

## **FTC v. Creative Aerosol Corp.**

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## **FTC v. Creative Aerosol Corp.**

**Case:** FTC v. Creative Aerosol Corp. (1994)

**Subject Category:** Federal agencies, FTC, Marketing

**Agency Involved:** Federal Trade Commission

**Complaint Synopsis:** Creative Aerosol marketed "Funny Color Foam" soap, an aerosol soap. The product advertised, "environmentally safe - contains no fluorocarbons" and that the aluminum aerosol can and plastic cap were recyclable. The FTC alleged that Funny Color Foam soap contained chlorodifluoromethane (HCFC-22), a Class II volatile organic compound known to the EPA as an ozone-depleting substance, and that although the can and cap were potentially recyclable there were no recycling facilities that would accept the can and only a few that would accept the cap.

**Consent Details:** Under the settlement Creative Aerosol agreed not to market products as "environmentally safe," "contains no fluorocarbons" or to imply the product does not harm the ozone layer unless they possessed competent and reliable evidence to substantiate the claim, and not to market their products as recyclable unless either adequate recycling facilities existed, or a prominent disclaimer explaining that few facilities to recycle the product exist.

**Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing:** Environmental claims that are only implied must still be substantiated by reliable and competent scientific evidence.

**FTC v. Creative Aerosol Corp.**, 58 Fed. Reg. (Oct. 31 1994): Creative Aerosol marketed "Funny Color Foam" soap, an aerosol soap. The product advertised, "environmentally safe - contains no fluorocarbons" and that the aluminum aerosol can and plastic cap were recyclable. The FTC alleged that Funny Color Foam soap contained chlorodifluoromethane (HCFC-22), a Class II volatile organic compound know to the EPA as an ozone-depleting substance, and that although the can and cap were potentially recyclable there were no recycling facilities that would accept the can and only a few that would accept the cap.

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[Federal Register: October 31, 1994]

FEDERAL TRADE COMMISSION [File No. 922 3197]

Creative Aerosol Corp.; Proposed Consent Agreement With Analysis To Aid Public Comment agency:  
Federal Trade Commission action: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, a New Jersey manufacturer of children's bath soap from representing that certain products or packaging will not harm the environment or atmosphere, or that any product or package offers any environmental benefit, unless it possesses competent and reliable evidence that substantiates the representation. The consent agreement also prohibits the respondent from misrepresenting that any product or packaging is capable of being recycled, or the extent to which recycling collection programs for them are available.

DATES: Comments must be received on or before December 30, 1994. addresses: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Michael Dershowitz, FTC/S-4002, Washington, DC 20580, (202) 326-3158. supplementary information: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

In the Matter of Creative Aerosol Corp., a Corporation; Agreement Containing Consent Order to Cease and Desist [File No. 922-3197]

The Federal Trade Commission having initiated an investigation of certain acts and practices of Creative Aerosol Corp., a corporation ("proposed respondent"), and it now appears that proposed respondent is willing to enter into an agreement containing an order to cease and desist from the acts and practices being investigated, It is hereby agreed by and between Creative Aerosol Corp., by its duly authorized officer, and counsel for the Federal Trade Commission that:

1. Proposed respondent Creative Aerosol Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office or place of business at 71 West Main Street, Freehold, New Jersey 07728-2114.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) All claims under the Equal Access to Justice Act.

4. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft of the complaint contemplated hereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the attached draft complaint or that the facts as alleged in the attached draft complaint, other than the jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Sec. 2.34 of the Commission's Rules, the Commission may without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of

the decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and the order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

## Order

## Definitions

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

"Volatile Organic Compound" ("VOC") means any compound of carbon which participates in atmospheric photochemical reactions as defined by the U.S. Environmental Protection Agency at 40 CFR 51.100(s), and as subsequently amended. When the final rule was promulgated, 57 FR 3941 (February 3, 1992), the EPA definition excluded carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and certain listed compounds that EPA has determined are of negligible photochemical reactivity.

"Class I ozone-depleting substance" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride, and 1,1,1-trichloroethane.

"Class II ozone-depleting substance" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

"Product or package" means any product or package that is offered for sale, sold or distributed to the public by respondent, its successors and assigns, under the Funny Color Foam brand name or any other brand name of respondent, its successors and assigns; and also means any product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

"Competent and reliable scientific evidence" means 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, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, 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 product or package containing any volatile organic compound, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, through the use of such terms as "environmentally safe," "environmentally safe, contains no fluorocarbons," or any other term or expression, that any such product or package will not harm the environment, or through the use of such terms as "no fluorocarbons," or any other term or expression, that any such product or package will not harm the atmosphere, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

II

It is further ordered that respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, 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 product or package containing any Class I or Class II ozone-depleting substance, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any such product or package contains "no fluorocarbons" or representing, in any manner, directly or by implication, that any such product or package will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere or otherwise harm the atmosphere.

III

A. It is further ordered that respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, 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 product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication the extent to which: (1) any such product or package is capable of being recycled; or, (2) recycling collection programs for such product or package are available.

B. Provided, however, respondent will not be in violation of Part III(A)(2) of this Order, in connection with the advertising, labeling, offering for sale, sale, or distribution of any high-density polyethylene cap or aluminum aerosol can, if it truthfully represents that such packaging is recyclable, provided that: (1) respondent discloses clearly, prominently, and in close proximity to such representation: (a) in regard to any high-density polyethylene cap, that it is recyclable in the few communities with recycling collection

programs for high-density polyethylene caps; and in regard to any aluminum aerosol can, that such packaging is recyclable in the few communities with recycling collection programs for aluminum aerosol cans; or (b) the approximate number of U.S. communities with recycling collection programs for such high-density polyethylene cap or aluminum aerosol can; or (c) the approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such high-density polyethylene cap or aluminum aerosol can are available; and (2) in addition, in the case of a high-density polyethylene cap, such cap itself bears a clear identification of the specific plastic resin(s) from which it is made. For purposes of this Order, a disclosure elsewhere on the product package shall be deemed to be "in close proximity" to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by the prospective purchaser when examining the part of the package on which the representation appears.

#### IV

It is further ordered that respondent, Creative Aerosol Corp., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, 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 product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any such product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

#### V

It is further ordered that for five (5) years after the last date of dissemination of any representation covered by this Order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying: A. All materials that were relied upon in disseminating such representation; and B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

#### VI

It is further ordered that respondent shall distribute a copy of this Order to each of its operating divisions and to each of its offices, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this Order.

## VII

It is further ordered that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations under this Order.

## VIII

It is further ordered that respondent shall, within sixty (60) days after service of this Order upon it, and at such other times as the 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 of Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Creative Aerosol Corporation, a Delaware corporation. The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action, or make final the agreement's proposed order. This matter concerns the labeling and advertising of the respondent's Funny Color Foam soap.

The Commission's complaint in this matter alleges that Funny Color Foam soap is sold in an aluminum aerosol can with a plastic cap which is made from high-density polyethylene. The product contained the volatile organic compounds (VOCs) isobutane and propane and was then reformulated by substituting for the VOCs Hydrochlorofluorocarbon--chlorodifluoromethane (HCFC-22). The Commission's complaint charges that the respondent made the following advertising claims while the product contained VOCs: "ENVIRONMENTALLY SAFE Contains no fluorocarbons. Non-Irritant. Non-toxic." The complaint alleges that through such claims, the respondent represented without substantiation that Funny Color Foam does not contain any ingredients that harm or damage the environment. In fact, Funny Color Foam contained VOCs--chemicals that under many atmospheric conditions contribute to the formation of ground level ozone, a major component of smog. The complaint also charges that the respondent claimed that its reformulated product contains "NO FLUOROCARBONS." The complaint alleges that through this claim, the respondent falsely represented that because Funny Color Foam contains no fluorocarbons, it will not deplete the earth's ozone layer or otherwise harm or damage the atmosphere. In fact, Funny Color Foam contains the harmful ozone-depleting ingredient chlorodifluoromethane (HCFC-22), which harms or causes damage to the atmosphere by contributing to the depletion of the earth's ozone layer. In addition, the complaint charges that the respondent falsely represented that Funny Color Foam's aluminum aerosol can and plastic cap are recyclable. In fact, the complaint alleges, while the aluminum can and plastic cap are capable of being recycled, the vast majority of consumers

cannot recycle them because there are virtually no collection facilities that accept aluminum aerosol cans for recycling and only a few collection facilities nationwide that accept the high-density polyethylene cap for recycling.

The proposed consent order contains provisions designed to remedy the violations charged and to prevent the respondent from engaging in similar acts and practices in the future. The term "volatile organic compound" (VOC) is defined in the consent order in accordance with the definition adopted by the Environmental Protection Agency (EPA) in a February 3, 1992, rulemaking.

To assist the public and the industry in understanding the coverage of this order, those compounds that EPA expressly excluded from the definition of VOC at the time the definition was promulgated are listed in the order. Because EPA could in the future modify the definition based on evolving scientific evidence, the term VOC as used in the order will vary depending upon EPA's definition of the term. Those compounds that EPA may decide should be excluded from the definition of VOC because of negligible photochemical reactivity will thus be excluded under the consent order. Likewise any compounds that EPA may decide should be defined as VOCs will be covered by the order. The proposed order also defines Class I and Class II ozone-depleting substances, incorporating the definitions established in the Clean Air Act Amendments of 1990. Class I substances currently listed under the Act include CFCs, halons, carbon tetrachloride, and 1,1,1-trichloroethane. Class II substances currently consist of HCFCs.

Part I of the proposed order requires the respondent to cease and desist from representing that any product or package containing volatile organic compounds is "environmentally safe," "environmentally safe, contains no fluorocarbons," contains "no fluorocarbons," or through the use of any other term or expression, that any such product or package will not harm the environment or the atmosphere, unless the respondent possesses competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

Part II of the proposed order requires the respondent to cease and desist from representing that any product or package containing any Class I or Class II ozone-depleting substance contains "no fluorocarbons" or representing, in any manner, that any such product or package will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere or otherwise harm the atmosphere. Under the Clean Air Act Amendments, the EPA has authority to add new chemicals to the Class I and Class II lists. In fact, EPA has added methyl bromide and hydrobromofluorocarbons (HBFCs) to the list of Class I substances. Thus, the order's definitions of Class I and Class II ozone-depleting substances include these and any other substances that may be added to the lists. If additional substances are added to the Class I or II lists, Part II of the order becomes applicable to claims made for products containing those substances after the substances are added to the lists.

Part III of the proposed order requires that the respondent cease and desist from misrepresenting, in any manner, directly or by implication, with respect to any product or package the extent to which it is capable of being recycled or the extent to which recycling collection programs are available. Part III also contains a proviso that allows the respondent to advertise high-density polyethylene caps and aluminum



aerosol cans as recyclable without violating Part III of the order. The respondent may do so if it truthfully represents that such packaging is capable of being recycled; discloses clearly, prominently and in close proximity to such claim (a) that such packaging is recyclable in the few communities with recycling collection programs for high-density polyethylene caps or aluminum aerosol cans; or (b) the approximate number of U.S. communities with recycling collection programs for such packaging; or (c) the approximate percentage of U.S. communities or the U.S. population to which recycling collection programs for such packaging is available; and in addition, in the case of the high-density polyethylene cap, the cap itself bears a clear identification of the specific plastic resin(s) from which it is made.

Part IV of the proposed order provides that if the respondent represents in advertising or labeling that any product or package offers any environmental benefit, it must have a reasonable basis consisting of competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the claims. The proposed order also requires the respondent to maintain materials relied upon to substantiate the claims covered by the order, to distribute copies of the order to certain company officials, to notify the Commission of any changes in corporate structure that might affect compliance with the order, and to file one or more reports detailing compliance with the order. 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.

Donald S. Clark,

Secretary.

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