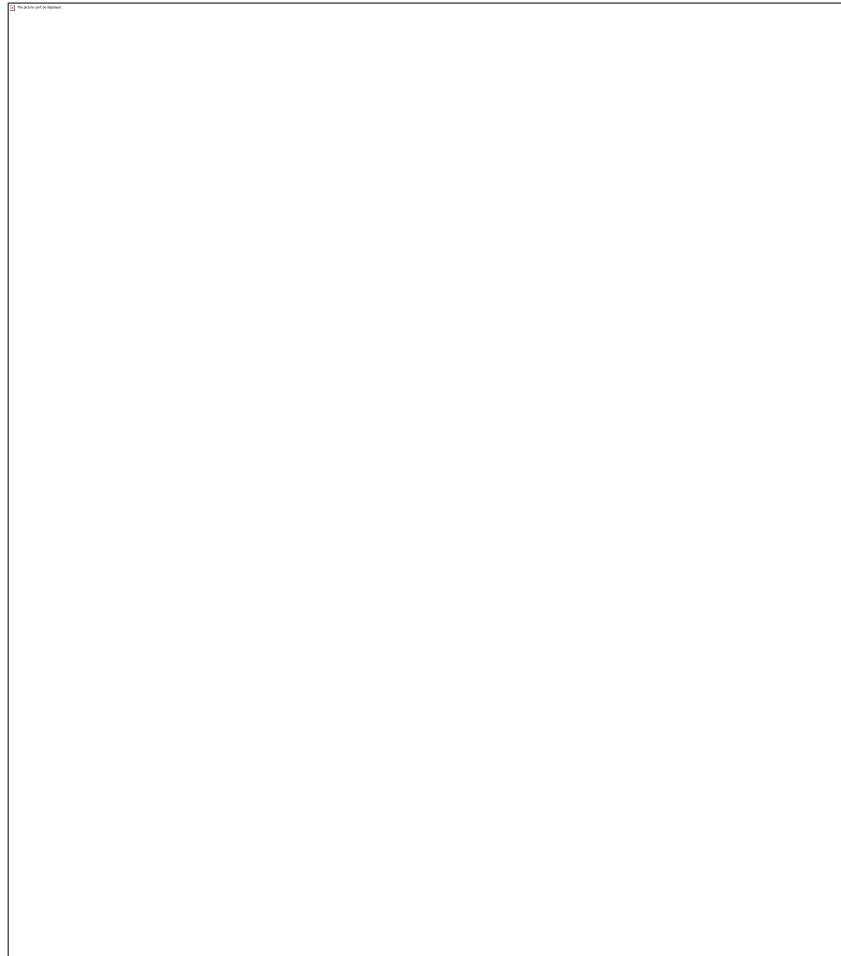
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this second day of October, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



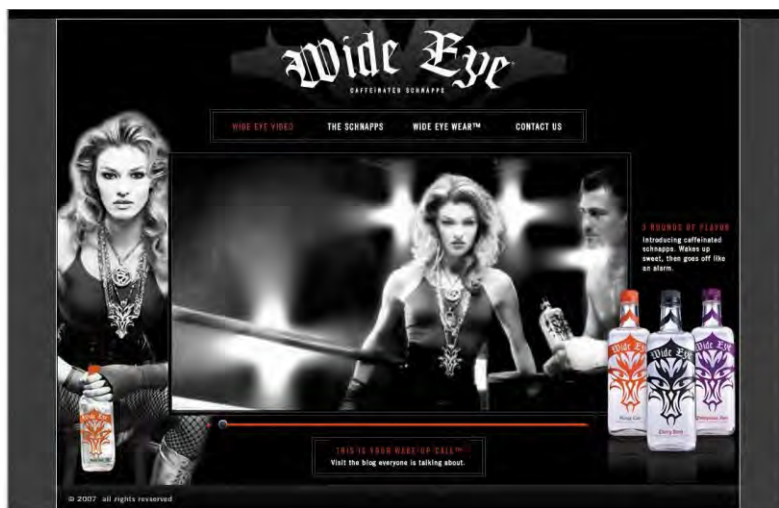
Complaint

Exhibit B



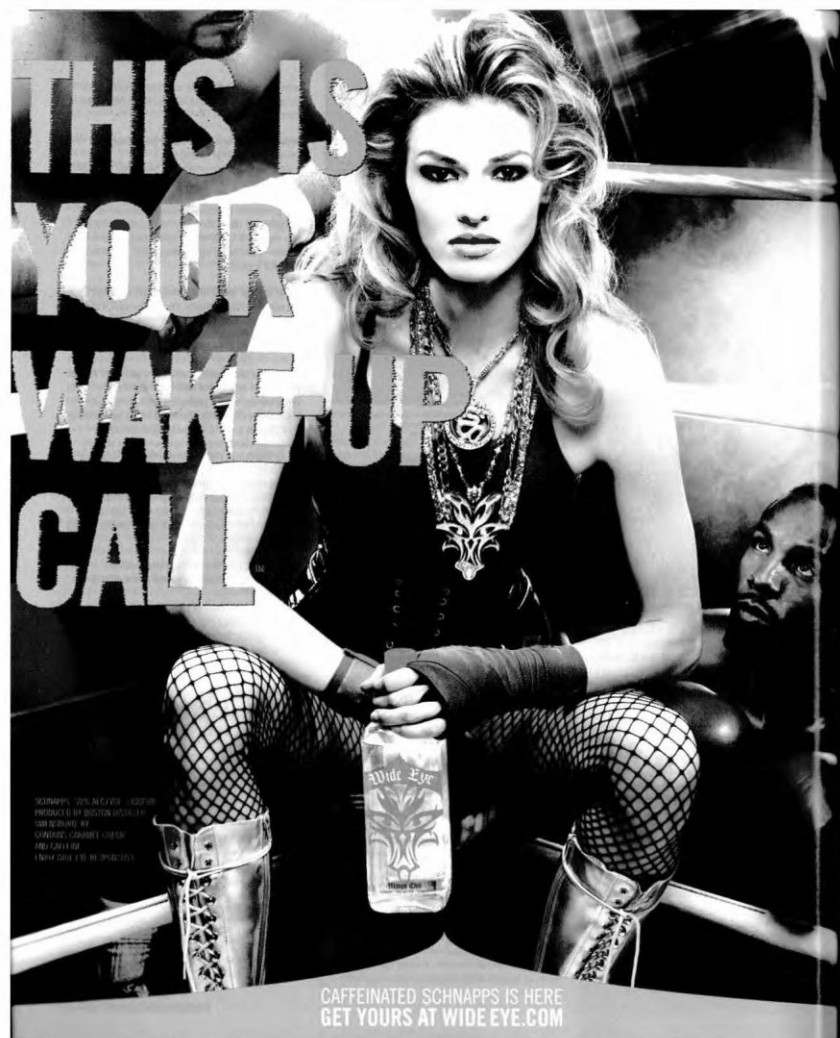
Complaint

Exhibit C



Complaint

Exhibit D



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 the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; 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 the respondent that the law has been violated as alleged in such 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 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. Respondent Constellation Brands, Inc. is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.
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 the purposes of this order, the following definitions shall apply:

- A. Unless otherwise specified, “respondent” shall mean Constellation Brands, Inc., its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Wide Eye” shall mean respondent’s distilled spirit beverage alcohol product, a caffeinated schnapps containing 30% alcohol by volume.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “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, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such product will remain alert when consuming alcohol, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any beverage alcohol product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that such product or any ingredient therein will counteract the effects of alcohol consumption, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent Constellation Brands, Inc. 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 reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- 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 upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent Constellations Brands, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors,

Decision and Order

and other employees with managerial authority 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.

V.

IT IS FURTHER ORDERED that respondent Constellation Brands, Inc. 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. 20580.

VI.

IT IS FURTHER ORDERED that respondent Constellation Brands, Inc. and its successors and assigns shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such 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.

Analysis to Aid Public Comment

VII.

This order will terminate on October 2, 2029, 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 this order, whichever comes later; *provided, however*, that the filing of such 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.

By the Commission, Commissioner Harbour recused.

**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 Constellation Brands, Inc. ("the company"). The proposed consent order has been placed on the public record

Analysis to Aid Public Comment

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 alleged unsubstantiated claims made in advertising for the beverage alcohol product Wide Eye schnapps, introduced by the company in 2007. Wide Eye contains 30% alcohol by volume plus caffeine. The company promoted Wide Eye through Internet advertising, including web video and print ads. Among other things, the company made the following claims about Wide Eye: "Wake up @ WideEye.com," "I am your wake up call," "Wakes up sweet, then goes off like an alarm," and "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life."

According to the FTC complaint, the company represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol. The complaint alleges that the company did not possess and rely upon a reasonable basis that substantiated the representation at the time it was made. Therefore, the representation was, and is, false and misleading.

The proposed consent order contains provisions designed to prevent the company from engaging in similar acts and practices in the future. Part I of the proposed consent order prohibits the company, in connection with the advertising, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, from representing, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such a product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Part II of the consent order further prevents the company from representing, expressly or by implication, including through the use of a product name or endorsement, that any beverage alcohol product or any ingredient therein will counteract the effects of alcohol consumption, unless that representation is true, non-

Analysis to Aid Public Comment

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

Parts III through VI of the consent order require the company to keep copies of relevant advertisements and promotional materials, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years with certain exceptions.

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.

Complaint

IN THE MATTER OF

REALCOMP II, LTD.

COMPLAINT IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT; INITIAL DECISION; AND
OPINION OF THE COMMISSION AND ORDER REVERSING AND
VACATING THE INITIAL DECISION.

Docket No. 9320; File No. 061 0088

Complaint, October 10, 2006 - Initial Decision, December 10, 2007

Opinion and Order, October 30, 2009

The Commission issued an administrative complaint, alleging that Realcomp II Ltd. restrained competition in the provision of residential real estate brokerage services by combining or conspiring to hinder the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing. In his Initial Decision, Chief Administrative Law Judge Stephen J. McGuire dismissed the Complaint after determining that Complaint Counsel had not met its burden of demonstrating that the Realcomp policies unreasonably restrained or substantially lessened competition in the relevant market. Complaint Counsel appealed the Initial Decision. On appeal, the Commission unanimously reversed and vacated the Initial Decision. The Commission ordered Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of Realcomp Members to enter into Exclusive Agency Listings or Other Lawful Listing agreements with the sellers of properties.

Participants

For the *Commission*: Sean P Gates.

For the *Respondents*: Scott L. Mandel, Foster, Swift, Collins & Smith, P.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (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 Realcomp II Ltd. (hereinafter sometimes referred to as “Respondent” or “Realcomp”), a corporation, has violated and is now violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in