

Complaint

IN THE MATTER OF

**THE LUBRIZOL CORPORATION
AND
THE LOCKHART COMPANY**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

*Docket C-4254; File No. 071 0230
Complaint, April 7, 2009 – Decision, April 7, 2009*

This consent order addresses the acquisition by the Lubrizol Corporation of certain assets from the Lockhart Company, which reduced competition in the market for rust preventives containing oxidates. The companies are the two largest providers of oxidates in the United States. The order requires Lubrizol to divest assets it acquired from Lockhart to Additives International LLC (AI). The transferred assets consist of a non-exclusive license to manufacture 28 former Lockhart rust preventive formulas that contain oxidates, including testing data relating to the formulas and the right to use the Lockhart trademarks and trade name for a period of two years after the date the order becomes final. Lockhart must also lease a portion of its Flint plant to AI and maintain the plant in good working order for the duration of the lease. AI also acquired from Lockhart a right of first refusal to purchase the plant. Lubrizol must release its right of first refusal to purchase Lockhart's oxidizer. The order also requires Lubrizol to execute a waiver of the non-compete provision of the acquisition agreement with Lockhart. The provision in the agreement prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. The order also prohibits Lubrizol from acquiring any or all of AI without prior Commission approval. The acquisition of the former Lockhart formulas and the lease of the Lockhart plant by AI decrease the normal barriers a new entrant would face and remedies the anticompetitive effects of the previously executed acquisition.

Participants

For the Commission: *Daniel P. Ducore, Leonard L. Gordon,
Alan Loughnan, Nancy Turnblacer, and Theodore Zang, Jr.*

Complaint

For the *Respondents: Elizabeth Grove, Lubrizol in-house counsel; and Thomas A. Donovan, Kirkpatrick & Lockhart Preston Gates Ellis LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that respondent The Lubrizol Corporation (“Lubrizol”), a corporation subject to the jurisdiction of the Commission, acquired certain assets of The Lockhart Company (“Lockhart”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent The Lubrizol Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 29400 Lakeland Boulevard, Wickliffe, Ohio 44092.

2. Respondent The Lockhart Company is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its principal office at 2873 West Hardies Road, Gibsonia, Pennsylvania 15044.

3. Respondents are, and at all times herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

II. THE ACQUISITION

4. Pursuant to an asset purchase agreement dated February 7, 2007, Lubrizol acquired certain assets from Lockhart, including assets relating to oxidates such as intellectual property, contracts, purchase orders, customer lists and records, product formulae and processes, and goodwill, for \$15.6 million (“the Acquisition”).

5. The purchase agreement included a non-competition agreement that prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. Lubrizol subsequently indicated that this provision barred Lockhart from leasing its plant in Flint, Michigan, to another oxidate manufacturer.

III. THE RELEVANT MARKET

6. For the purposes of this Complaint, the relevant product market in which to evaluate the effects of the Acquisition is oxidate for use as a rust preventive additive. Oxidates include products composed of or containing oxidates, products derived from oxidates, and those products’ functional equivalents (collectively “oxidates”).

7. For the purposes of this Complaint, the relevant geographic market in which to evaluate the effects of the Acquisition is the United States of America.

8. Purchasers of Lubrizol’s oxidates have no economic alternative to purchasing these products.

IV. THE STRUCTURE OF THE MARKET

9. Lubrizol and Lockhart are, by a large margin, the two largest providers of oxidates in the United States. Consequently, the United States market for oxidates is highly concentrated, with a pre-acquisition Herfindahl-Hirschman Index (“HHI”) of 7,007. Prior to the Acquisition, Lubrizol and Lockhart dominated the market for

Complaint

oxidates, and, together accounted over 98% of sales in the U.S. market for oxidates. The Acquisition created a monopoly in this market and increased HHI concentration by 2,672, resulting in a post-acquisition HHI of 9,679.

10. Lubrizol and Lockhart were actual and substantial competitors in the relevant market.

V. ENTRY CONDITIONS

11. New entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 14 below.

12. New entry into the relevant market is a difficult process because of, among other things, the time and costs associated with building a plant capable of producing oxidates, obtaining the necessary regulatory permits for the plant, research and development of formulae, and the lengthy testing period necessary to attain customer approval for new oxidate products. As a result, entry into the market sufficient to achieve a significant market impact within two years is unlikely.

13. Lubrizol's plant in Painesville, Ohio, and Lockhart's plant in Flint, Michigan, are the only two plants in the United States that currently have the equipment capable of oxidizing products at the requisite pressure necessary to produce quality products.

VI. ANTICOMPETITIVE EFFECTS

14. The Acquisition substantially lessened competition in the following ways:

- a. it eliminates actual, actual potential, and perceived potential competition between Lubrizol and Lockhart;
- b. it removes Lockhart, the only alternative source of oxidates in the relevant market;

Complaint

- c. it thwarts entry by restricting the use of Lockhart's Flint plant or equipment;
- d. it creates a monopoly in the relevant market;
- e. it leads to increased prices for the relevant product;
- f. it increases Lubrizol's market power in the relevant market; and
- g. it allows Lubrizol to exercise its market power unilaterally in the relevant market.

VII. VIOLATIONS CHARGED

15. The Acquisition described in Paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of April, 2009, issues its Complaint against Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of various product lines of chemical additives used to make rust preventives and other assets by The Lubrizol Corporation (“Respondent Lubrizol”) from The Lockhart Company (“Respondent Lockhart”) (collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents 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 Respondents 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent The Lubrizol Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business located at 29400 Lakeland Boulevard, Wickliffe, OH 44092.

2. Respondent The Lockhart Company is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at 2873 West Hardies Road, Gibsonia, PA 15044.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Lubrizol” means The Lubrizol Corporation its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Lubrizol Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Lockhart” means The Lockhart Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including Lockhart Chemical Company), divisions, groups and affiliates controlled by The Lockhart Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.

Decision and Order

- D. “Additives International” means Additives International LLC, a limited liability corporation, organized, existing and doing business under and by virtue of the laws of Ohio, with its office and principal place of business located at 635 Chicago Ave., #104, Evanston, IL 60602.
- E. “Flint Plant” means the Lockhart manufacturing facility located at 4302 James P. Cole Boulevard, Flint, Michigan 48505.
- F. “Flint Plant Lease Agreement” means the October 6, 2008, lease agreement between Additives International and Lockhart Chemical Company, as amended on January 6, 2009, and that includes, among other things, an option for Additives International to acquire all or part of the Flint Plant and an option for Additives International to renew and extend the lease.
- G. “Flint Plant Leased Area” means those areas described in Paragraph 1 of the Flint Plant Lease Agreement including, but not limited to, calcium sulfonate reactors, a calcium sulfonate filter press, additive blend tanks, storage and blend tanks, shared use of the oxidation reactor, shared use of laboratory space and hot room, and 4800 square feet of warehousing space, including shared use of the loading dock.
- H. “Flint Plant Lessee” means Additives International or any other Person who leases the Flint Plant Leased Area pursuant to this Order.
- I. “Flint Plant Operational Areas” means the:
 - 1. areas appurtenant to and used in the operation of the Flint Plant Leased Area including, but not limited to, loading and unloading areas, storage areas for inputs and inventory, at the Flint Plant;

Decision and Order

2. areas for the use of employees working at the areas leased pursuant to the Flint Plant Lease Agreement, similar to those areas available to Respondent Lockhart employees working at the Flint Plant, including, but not limited to, exits and entrances, parking areas, machine rooms, work rooms, break rooms, bathrooms, and locker rooms;
 3. existing easements and rights of way relating to the leased areas;
 4. related facilities required for the storage of products produced at the Flint Plant by the Flint Plant Lessee.
- J. “Lockhart Oxidates” means the products listed on Non-Confidential Exhibit A to this Order that were previously manufactured and sold by Respondent Lockhart and acquired from Respondent Lockhart by Respondent Lubrizol, whether or not currently manufactured or sold by Respondent Lubrizol.
- K. “Lockhart Oxidates Assets” means
1. the non-exclusive rights to use trademarks, trade names, domain names, service marks and copyrights Relating To the Lockhart Oxidates solely to describe Additives International products as comparable, functionally equivalent, or chemically equivalent to the pertinent Lockguard product [Product No.] orally, in communications with individual customers, or on Additives International’s website for a period of two years after the date on which the order becomes final, if such products are made using the Lockhart formulae transferred pursuant to this Paragraph I.K.2;
 2. a copy of all processes, batch sheets, material data safety sheets, formulae, methods, quality control procedures, trade secrets, technology, know-how, inventions and

Decision and Order

tangible or intangible proprietary information or material received by Lubrizol from Lockhart, including, but not limited to, technical information, processes, procedures, and methods Relating To the Lockhart Oxidates; and

3. a copy of all existing data and information relating to any of Respondent Lockhart's or Respondent Lubrizol's approvals, clearances, licenses, registrations, permits, franchises, product registrations or authorizations issued by any federal, state, municipal, or foreign authority, or any third party test house, registrar or certification body Relating To the Lockhart Oxidates including, without limitation, all clinical trial data, filings, engineering and design documentation, manufacturing and test results and procedures.
- L. "Material Confidential Information" means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person's business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- M. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- N. "Relating To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.

II.

IT IS FURTHER ORDERED that Respondent Lubrizol shall,

- A. Remove and rescind any prohibition or restraint including, but not limited to, any non-compete agreements, on the sale

Decision and Order

or use of all or any part of Respondent Lockhart's Flint Plant for the manufacture and sale of any products produced at the Flint Plant by Additives International or any other Person;

- B. Within thirty (30) days after the date this Order becomes final, divest to Additives International the Lockhart Oxidates Assets.

III.

IT IS FURTHER ORDERED that:

- A. Respondent Lockhart shall Lease the Flint Plant in good faith to Additives International, pursuant to and in accordance with the Flint Plant Lease Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Additives International or to reduce any obligations of Respondent under such agreement), and such agreement, if approved by the Commission, is incorporated by reference into this Order and made a part hereof as Confidential Appendix B.
- B. For the length of time during which Respondent Lockhart leases the Flint Plant to the Flint Plant Lessee, Respondent Lockhart shall:
 - 1. except as requested by the Flint Plant Lessee, take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the Flint Plant Leased Area and the Flint Plant Operational Area, *provided, however* Respondent Lockhart shall not be responsible for changes to or problems of the Flint Plant Leased Area and the Flint Plant Operational Area caused by the Flint Plant Lessee; *provided, further, however*, Respondent Lockhart shall give the Flint Plant Lessee sixty (60) days prior notice of any facility

Decision and Order

maintenance, including ordinary and regular maintenance, when such maintenance may affect the operation of the Flint Plant Leased Area and the Flint Plant Operational Area; *provided, further, however*, in the event Respondent Lockhart cannot give the Flint Plant Lessee sixty (60) days prior notice, then Respondent Lockhart shall notify the Flint Plant Lessee as soon as it first notifies any persons at the Flint Plant regarding maintenance or problems that may affect the operation of the Flint Plant Leased Area and the Flint Plant Operational Area; and

2. maintain the Flint Plant Leased Area and the Flint Plant Operational Area in the same general way in which it maintains the other areas at the Flint Plant owned by Respondent Lockhart (to the extent the Flint Plant Lessee complies with the lease terms) including, but not limited to, the uninterrupted provision of utilities and services.
- C. Respondent Lockhart shall not, directly or indirectly, discuss with, or provide, disclose or otherwise make available to, Respondent Lubrizol, or any person working on behalf of Respondent Lubrizol, any Material Confidential Information Relating To the Flint Plant Lessee's manufacture or sale of products at the Flint Plant.
- D. The purpose of this Order is to remedy the lessening of competition alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that, for the term of this Order, Respondent Lockhart shall not, without providing advance written notification to the Commission in the manner described in this paragraph directly or indirectly modify, change or amend the Flint Plant Lease Agreement. *Provided, however*, advance written notice is not required if the Flint Plant Lease Agreement is being

Decision and Order

terminated because Additives International is acquiring all of the Flint Plant.

Said advance written notification shall contain (i) a detailed description of the proposed modification, change, or amendment to such agreements, or acquisition and (ii) documents discussing the reasons for the proposed modification, change, or amendment, or acquisition (hereinafter referred to as “the Notification”). Respondents shall provide the Notification to the Commission, with a copy to the Commission’s Compliance Division of the Bureau of Competition, at least thirty (30) days prior to instituting the modifications, changes, or amendments (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not institute changes to the agreements until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

V.

IT IS FURTHER ORDERED that, for the term of this Order, Respondent Lubrizol shall not acquire, without prior Commission approval, all or any part of Additives International.

VI.

IT IS FURTHER ORDERED that:

- A. The Commission may, at any time after the Order becomes final, appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in

Decision and Order

writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor. Respondents shall comply with the terms of Paragraph VI.B. and VI.C. after the appointment of the substitute Monitor pursuant to Paragraph VI.F.

- B. Not later than ten (10) days after appointment of a Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order ("Monitor Agreement").
- C. No later than one (1) day after the Monitor Agreement is approved pursuant to Paragraph VI.B., Respondents shall, pursuant to the Monitor Agreement and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform his or her duties and responsibilities in a manner consistent with the purposes of this Order.
- D. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to, assuring that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

Decision and Order

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.
5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in

Decision and Order

any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Respondents shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, with respect to the performance of Respondents' obligations under this Order.
 8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.
 9. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, or if the Monitor is otherwise unable to perform his or her duties, the Commission may

Decision and Order

appoint a substitute Monitor in the same manner as provided in this Paragraph VI.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VII.

IT IS FURTHER ORDERED that:

- A. Thirty (30) days after the date this Order becomes final, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order.
- B. If Respondent Lockhart sells the Flint Plant to Additives International, then within thirty (30) days of such sale, Respondent Lockhart shall submit a written report setting forth in detail the terms, including the contract for sale of the property, on which the Flint Plant was sold to Additives International.
- C. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, until the Order terminates, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent is complying and has complied with this Order. Respondents shall submit at the same time a copy of these reports to the Monitor, if any Monitor has been appointed.

VIII.

Decision and Order

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of that Respondent;
- B. Any proposed acquisition, merger, or consolidation of that Respondent; or
- C. Any other change in that Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to each Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, each Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission to:

- A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

Decision and Order

X.

IT IS FURTHER ORDERED that this Order shall terminate on April 7, 2019.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Decision and Order

NON-CONFIDENTIAL EXHIBIT A

LOCKHART OXIDATES*

LG 1216-47
LG 8000
LG 8000Z
LG 8002
LG 8020
LG 8022
LG 8080
LG 8085
LG 8855
LG 8870
LG 9005
LG 9008
LG 9009
LG 9010
LG 9013
LG 9015
LG 9017
LG 9020
LG 9021
LG 9024
LG 9025
LG 9056
LG 9057
LG 9060
LG 9070
LG 9072
LG 9075
LG 9080

* Product names may have a letter such as a "S" or "W" and all variations on each product name are intended to be included in this list.

Analysis to Aid Public Comment

**CONFIDENTIAL EXHIBIT B
Flint Plant Lease Agreement**

**[Redacted From Public Record
But Incorporated By Reference]**

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from The Lubrizol Corporation and The Lockhart Company (“Respondents”). The Consent Agreement is intended to resolve anticompetitive effects stemming from The Lubrizol Corporation’s (“Lubrizol”) acquisition of certain assets of The Lockhart Company (“Lockhart”) in the United States market for rust preventives containing oxidates. Under the terms of the proposed Consent Agreement, Lubrizol is required to divest assets it acquired from Lockhart to Additives International LLC (“AI”).

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Pursuant to an Asset Purchase Agreement dated February 7, 2007, Lubrizol acquired from Lockhart a product line of chemical

Analysis to Aid Public Comment

additives used to make rust preventives for approximately \$15.6 million (“Acquisition”). The Asset Purchase Agreement also included a non-competition agreement that prohibited Lockhart, for a period of five years from the date of the purchase agreement, from directly or indirectly engaging in any business competitive with the assets it sold to Lubrizol. The Commission’s complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45, by lessening competition in the market for rust preventives containing oxidates sold to metalworking firms, automotive parts suppliers, and other entities. The proposed Consent Agreement would remedy the alleged violation by replacing the competition that has been lost in this market as a result of the Acquisition.

II. The Parties

Lubrizol is a specialty chemical manufacturer that produces and supplies products designed for use in the global transportation, industrial, and consumer markets. Lubrizol manufactures products such as additives, ingredients, resins, and compounds, which customers use as rust preventives and in other ways to improve the quality of their end-use products. Prior to the Acquisition, Lubrizol was the leading maker of oxidates in North America. Lubrizol, headquartered in Wickliffe, Ohio, operates facilities in 29 countries, including production facilities in 20 countries and laboratories in 13 countries. In FY2007, Lubrizol had approximately \$4.5 billion in revenue.

Lockhart, a private corporation headquartered in Flint, Michigan, was the second leading maker of oxidates in North America. Lockhart previously manufactured specialty chemicals including corrosion and lubricity additive packages, soluble bases, coating intermediates, and petroleum sulfonates and oxidates that serve the metalworking and coatings industries. Lockhart’s metalworking product line included oxidates, natural, synthetic and gelled sulfonates, corrosion inhibitors and lubricity agents, emulsifier

Analysis to Aid Public Comment

packages, grease additives, esters, soaps, semi-finished coatings, and rust preventives.

III. Oxidates

Oxidates are waxy petroleum-based substances that are normally solid at room temperature and are used in chemical formations designed to be applied to metal for rust prevention purposes. Oxidates may be further processed into soaps of oxidates and esters, which have the same rust preventive abilities as oxidates and are also used in chemical blends. In addition to their excellent rust preventive properties, oxidates are inexpensive and long-lasting compared to other rust preventive additives in the market. Due to oxidates' low costs and superior rust-preventing properties, they have become the "gold-standard" in long-term rust and corrosion protection. Oxidates are purchased by chemical formulators who use them to formulate rust protection and corrosion-inhibiting additives.

The relevant geographic market in which to assess the impact of the Acquisition is the United States. Foreign importers of oxidates face tariffs and other obstacles that increase their prices and make United States customers less likely to rely on foreign sources.

The market for oxidates is highly concentrated, with Lubrizol, and previously, Lockhart, being the top two providers of oxidates in the United States. While a few fringe firms exist, oxidates customers do not regard them as suitable alternatives to Lubrizol and Lockhart.

The acquisition of Lockhart's oxidate line by Lubrizol substantially lessened competition in the oxidate market. Through the Acquisition, Lubrizol removed its last substantial competitor in the market. Before the Acquisition, customers benefitted from the rivalry between Lubrizol and Lockhart in the form of lower prices, innovative products, and better service inand support. In addition, the Acquisition thwarted entry by restricting the use of Lockhart's Flint, Michigan, plant and equipment through the non-competition agreement.

Analysis to Aid Public Comment

New entry or fringe expansion into the market for the manufacture of oxidates sufficient to counteract the competitive effects of the Acquisition is unlikely to occur within two years. To enter the market, a firm needs to invest in assets such as equipment, production know-how, supplier relationships, and infrastructure. The market for oxidates is not expanding and it is likely a new entrant would not be able to establish enough sales to achieve the minimum viable scale to make entry economically feasible. In addition, the formulations for oxidates and other rust preventatives go through extensive testing and certification processes. Due to the time and expense of testing, customers are reticent to change suppliers absent exigent circumstances.

IV. Consent Agreement

Under the terms of the Consent Agreement, Lubrizol is required to transfer certain assets to AI. The transferred assets consist of a non-exclusive license to manufacture twenty-eight former Lockhart rust preventive formulas that contain oxidates, including testing data relating to the formulas and the right to use the Lockhart trademarks and trade name for a period of two years after the date upon which the Decision and Order becomes final. Under the terms of the Consent Agreement, Lockhart must also lease a portion of its Flint plant to AI and maintain the plant in good working order for the duration of the lease. Lubrizol must also release its right of first refusal to purchase Lockhart's oxidizer. AI also acquired from Lockhart a right of first refusal to purchase the plant.

The Consent Agreement also requires Lubrizol to execute a waiver of the non-compete provision of the Acquisition Agreement. Specifically, Section II.A. of the Decision and Order requires Lubrizol to "[r]emove and rescind any prohibition or restraint including, but not limited to, any non-compete agreements, on the sale or use of all or any part of Respondent Lockhart's Flint Plant for the manufacture and sale of any products produced at the Flint Plant by [AI] or any other Person." Finally, the Consent Agreement

Analysis to Aid Public Comment

prohibits Lubrizol from acquiring any or all of AI without prior Commission approval.

The Commission believes that this Consent Agreement establishes AI as a viable competitor in the oxidate market and substantially restores the competition lost as a result of the transaction. The acquisition of the former Lockhart formulas and the lease of the Lockhart plant by AI decreases the normal barriers a new entrant would face and remedies the anticompetitive effects of the previously executed Acquisition.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order, and does not modify their terms in any way. Further, the proposed Consent Agreement has been entered into for settlement purposes only, and does not constitute an admission by Respondents that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

Complaint

IN THE MATTER OF

**NATIONAL ASSOCIATION OF MUSIC
MERCHANTS, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4255; File No. 001 0203
Complaint, April 8, 2009 – Decision, April 8, 2009*

This consent order addresses allegations that the National Association of Music Merchants (NAMM), a trade association of more than 9000 manufacturers, distributors, and dealers of musical instruments and related products, arranged and encouraged the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The order prohibits NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The order also prohibits NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. In addition, the order requires NAMM to institute an antitrust compliance program; it requires the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order. The order does not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. It explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor and the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

Complaint

Participants

For the *Commission*: Dana Abrahamsen, Barbara Blank, David Conn, Maria M. DiMoscato, Geoffrey M. Green, William L. Lanning, Teresa Martin, Steven Osnowitz, Jana Pariser, Mark D. Peterson, Christopher Renner, and Melanie Sabo.

For the *Respondents*: Debra Bernstein, Alston & Bird LLP; Frank M. Hinman, Bingham McCutchen; Joseph Datillo, Brouse McDowell; Larry Scarborough and J. Alex Grimsley, Bryan Cave; Rob Lipstein, Crowell & Moring; Michael R. Borasky, Eckert Seamans; Monica L. Rebuck, Hangle, Aronchick, Segal & Pudlin; Veronica G. Kayne, Haynes and Boone LLP; Michael McNeely, Law Offices of Michael D. McNeely; Steve Chidester, Luce, Forward, Hamilton & Scripps; Bill Codhina, Nixon Peabody; Larry F. Gitlin, Rapkin, Gitlin & Beaumont; Bryan King, Sheldon, Lim, Ruger & Kim LLP; Tara Reinhart, Skadden Arps.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 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 the National Association of Music Merchants, Inc. has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Federal Trade Commission (“Commission”) that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

1. Respondent National Association of Music Merchants, Inc. (“NAMM” or “Respondent”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 5790 Armada Drive, Carlsbad, California 92008.

2. NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of

Complaint

musical instruments and related products. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, *inter alia*, promoting consumer demand for musical instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competitors an opportunity to meet and discuss issues of concern to the industry.

3. The acts and practices of NAMM, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. An ongoing subject of concern in the musical instruments industry has been the increased retail price competition for musical instruments. Commencing in 1999, and continuing thereafter, numerous leading musical instrument manufacturers adopted minimum advertised price policies.

5. Between 2005 and 2007, NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, competitors discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues.

6. In many instances, the exchange of information and opinion arranged by NAMM, as set forth in Paragraph 5 above, served no legitimate business purpose for NAMM or its members.

Complaint

7. The exchange of information among NAMM members, as alleged herein, had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably.

Violations Alleged

8. As set forth in Paragraph 5 above, NAMM arranged and encouraged the exchange among its members of competitively sensitive information, in violation of Section 5 of the FTC Act, as amended.

9. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of April, 2009, issues its complaint against Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the National Association of Music Merchants, Inc. (hereinafter “NAMM” or Respondent), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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 Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent NAMM is a corporation organized, existing and doing business under and by virtue of the laws of the State of New

Decision and Order

York with its principal place of business located at 5790 Armada Drive, Carlsbad, CA 92008.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “NAMM” means the National Association of Music Merchants, Inc., its successors and assigns, and its directors, trustees, officers, representatives, committees, subcommittees, boards, divisions, agents, and employees.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “Antitrust Compliance Officer” means a person appointed under Paragraph II.B.1.(a) of this Order.
- D. “Antitrust Counsel” means a lawyer admitted to practice law in one or more of the judicial districts of the courts of the United States. Antitrust Counsel may delegate obligations under this Order to another lawyer supervised by Antitrust Counsel.
- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. §41 *et. seq.*, and the Sherman Act, 15 U.S.C. §1 *et. seq.*

Decision and Order

- F. “Distribution” or “Distributed” means, with respect to Prepared Remarks or Written Materials, transmittal or delivery by any means.
- G. “Global Economic Summit” or “Global Summit” means the particular recurring event attended by Musical Products industry leaders, media, and advisors, including those events held in Carlsbad, California, such as the Fifth Global Summit in 2004, the Sixth Global Summit in 2007, and any future event held where NAMM performs the same, or substantially the same, organizing and hosting role as it did for previous Global Summits.
- H. “Member of the Board of Directors” means any member of Respondent’s Board of Directors, including any Member of the Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- I. “Member of the Executive Committee” means any member of Respondent’s Executive Committee, acting in an official capacity or having the apparent authority to act in an official capacity.
- J. “Minimum Advertised Price Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the advertisement or display of Musical Products at or above a specified minimum dollar amount.
- K. “Musical Product(s)” means any musical instrument or musical instrument accessory sold or offered for sale by Respondent’s members.
- L. “Musical Product Dealer” means any person, corporation, or entity that in the course of its business offers for sale or sells to consumers any Musical Product in or into the United States, including, but not limited to, retail establishments,

Decision and Order

catalogue sellers, and internet retail sites, and the officers, agents, and employees thereof.

- M. “Musical Product Manufacturer” means any person, corporation, or entity that manufactures or distributes Musical Products to Musical Product Dealers for resale to consumers, and the officers, agents, and employees thereof.
- N. “NAMM Event” includes any trade show, town hall meeting or any similar event that NAMM sponsors and organizes and for which NAMM has final authority over the list of invitees. NAMM Event also means any meeting or teleconference of Respondent’s Board of Directors or Executive Committee to which the entire Board of Directors or Executive Committee has been invited to participate.
- O. “Prepared Remarks” means the final version of any script, speech, or other statement prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.
- P. “Price Terms” means:
 - 1. The retail or wholesale prices, resale prices, credit terms, or terms defining, setting forth, or relating to monetary or non-monetary compensation paid by or on behalf of any Musical Product Dealer or other person who acquires one or more Musical Products; or
 - 2. The retail or wholesale prices, resale prices, credit terms, return policies, volume or other discounts, rebates, or other policies, programs, conditions, or terms defining, setting forth, or relating to monetary or non-monetary compensation of any Musical Product Manufacturer.

Decision and Order

Provided, however, that Price Terms do not include purchase for personal use by an employee of Respondent or donation for charitable use.

- Q. “Resale Price Maintenance Policy” means any Musical Product Manufacturer’s policy, program, or provision of any program that conditions the sale or continued sale of its Musical Products to Musical Product Dealers upon the sale of Musical Products at or above a specified minimum dollar amount.
- R. “Written Materials” means the final version of any written or paper document, or any electronic version of any document, audio recording, video recording, photograph, or other data, created on, included in, or stored on any computer, computer file, electronic mail, audio CD, DVD, or other electronic or magnetic storage media prepared for Distribution at, or in advance of, a NAMM Event, a Global Summit, or an event at which any Member of the Board of Directors, employee or agent of Respondent delivers a speech or statement.

II.

IT IS FURTHER ORDERED that:

- A. Respondent, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, forthwith shall cease and desist from:
1. Urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to:
 - (a) the retail price of Musical Products; or

Decision and Order

- (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies or Resale Price Maintenance Policies.
2. Entering into, adhering to, enforcing, urging, encouraging, advocating, suggesting, assisting or otherwise facilitating any Musical Product Manufacturer or Musical Product Dealer to enter into, adhere to or enforce any combination, conspiracy, agreement or understanding between or among any Musical Product Manufacturers or Musical Product Dealers relating to:
- (a) the retail price of any Musical Product;
 - (b) any term, condition or requirement upon which any Musical Product Manufacturer or Musical Product Dealer deals, or is willing to deal, with any other Musical Product Manufacturer or Musical Product Dealer, including, but not limited to, Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies, or Resale Price Maintenance Policies; or
 - (c) the refusal to do business, or the reduction of business, with particular Musical Product Manufacturers or Musical Product Dealers.

Provided, however, that nothing in this Paragraph II.A prohibits Respondent from engaging in, participating in, coordinating, urging, encouraging, or suggesting to others to engage in any conduct protected by the *Noerr-Pennington* doctrine;

Decision and Order

Provided, further, however, that nothing in this Paragraph II.A prohibits the participants in Respondent's trade shows from conducting their commercial activities on the show floor in their ordinary and customary manner;

Provided, further, however, that nothing in this Paragraph II.A applies to meetings of industry participants not attended by Respondent at which Respondent's role is limited to the provision of a venue, a speaker, administrative support, refreshments, or other incidentals; and

Provided, further, however, that nothing in this Paragraph II.A prohibits Respondent from publishing or disseminating, by any means: (i) information relating to creditworthiness, product safety, and warranty service issues; (ii) links to individual web sites of Musical Product Manufacturers, Musical Product Dealers, distributors, sales representatives, consultants, industry associations, education and arts associations, societies, and organizations; (iii) NAMM or third-party publications or material containing advertisements, brand image, or public relations material; (iv) aggregated survey data, such as that published in Music Trades, The NAMM Global Report Featuring Music USA, and the Cost of Doing Business Survey; or (v) in the context of industry education, including the sharing of best practices and training materials, generic references to Price Terms, Resale Price Maintenance Policy, and the terms and conditions on which Musical Product Manufacturers and Musical Product Dealers do business.

B. Respondent shall:

1. Institute a program to comply with this Order and with the Antitrust Laws, which program shall require:
 - (a) The appointment and maintenance of an Antitrust Compliance Officer for the duration of this Order. For the first three (3) years of this Order, the

Decision and Order

Antitrust Compliance Officer shall be Antitrust Counsel. After the third anniversary of the date this Order becomes final, a new Antitrust Compliance Officer may be appointed who shall be Antitrust Counsel, a Member of the Board of Directors, or the general counsel of Respondent. Respondent shall direct the Antitrust Compliance Officer to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws.

- (b) The appointment and maintenance of Antitrust Counsel, who shall also serve as the Antitrust Compliance Officer until at least the third anniversary of the date this Order becomes final. Within fifteen (15) days of the date this Order becomes final, Respondent shall appoint Antitrust Counsel to provide legal advice to Respondent. Respondent shall direct Antitrust Counsel to take reasonable steps to develop, implement, administer, monitor, and actively supervise a program to obtain Respondent's compliance with this Order and with the Antitrust Laws. Antitrust Counsel shall also train an Antitrust Compliance Officer to take reasonable steps to obtain Respondent's compliance with this Order and with the Antitrust Laws.
- (c) Annual in-person training of Respondent's Board of Directors concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct;
- (d) Annual training of Respondent's employees and agents concerning Respondent's obligations under this Order and an overview of the Antitrust Laws as

Decision and Order

they apply to Respondent's activities, behavior, and conduct;

- (e) Review and written approval by the Antitrust Compliance Officer, prior to Distribution, of:
 - (i) All Written Materials and Prepared Remarks by any Member of the Board of Directors, or by any employee or agent of Respondent, acting in an official capacity or having the apparent authority to act in an official capacity, that concern or relate to the Price Terms, margins, profits, Minimum Advertised Price Policies, or Resale Price Maintenance Policies for Musical Products; and
 - (ii) All final agendas and materials Distributed at, in advance of, or after any meeting of Respondent's Board of Directors or Executive Committee.
- (f) Provision of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws to all Musical Product Manufacturers or Musical Product Dealers who are scheduled speakers at NAMM Events and Global Summits;
- (g) Certification, in writing, by each Musical Product Manufacturer or Musical Product Dealer who is a scheduled speaker at a NAMM Event or Global Summit that he or she is in receipt of, and has read, the written statement provided in Paragraph II.B.1(f);
- (h) Implementation and administration of a procedure to enable persons (including, but not limited to, Respondent's members, officers, directors, employees, and agents) to report violations of this Order and the Antitrust Laws to the Antitrust Compliance Officer and Antitrust Counsel,

Decision and Order

confidentially and without fear of retaliation of any kind; and

- (i) Implementation of internal policies and procedures that provide for discipline for members of Respondent's Board of Directors, employees, and agents for failure to comply fully with this Order, which policies and procedures shall require, among other steps, the termination or discharge of any such person who engages in such conduct only after conviction and all appeals have run or after civil liability and all appeals have run, provided that such termination or discharge does not violate any other applicable U.S. law.
2. Require the personal attendance of Antitrust Counsel at all NAMM Events and Global Summits for three (3) years from the date this Order becomes final.
 3. Require that Antitrust Counsel be present at, or be a party to, any meeting or teleconference conducted by Respondent to which the entire Board of Directors or Executive Committee has been invited to participate, for three (3) years from the date this Order becomes final.
 4. Require the recitation of a statement:
 - (a) At the commencement of each meeting of the Board of Directors and Executive Committee that summarizes Respondent's obligations under this Order and provides context-appropriate guidance on compliance with the Antitrust Laws; and
 - (b) At the commencement of each NAMM Event and Global Summit that provides context-appropriate guidance on compliance with the Antitrust Laws.

Decision and Order

Provided, however, that Respondent may satisfy the requirements of this Paragraph II.B.4 with respect to NAMM University or “NAMM U” sessions (other than NAMM U breakfast sessions) by enclosing in any materials provided to session attendees a copy of a written statement that provides context-appropriate guidance on compliance with the Antitrust Laws.

5. Require the audio or video recording of each panel discussion or presentation at all NAMM Events and Global Summits, prompt delivery of each such recording to the Antitrust Compliance Officer, and the retention of each such recording in the custody and control of the Antitrust Compliance Officer for five (5) years, provided that Respondent need not require the audio or video recording of meetings of the Board of Directors or Executive Committee.
6. Publish a copy of this Order and the Complaint issued by the Commission, and the internet address of the link to the Commission’s press release concerning this Order on the Commission’s web site at www.FTC.gov, in the first electronic edition of NAMM’s newsletter prepared for publication after this Order becomes final, in the same size and font as regularly featured items in NAMM’s newsletter.
7. Within thirty (30) days after the date this Order becomes final:
 - (a) Distribute, electronically or by other means, return receipt requested, to each Member of the Board of Directors a copy of this Order and the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order; and,
 - (b) Publish on Respondent’s official web site until the termination of this Order, a copy of this Order and

Decision and Order

the Complaint issued by the Commission, and a letter in the form of the letter attached as Exhibit A to this Order, with a link from NAMM's home or menu page, entitled "Antitrust Compliance," in the same size and font provided to other menu items. The Order shall remain accessible through common search terms and archives on the web site until the termination of Respondent's obligations under this Order.

8. Within thirty (30) days of the date any person becomes a Member of the Board of Directors, distribute electronically or by other means, return receipt requested, a copy of this Order and the Complaint issued by the Commission. In addition, a hard copy of this Order and the Complaint shall be provided to any new member at the first subsequent meeting of the Board of Directors, and any new member shall certify in writing that he or she is in receipt of, and has read, this Order and the Complaint.

Provided, however, that nothing in this Paragraph II.B prohibits Respondent from instituting additional components to its compliance program; and

Provided further, however, that full compliance with Paragraph II.B is not a defense to a violation of Paragraph II.A.

Decision and Order

III.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date the Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. A description in reasonable detail of the program instituted by Respondent to comply with Paragraph II.B.1 of this Order;
 3. A list of the NAMM Events and Global Summits held within sixty (60) days after the date the Order became final, including the title of each NAMM Event and Global Summit, and the dates on which and the locations at which each was held;
 4. A copy of all Written Materials and Prepared Remarks Distributed by Respondent, and reviewed by the Antitrust Compliance Officer under Paragraph II.B.1(e), at each NAMM Event, Global Summit, or other event at which any Member of the Board of Directors, employee or agent of Respondent delivered a speech or statement within sixty (60) days after the date the Order became final;
 5. The names, business addresses, e-mail addresses, and business phone numbers of each Member of the Board of Directors and each Member of the Executive Committee;

Decision and Order

6. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;
 7. A copy of NAMM's newsletter in which Respondent published this Order and the Complaint issued by the Commission; and
 8. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.
- B. One (1) year after the date the Order becomes final, annually for the next nine (9) years on the anniversary of the date the Order becomes final, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The names, business addresses, e-mail addresses, and business phone numbers of the Antitrust Compliance Officer and Antitrust Counsel;
 2. The name and business address of each Member of the Board of Directors to whom Respondent distributed, electronically or by other means, a copy of this Order and the Complaint issued by the Commission, the date Respondent distributed the documents, and the date each person signed for receipt or electronic receipt was received by Respondent;

Decision and Order

3. The name, title, and business address of each person required to receive, and who has received, annual in-person training concerning Respondent's obligations under this Order, an overview of the Antitrust Laws as they apply to Respondent's activities, behavior, and conduct, and the identity of the Antitrust Compliance Officer, and the name, title, and business address of the person who conducted the training; and
4. A description and explanation, in reasonable detail, of any affirmative action taken by Respondent with regard to Paragraph II.B.1(i) of this Order.

Provided, however, that nothing in this Paragraph III shall require the provision of information protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

IV.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Respondent.

V.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

Decision and Order

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order shall terminate on April 8, 2029.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Decision and Order

Exhibit A**EXHIBIT A**

(Letterhead of NAMM)

Dear Member:

As many of you know, the Federal Trade Commission has conducted an investigation concerning Minimum Advertised Price policies ("MAP policies") and retail pricing in the music products industry.

To end the investigation expeditiously and to avoid disruption to its core functions, NAMM has voluntarily agreed, without admitting any violation of the law, to the entry of a Consent Agreement and a Decision and Order by the Federal Trade Commission, pertaining to NAMM's practices with regard to NAMM events and programs and other related matters.

In general, the Federal Trade Commission has prohibited NAMM from engaging in certain activities involving information exchanges among its members relating to MAP policies, retail margins, and retail pricing in connection with the sale and marketing of musical products. In addition, NAMM will be required to implement an antitrust compliance program. A copy of the Federal Trade Commission Decision and Order is enclosed and sets forth the specific requirements of the Order that apply to NAMM. The Decision and Order is also available on the Federal Trade Commission website at www.FTC.gov.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the National Association of Music Merchants, Inc. (“NAMM” or “Respondent”). NAMM is a trade association composed of more than 9000 members that include manufacturers, distributors, and dealers of musical instruments and related products. The agreement settles charges that NAMM violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by arranging and encouraging the exchange among its members of competitively sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and collusion among competitors. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

NAMM is a trade association. Most U.S. manufacturers, distributors, and dealers of musical instruments are members of NAMM. NAMM serves the economic interests of its members by, among other things, promoting consumer demand for musical

Analysis to Aid Public Comment

instruments, lobbying the government, offering seminars, and organizing trade shows. In the United States, NAMM sponsors two major trade shows each year, where manufacturers introduce new products and meet with dealers. In addition, NAMM's trade shows provide competing manufacturers, distributors and retailers of musical instruments an opportunity to meet and discuss issues of concern to the industry.

An ongoing subject of concern to NAMM members in recent years has been the increased retail price competition for musical instruments, and whether that competition benefitted consumers more than it benefitted NAMM members. Between 2005 and 2007, NAMM organized various meetings and programs for its members at which competing retailers of musical instruments were permitted and encouraged to exchange information and discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of information exchange and discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, NAMM members discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail price and margins; and other competitively sensitive issues.

II. Legal Analysis

Adam Smith famously warned of the danger of permitting competitors even to assemble in one place.¹ The Federal Trade Commission does not take nearly so jaundiced a view toward trade association activities. The Commission is aware that trade associations can serve numerous valuable and pro-competitive functions, such as expanding the market in which its members sell;

¹ "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* 55 (Great Books ed. 1952) (1776).

Analysis to Aid Public Comment

educating association members, the public, and government officials; conducting market research; establishing inter-operability standards; and otherwise helping firms to function more efficiently.

At the same time, it is imperative that trade association meetings not serve as a forum for rivals to disseminate or exchange competitively-sensitive information, particularly where such information is highly detailed, disaggregated, and forward-looking. The risk is two-fold. First, a discussion of prices, output, or strategy may mutate into a conspiracy to restrict competition. Second, and even in the absence of an explicit agreement on future conduct, an information exchange may facilitate coordination among rivals that harms competition. In light of the long-recognized risk of antitrust liability, a well-counseled trade association will ensure that its activities are appropriately monitored and supervised.²

According to the Complaint, NAMM's activities crossed the line that distinguishes legitimate trade association activity from unfair methods of competition. A respondent violates Section 1 of the Sherman Act and Section 5 of the FTC Act when it engages in

² See, e.g., Steven J. Fellman, *Antitrust Compliance: Trade Association Meetings and Groupings of Competitors: The Associations's Perspective*, 57 *Antitrust L. J.* 209 (1988) ("Counsel should receive agendas of all committee meetings in advance of the meetings and make sure that he or she monitors committee meetings that may involve antitrust-sensitive issues."); Kimberly L. King, *An Antitrust Primer For Trade Association Counsel*, 75 *Fla. Bar J.* 26 (2001):

Here are a few things trade association counsel, executives, and members generally should and should not do: DO encourage the trade association to help expand the markets within which its members compete; DON'T let the association be used as a forum for discussion of members' price-related terms of sale, geographic areas or customers to be served, or the kinds of goods or services to be offered; DON'T let the association adopt rules governing price-related terms under which members sell goods or services; DON'T let the association be used as a conduit for anticompetitive exchanges of information, such as current pricing to particular customers or planned price increases; DON'T let the association be used to facilitate an agreement among competitors to refuse to deal with any third person . . .

Analysis to Aid Public Comment

concerted conduct that has the principal tendency or the likely effect of harming competition and consumers. *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999).³ The conduct of a trade association or its authorized agents is generally treated as concerted action. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 356 (5th Cir. 2008) (“When an organization is controlled by a group of competitors, it is considered to be a conspiracy of its members.”).

The Complaint alleges that at meetings and programs sponsored by NAMM, competing retailers of musical instruments and other NAMM members discussed strategies for raising retail prices. Firms also exchanged information on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their enforcement. And not only did NAMM sponsor these meetings, but its representatives set the agenda and helped steer the discussions. The antitrust concern is that this joint conduct can facilitate the implementation of collusive strategies going forward.⁴ For example, such discussions could lead competing NAMM members to refuse to deal with a manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum advertised prices,

³ Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well. *E.g.*, *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

⁴ Concerted action that impairs competition by facilitating collusion may be challenged under Section 1 of the Sherman Act. *E.g.*, *United States v. Container Corp.*, 393 U.S. 333 (1969) (agreement to exchange price information); *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936) (agreement to exchange price information); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952) (agreement to standardize product); *United States v. Rockford Memorial Hospital Corp.*, 898 F.2d 1278 (7th Cir. 1990) (merger).

Unilateral conduct that impairs competition by facilitating collusion may be challenged under Section 5 of the FTC Act. *E.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *In the Matter of Valassis Communications, Inc.*, C-4160, 2006 FTC LEXIS 25 (April 19, 2006) (invitation to collude); *In the Matter of Sony Music Entertainment, Inc.*, C-3971, 2000 FTC LEXIS 95 (Aug. 30, 2000) (minimum advertised price policy).

Analysis to Aid Public Comment

were observed and enforced against discounters.⁵ Alternatively, NAMM members could lessen price competition in local retail markets. Any or all these strategies may result in higher prices and harm consumers of musical instruments. Any savings from lower manufacturing costs would be reserved to NAMM members, and not shared with consumers in the form of lower retail prices.

The potential for competitive harm from industry-wide discussions must be weighed against the prospect of legitimate efficiency benefits. Here, the Complaint alleges that no significant pro-competitive benefit was derived from the challenged conduct.

⁵ In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2717 (2007), the Supreme Court explained that competing retailers, by acting together to compel a manufacturer to implement or enforce a vertical distribution restraint, may harm competition:

A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement.

The Court also observed that antitrust condemnation may be appropriate where resale price maintenance policies are adopted or enforced pursuant to an agreement among manufacturers.

Resale price maintenance may, for example, facilitate a manufacturer cartel. . . . An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. . . . To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel [*i.e.*, a manufacturer cartel or a retailer cartel], it, too, would need to be held unlawful under the rule of reason.

Id. at 2717-18.

Analysis to Aid Public Comment

The Commission does not contend that the exchange of information among competitors is categorically without benefit.⁶ Rather, the allegation is that here – taking into account the type of information involved, the level of detail, the absence of procedural safeguards, and overall market conditions – the exchange of information engineered by NAMM lacked a pro-competitive justification.

III. The Proposed Consent Order

NAMM has signed a consent agreement containing a proposed consent Order. The proposed Order enjoins NAMM from encouraging, advocating, coordinating, or facilitating in any manner the exchange of information among musical instrument manufacturers and dealers relating to the retail price of musical instruments or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer. The proposed Order also enjoins NAMM from facilitating any musical instrument manufacturer or dealer in entering into or enforcing any agreement between or among musical instrument manufacturers or dealers relating to the retail price of any musical instrument or the conditions pursuant to which any manufacturer or dealer will deal with any other manufacturer or dealer.

In addition, the proposed Order requires NAMM to institute an antitrust compliance program. The proposed Order requires, *inter alia*, the review by antitrust counsel of all written materials and prepared remarks by any member of NAMM's board of directors, employee, or agent of NAMM relating to price terms and minimum advertised price policies; the provision by antitrust counsel of appropriate guidance on compliance with the antitrust laws; and annual training of NAMM's board of directors, agents, and employees concerning NAMM's obligations under the Order.

⁶ See *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (explaining that the exchange of information can, in some circumstances, increase economic efficiency and render markets more, rather than less, competitive). See also Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 *Geo. L. J.* 1187, 1193-97 (1979).

Analysis to Aid Public Comment

The proposed Order would not interfere with the ability of NAMM to engage in legitimate trade association activity, including its sponsorship of trade shows and other events. The proposed Order explicitly excludes from its prohibitions the ordinary commercial activities of NAMM's members on the show floor, and any conduct protected by the *Noerr-Pennington* doctrine. In addition, the proposed Order excludes from its prohibitions the publication or dissemination of aggregated survey data, the sharing of best practices and training materials, and the communication of information relating to creditworthiness, product safety, and warranty issues.

The proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

AMERICAN TELECOM SERVICES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4256; File No. 082 3114
Complaint, April 15, 2009 – Decision, April 15, 2009

This consent order addresses the offer of rebates by American Telecom Services, Inc., a company that has advertised and sold products to the public, including telephones and telephone services. The order prohibits the respondent from misrepresenting, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers; from failing to provide any rebate within the time specified or, if no time is specified, within 30 days of receiving a properly completed request; and from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate. The order requires the respondent to make available to the Commission, upon request, a specimen copy of all advertisements or rebate forms containing the representation covered by this order, all materials that were relied upon in disseminating the representation, and all written or electronic complaints relating to rebates and any responses to those complaints. The order also requires the respondent to provide a copy of the order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives whose duties include the exercise of managerial responsibility with respect to the subject matter. In addition, the order requires the respondent to notify the Commission prior to any change in the corporation that may affect compliance obligations arising under the order and to file periodic reports with the Commission.

Participants

For the *Commission*: *Linda K. Badger and Matthew D. Gold.*

For the *Respondent*: *Sean P. Gates, Morrison & Foerster.*

COMPLAINT

The Federal Trade Commission, having reason to believe that American Telecom Services, Inc., a corporation (“ATS” or

Complaint

“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 is a Delaware corporation with its principal office or place of business at 6 Concourse Parkway NE, Suite 1525, Atlanta, GA 30328-6117.

2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to the public, including telephones and phone services. Respondent has distributed these products to the public through large, nationwide retailers.

3. To make its products more attractive to retailers and their customers, ATS has offered numerous mail-in rebates ranging from \$5 to \$50 in value. Most of ATS’s rebate offers have required consumers to fill out a rebate form, provide proof-of-purchase documentation, and “activate” an account entitling the consumer to 100 free long distance minutes. ATS has used third party fulfillment houses to process and pay rebate requests received from its customers.

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.

ATS’S REBATE ADVERTISEMENTS

5. Respondent has disseminated or has caused to be disseminated advertisements and rebate forms for mail-in rebates, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

“American Telecom **Pay N’Talk**

\$15 REBATE

...

Complaint

Terms and Conditions:

...

Allow 8 weeks to receive your rebate check.

....”

(Excerpts from Exhibit A, an ATS rebate form for a rebate offered on a Pay N’Talk telephone).

FALSE SHIPMENT REPRESENTATION

6. Through the means described in Paragraph 5, including but not necessarily limited to Exhibit A, respondent has represented, expressly or by implication, that purchasers of eligible ATS products will receive rebate checks within eight weeks after receipt of their properly completed requests.

7. In truth and in fact, in numerous instances, purchasers of eligible ATS products did not receive rebate checks within eight weeks after receipt of their properly completed requests. Tens of thousands of consumers who submitted properly completed requests for rebates since 2006 have experienced substantial delays, including delays of one year or longer. These delays have been due, in part, to ATS’s inability to pay its third party fulfillment houses, as well as its refusal to timely pay third party fulfillment houses with which it had disagreements. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

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

Complaint

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

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Complaint

EXHIBIT A


<h1 style="margin: 0;">\$15 REBATE</h1>											
<p>To qualify for rebate, you must:</p> <ol style="list-style-type: none"> 1. Purchase the specified product between the promotion dates listed on this form. 2. Reveal the unique PIN # located on the top left hand corner of the "My Account Card" by scratching off the silver area. Write the PIN # in space provided below. 3. Find the unique S/N # (Serial Number) located on the bottom left corner of the "My Account Card" and write it in the space provided below. 4. Activate the "My Account Card" before submitting your rebate claim. Attention: Your rebate is not valid unless you have pressed the money-saving green button to access your free minutes. 5. Submit postmarked form within 30 days from purchase date. 6. Mail the following in one envelope to the address below. <ul style="list-style-type: none"> • This completed rebate form (incomplete forms will not be accepted). • Original or photocopy of the receipt (circle item purchased). • Original 12-digit UPC barcode cut from the product packaging. <p>Mail to: PayN'Talk Rebate Offer # H811559 P.O. Box 100546 White Bear Lake, MN 55110-0546</p>	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr style="background-color: #333; color: white;"> <td>Product:</td> </tr> <tr> <td>PayN'Talk Analog Master RA22304H</td> </tr> <tr style="background-color: #333; color: white;"> <td>Promotion Dates:</td> </tr> <tr> <td>6/1/07-6/1/09</td> </tr> <tr style="background-color: #333; color: white;"> <td>Postmark Date:</td> </tr> <tr> <td>Within 30 Days from Purchase Date</td> </tr> <tr style="background-color: #333; color: white;"> <td>Valid Retailer:</td> </tr> <tr> <td>Walgreen's</td> </tr> <tr style="background-color: #333; color: white;"> <td>Rebate Amount:</td> </tr> <tr> <td>\$15.00</td> </tr> </table>	Product:	PayN'Talk Analog Master RA22304H	Promotion Dates:	6/1/07-6/1/09	Postmark Date:	Within 30 Days from Purchase Date	Valid Retailer:	Walgreen's	Rebate Amount:	\$15.00
Product:											
PayN'Talk Analog Master RA22304H											
Promotion Dates:											
6/1/07-6/1/09											
Postmark Date:											
Within 30 Days from Purchase Date											
Valid Retailer:											
Walgreen's											
Rebate Amount:											
\$15.00											
<p>Customer Information (please print clearly)</p> <p>*Full Name: _____</p> <p>*Address: _____</p> <p>*City: _____ *State: _____ *Zip: _____</p> <p>Phone: _____</p> <p>email address: _____</p> <p>*Account Card PIN #: _____</p> <p>*Account Card S/N # (Serial Number): _____</p> <p>Signature of Purchaser: _____</p> <p>Date Submitted: _____</p> <p style="font-size: small; text-align: center;">Please keep copies of entire submission for your records. To check the status of your claim visit www.rebate-zone.com/ats</p>	<p>Terms and Conditions: You must submit all of the required information and the completed rebate form. Request for rebates must be postmarked within 30 days from purchase date. LIMIT ONE REBATE PER HOUSEHOLD. Checks are paid in U.S. funds only to U.S. residents and must be cashed within 90 days of issuance. American Telecom Services, Inc. is not responsible for lost or stolen checks. Checks will not be mailed to PO boxes. All federal, state, and local rules apply. Offer not available in all areas or stores, outside the U.S., or to customers under 18 years of age. Rebate offer void where prohibited or restricted by law. We reserve the right to modify specifications and terms without notice. Late, incomplete, postage due, and illegible claims will be rejected. Fraudulent mailing of multiple requests can result in federal prosecution under U.S. Mail Statutes (18 USC, 1341/1342). Offer cannot be combined with any other offer or rebate. Allow 8 weeks to receive your rebate check. To check the status of your claim, call 1-866-818-8964 or visit www.rebate-zone.com/ats. (ABQ)</p>										

EXHIBIT A

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 the complaint which the Western Region 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 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 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, 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 American Telecom Services, Inc., is a Delaware corporation with its principal office or place of business at 6 Concourse Parkway NE, Suite 1525, Atlanta, GA 30328-6117.
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:

1. Unless otherwise specified, “respondent” shall mean American Telecom Services, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Rebate” shall mean a check, cash, credit towards future purchases, or any other consideration offered to consumers who purchase products or services, and which is to be provided, subsequent to the purchase, to consumers who submit a request for redemption after satisfying the terms and conditions of the offer.
3. “Properly completed request” shall mean a rebate request made in compliance with the express terms of the rebate offer, including the submission of all documentation, information, and other materials required by such terms.
4. “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, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or service sold to consumers, in or affecting commerce, shall not:

- A. misrepresent, in any manner, expressly or by implication, the time in which any rebate will be mailed, or otherwise provided to consumers;

Decision and Order

- B. fail to provide any rebate within the time specified or, if no time is specified, within thirty (30) days of receiving a properly completed request; or
- C. misrepresent, in any manner, expressly or by implication, any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

II.

IT IS FURTHER ORDERED that respondent ATS, 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. A specimen copy of all advertisements or rebate forms containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All written or electronic complaints relating to rebates (whether received directly, indirectly, or through any third party) and any responses to those complaints.

III.

IT IS FURTHER ORDERED that respondent ATS, 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 whose duties include the exercise of managerial responsibility 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

Decision and Order

future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent ATS, 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent ATS, 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.

Decision and Order

VI.

This order will terminate on April 15, 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 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.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from American Telecom Services, Inc. (“ATS”). ATS, with headquarters in Atlanta, Georgia, is a distributor of telephones and phone services.

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 agreement’s proposed order.

This matter concerns ATS’s cash rebate promotions. To make its products more attractive to retailers and their customers, ATS has offered numerous mail-in rebates ranging from \$5 to \$50 in value. In implementing these promotions, ATS used third party fulfillment houses to process and pay rebate requests received from its customers. The complaint alleges that ATS engaged in deceptive practices relating to these rebate offers. Specifically, the complaint alleges that ATS falsely represented that purchasers of eligible ATS products will receive rebate checks within eight weeks after receipt of their properly completed requests. The proposed complaint further alleges that tens of thousands of consumers who submitted properly completed requests for rebates since 2006 have experienced substantial delays, including delays of one year or longer. According to the complaint, these delays have been due, in part, to ATS’s inability to pay its third party fulfillment houses, as well as its refusal to timely pay third party fulfillment houses with which it had disagreements.

The proposed order contains provisions designed to prevent ATS from engaging in similar acts and practices in the future. Part I of the proposed order prohibits ATS from misrepresenting the time in which any rebate will be mailed and from failing to provide any

Analysis to Aid Public Comment

rebate within the time specified, or if no time is specified, within thirty days. This provision also prohibits the company from misrepresenting any material terms of any rebate program, including the status of or reasons for any delay in providing any rebate.

Parts II through V of the proposed order are standard reporting and compliance provisions. Part VI 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

**NATIVE ESSENCE HERB COMPANY,
MARK J. HERSHISER,
AND
MARIANNE HERSHISER**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. 9328; File No. 082 3115
Complaint, September 16, 2008 – Decision, May 7, 2009*

This consent order addresses the respondents' advertising and promotion of Native Essence (Rene Caisse) Formula tea and extract, Native Essence Plus tea and extract, Native Essence with Cat's Claw tea and extract, chaparral herb, Maitake mushroom extract, and Mai-T Mushroom Plus Formula extract. The complaint alleges that respondents have claimed that their products are effective in treating and curing various forms of cancer and in reducing the size of, or eliminating, cancerous tumors. The consent order requires respondents to have competent and reliable scientific evidence substantiating any claim that their products are effective in the treatment or cure of cancer; prevent or lower the risk of cancer; are effective in reducing the size of, or eliminating, cancerous tumors; or is safe or non-toxic or has no side effects.

Participants

For the *Commission*: Rich Cleland, Matthew D. Gold, Rosemary Rosso, and Erika Wodinsky.

For the *Respondents*: Richard A. Jaffe and Judith A. Rosenstein.

COMPLAINT

The Federal Trade Commission, having reason to believe that Native Essence Herb Company, a corporation, Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation, and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation

Complaint

(“respondents”), have 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 Native Essence Herb Company (“Native Essence”) is or has been a New Mexico corporation, with its principal office or place of business at 4 Tune Drive, Unit B, El Prado, New Mexico 87529.

2. Respondent Mark J. Hershiser is an officer of Native Essence. Individually or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Native Essence.

3. Respondent Marianne Hershiser is an officer of Native Essence. Individually or in concert with others, she has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Native Essence.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed herbal products to the public, including Native Essence (Rene Caisse) Formula (also called the “Native Essence Original Formula”), Native Essence Plus, Native Essence with Cat’s Claw, chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus. Respondents offer these products through the following Internet websites: www.herbalformulas.com, www.herbalalternative.com, www.herbmed.com, and www.herbalremedy.com. Native Essence Original Formula, Native Essence Plus, Native Essence with Cat’s Claw, chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus are “foods” and/or

Complaint

“drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. Respondents promote their Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat’s Claw products as a treatment or cure for lymphoma, colon, rectal, and prostate cancer, as well as for diabetes, ulcers and other ailments. Respondents promote chaparral herb, Japanese Maitake mushrooms, and Mai-T Mushroom Plus, which contains a mix of Japanese Maitake mushrooms, Red Reishi mushrooms, Shiitake mushrooms, Corydyceps fungus, Chinese Astragalus root, and Rose Hips, as products that can treat or cure cancer.

Native Essense Original Formula, Native

Essense Plus, and Native Essense with Cat’s Claw

7. Respondents have disseminated or caused to be disseminated advertisements for their Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat’s Claw products, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

“Native Essense™ (Rene Caisse) Formula

...

Uses:

Thousands of people over the years have testified that Rene Caisse’s formula has cured their cancer, diabetes, ulcers and many other ailments. [Exhibit A, at 1]

...

Complaint

Testimonials:

“I was battling lymphoma for 10 years and was in horrendous pain. I began taking Native Essence™ Plus and began feeling better right away. After 4 months my blood was normal and I was not feeling pain anymore . . . I still take the Native Essence™ Plus everyday and have now been in remission for over a year.”

Christiane B. [Exhibit A, at 2; ellipses in the original]

“I am glad my wife is taking these herbs (Native Essence™ tea) you are giving her. Iit [sic] seems to be working, the cancer cells in her blood stream went from 10 to 1.05. Thank you very much for taking the time to talk with her and encouraging her to get well again.” Bernard G. “My PSA count went down from 6.4 to 3.9 after 3 months and the only thing I did differently was to take the Native Essence™ with Cat’s Claw formula. I’m very happy with the progress and I’m going to continue using it.”

Roland M. [Exhibit A, at 2]

. . .

“I had colon and rectal cancer and they could do no more for me as I’d had 8 weeks of chemo and 11 days of radiation. I could take the radiation no more and they told me the chemo was not reaching the tumor. I started on Native Essence™, 2 ounces three times a day for four months then 2 ounces twice a day. After about six months a large tumor was expelled and after that about five more smaller ones.” Comments from my Radiologist: “I’ve heard wonderful things about essiac.” Comments from my nurse after reading my blood test: “This blood test is awesome for a woman with colon and rectal cancer.”

Mary Helen H. [Exhibit A, at 2]

Complaint

...

Native Essense (essiac herbs) Ingredients

...

Ingredients

Original: Burdock root, Sheep Sorrel herb, Slippery Elm bark, Turkish rhubarb root.

Plus adds: Red Clover, Watercress, Blessed Thistle, Kelp/Bladderwrack.

With Cats Claw adds Cats Claw bark to the Original.

...

Sheep Sorrel herb (*Rumex acetosella*)

...

Common Use: Throughout the centuries, the sorrels have appeared in historical archives as a folk remedy for cancer in both Europe and America. In the late 1740's, legislation was introduced in Williamsburg, Virginia, that permitted Mrs. Mary Johnson to use this plant as a treatment for cancer. . . . In 1926, the National Cancer Institute received a recipe from Canada citing an old Indian cure for cancer using a paste made with bread and the juice of sheep sorrel, applied externally. Thus, it would appear from early literature that the sorrels were used to treat cancer. Sorrel contains a high amount of nutrients including chlorophyll . . . The chlorophyll molecules that carry oxygen through the bloodstream may do the following: Inhibit chromosome damage to effectively block cancer, reduce the damage of radiation burns . . . [Exhibit A, at 4-5]

...

Complaint

Kelp (*Laminaria species*) or **Bladderwrack** (*Fucus vesiculosus*)

...

Common Uses: . . .The extensive research done on this remarkable sea-weed has shown it to have anti-tumor properties (Japanese researchers have claimed kelp has been 'conclusively proven to prevent breast cancer'), as well as antibiotic, antioxidant and antibacterial properties. [Exhibit A, at 7]

...

Peruvian Cat's Claw (Uña de Gato) bark (*Uncaria tomentosa*)

...

Common Uses: This amazing vine from the Peruvian rain forest is offered in Peruvian pharmacies, the label states that the curative properties are almost unlimited. This is because the herb is considered a powerful cellular reconstitutor. Studies beginning in 1970 and continuing through today suggest it has applications in the treatment of

cancer. . . [Exhibit A, at 7]

...”

[Exhibit A, portions of respondents' website www.herbmed.com/caisseinfo.html, as accessed on February 29, 2008]

8. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that:

a. Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat's Claw are effective in treating and

Complaint

curing cancer, including but not limited to lymphoma, colon cancer, rectal cancer, and prostate cancer;

b. Native Essense Original Formula, Native Essense Plus, and Native Essense with Cat's Claw are effective in reducing the size of, or eliminating, cancerous tumors; and

c. Native Essense Plus is effective in preventing breast cancer.

9. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false and misleading.

11. Through the means described in Paragraph 7, respondents have represented, expressly or by implication, that:

a. Scientific research proves that Native Essense Plus prevents breast cancer; and

b. Scientific studies prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

12. In truth and in fact:

a. Scientific research does not prove that Native Essense Plus prevents breast cancer; and

b. Scientific studies do not prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

Complaint

Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

Chaparral Herb

13. Respondents have disseminated or caused to be disseminated advertisements for their Chaparral herb extract, including but not necessarily limited to the attached Exhibit B. These advertisements contains the following statements:

“Chaparral herb (Larrea v. sp.)

...

Common Uses: For centuries, Native Americans have been using chaparral leaves and stems to treat a wide variety of ailments, including cancer . . . In folk medicine, chaparral has been used for leukemia and many different types of cancers. Many people with cancer have claimed tumor shrinkage or complete remission using only chaparral. The plant contains immune stimulating polysaccharides and a key ingredient nordihydroguaiaretic acid (NGDA) [sic.], which has been shown to have powerful antitumor properties. According to vol. 19 of Biochemical Pharmacology NGDA inhibits electron transport in the mitochondria, or 'energy producing factories' within cancer cells, thereby depriving tumors of the electrical energy they require to exist. . . .”

[Exhibit B, portions of respondents' website www.herbalformulas.com/chaparral.html, as accessed on February 29, 2008]

14. Through the means described in Paragraphs 13, respondents have represented, expressly or by implication, that:

- a. Chaparral herb is effective in treating and curing cancer;

Complaint

b. Chaparral herb is effective in causing people with cancer to go into complete remission, without the need for any other form of treatment; and

c. Chaparral herb is effective in shrinking or eliminating cancerous tumors.

15. Through the means described in Paragraph 13, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 14, at the time the representations were made.

16. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 14, at the time the representations were made. Therefore, the representation set forth in Paragraph 15 was, and is, false and misleading.

Maitake Mushroom Extract and Mai-T Mushroom Plus Extract

17. Respondents have disseminated or have caused to be disseminated advertisements for their Maitake mushroom extract and Mai-T Mushroom Plus extract products, including but not necessarily limited to the attached Exhibit C. These advertisements contain the following statements:

“Mai-T Mushroom Plus™ Ingredients

...

Immune, Adaptogenic and Whole Body Tonic. The benefits shown by clinical trials performed on these mushrooms in China and Japan are far too numerous to list here. Among these include: the ability to inhibit many types of tumors, build bone marrow, aid in cancer prevention, stimulate the immune system on all levels, support people undergoing chemotherapy, stimulate circulation and help

Complaint

with coronary/heart disease. The Japanese government has officially listed Reishi as an adjunct herb for cancer . . . [Exhibit C, at 1]

...

Ingredients: Maitake mushroom, Reishi mushroom, Shiitake mushroom, Cordyceps fungus, Astragalus root and concentrated Rose Hips extract.

...

Japanese Maitake mushroom (*Grifola frondosa*)

...

Common Uses: A Maitake extract is being studied in medical clinics in the U.S. for patients with breast and colorectal cancers. In China, an extract of this mushroom demonstrated an anti-cancer effect in 63 patients with lung, stomach, hepatocellular cancers and leukemia. Dr. Joan Priestly MD, reports that her patients with Kaposi's sarcoma and other symptoms of AIDS show improvement when administered the extract. When used consistently (3-5 times weekly), Maitake is said to aid in cancer prevention, immune stimulation in people with cancer, support people undergoing chemotherapy and benefit people with the AIDS virus. . . . [Exhibit C, at 1]

...

Red Reishi mushroom (*Ganoderma lucidum*)

...

Common Use: Red Reishi is in the most highly rated category of herbs ("Superior"), in terms of multiple benefits and lack of side effects, in Traditional Chinese Medicine.

Complaint

Here is a small list of some of the things it is claimed to benefit. Cancer, side effects of cancer treatments including radiation, chemo-therapy and surgery . . . [Exhibit C, at 1]

...

Shiitake mushroom (*Lentinus edodes*)

...

Common Use: Shiitake is used for any and all diseases involving depressed immune function, including cancer . . . [Exhibit C, at 2]

...

Chinese Astragalus root (*Astragalus membranaceus*)
[ingredient in *Mai-T Mushroom Plus*]

...

Common use: . . . Astragalus root has also been indicated as an aid in the side effects of chemotherapy as well as having the ability to inhibit tumor growth. If taken cumulatively, especially with Chinese Ligustrum (Privet) fruit, it shows marked anti-tumor properties. [Exhibit C, at 3]

...”

[Exhibit C, portions of respondents’ website www.herbalformulas.com/mitxpinfo.html, as accessed on February 29, 2008]

18. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that:

- a. Mai-T Mushroom Plus is effective in preventing, treating and curing cancer, including but not limited to lung cancer,

Complaint

stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma; and

b. Mai-T Mushroom Plus is effective in inhibiting the growth of cancerous tumors.

19. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made.

20. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 18, at the time the representations were made. Therefore, the representation set forth in Paragraph 19 was, and is, false and misleading.

21. Through the means described in Paragraph 17, respondents have represented, expressly or by implication, that clinical studies prove that Maitake mushrooms and Mai-T Mushroom Plus prevent and treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma, and inhibit tumor growth.

22. In truth and in fact, clinical studies do not prove that Maitake mushrooms and Mai-T Mushroom Plus prevent or treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma, and inhibit tumor growth. Therefore, the representation set forth in Paragraph 21 was, and is, false and misleading.

23. The acts and practices 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.

* * *

Complaint

NOTICE

Proceedings on the charges asserted against the respondents named in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the ALJ shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the ALJ, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

Complaint

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 7 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice is hereby given to each of the respondents named in this complaint that a hearing before the ALJ on the charges set forth in this complaint will begin on December 16, 2008, at 10:00 a.m., or such other date and time as determined by the ALJ, in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. At the hearing, you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully protect the consuming public, the Commission may order such other relief as it finds necessary or appropriate.

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution for past, present, and future consumers and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative

Complaint

proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “respondents” means Native Essence Herb Company, a corporation, its successors and assigns and its officers; Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and each of the above’s agents, representatives and employees.
2. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “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.
4. “Food” and “drug” mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T

Complaint

Mushroom Plus Formula extract, or any other health-related product, service, or program.

6. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any substantially similar product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Such product is effective in the treatment or cure of cancer;
- B. Such product prevents or lowers the risk of cancer;
- C. Such product is effective in reducing the size of, or eliminating, cancerous tumors; or
- D. Such product is safe or non-toxic or has no side effects;

unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade

Complaint

name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any covered product or service, unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

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

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit respondents 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.

Complaint

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall, within seven (7) days after the date of service of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula, on or after January 1, 2005 through the date of service of this order. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;
- B. Within forty-five (45) days after the date of service of this order, respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any respondent, at any time prior to issuance of this order, in connection with the purchase of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cats Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus extract. *Provided, however*, that respondents may disclose

Complaint

such identifying information to the FTC pursuant to Part V.A, above, or any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that respondents 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. A specimen copy of 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 their 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.

VII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, and its successors and assigns, and respondents Mark J. Hershiser and Marianne Hershiser 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. Respondents 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. Respondents shall maintain and upon

Complaint

request make available to the Federal Trade Commission for inspection and copying a copy of each signed statement acknowledging receipt of the order.

VIII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, 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.

IX.

IT IS FURTHER ORDERED that respondents Mark J. Hershiser and Marianne Hershiser, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. 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.

Complaint

X.

IT IS FURTHER ORDERED that respondents 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 they have complied with this order.

XI.

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 respondents 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.

Complaint

THEREFORE, the Federal Trade Commission this sixteenth day of September, 2008, has issued this complaint against respondents.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Complaint

Attachment AATTACHMENT A
LETTER TO BE SENT BY FIRST CLASS MAIL
[To be printed on letterhead of Native Essence Herb Company]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Native Essence (Rene Caisse or essiac herbs) Formula, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, and/or Mai-T Mushroom Plus Formula from one of our websites, www.herbalformulas.com, www.herbmed.com, www.herbalalternative.com, and www.herbremedy.com. We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making those claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

Very little scientific research has been done concerning Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, or the ingredients in these products, are effective when used as treatments for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, Chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

Attachment A

Complaint

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

Attachment A

Complaint

Attachment B

ATTACHMENT B

Native Essence Herb Company
P.O. Box 189
Carson, New Mexico 87517

[name and address of purchaser]

GOVERNMENT ORDERED NOTICE

Complaint

Exhibit A

Rene Caisse Herbs

Page 1 of 3

- Home
- Herbal Formulas
- Single Herbs
- Rene Caisse Herbs
- Roadside Formula
- Categories
- Ingredients
- About Us / FAQ
- Ordering
- Show Order
- Privacy Policy
- Info
- Search
- Index
- SHOPPING

Native Essence Herb Company's
HerbalFormulas.com

Free Shipping
We are offering free priority mail shipping on all US orders - select "priority mail" at check out! Estimated delivery 2-3 days

Native Essence™ (Rene Caisse) Formula

Compare to Essiac™ or Flor-Essence™ and save!
This is the combination of herbs originally prepared by the Ojibwa Indians and later used so successfully by the late Canadian nurse Rene Caisse and called (Essiac is Caisse backwards). This formula is believed to normalize body systems by purifying the blood and thoroughly cleansing the body of harmful toxins. We call this formula Native Essence™ and we prepare it using only the finest organic quality herbs available.



Click [HERE](#) for more info on this amazing formula

[Order Here](#)

[Product Info](#)

[Ingredients](#)

Available in the traditional dry tea and a super concentrated, already prepared liquid extract that requires no preparation and no refrigeration.



The origins of Essiac

About Native Essence™

Native Essence is available in the traditional dry herbal tea format as well as a concentrated liquid extract. The Native Essence™ formula is carefully prepared using only the finest quality herbs. The herbs used in this formula are always organically grown or ecologically wildcrafted and will never be irradiated or fumigated.

The original Essiac™ formula consisted of 4 herbs: burdock root (picked in its first year of life), sheep sorrel (the whole plant), slippery elm bark (the innermost bark) and Turkish rhubarb root. Native Essence is always prepared using these herbs as listed above.

Throughout its evolution, 4 additional herbs have sometimes been added to the original formula. The addition of these herbs is based on the research of Dr. Chaites Brusck M.D., the personal physician to president John F. Kennedy. Dr. Brusck worked closely with Rene Caisse for many years, and after 30 years of testing and research, believed the formula to be perfected. These herbs (watercress, red clover, blessed thistle and kelp) are added to enhance the original formula. It is believed by some that these additional herbs help bring out the full potential of the original herbs, which still make up the heart and soul of the formula.

So that you may make your own choice regarding these additions, Native Essence is available in the original 4 herb formula (known as Native Essence original) and also in the "enhanced" 8 herb formula (known as Native Essence Plus). We make no recommendations with regard to these additions, and since both formulas contain the original "essential herbs" as traditionally prepared and proportioned, we believe either will be highly beneficial.

Uses:

Thousands of people over the years have testified that Rene Caisse's formula has cured their cancer, diabetes, ulcers and many other ailments. The formula is believed to normalize body systems by purifying and oxygenating the blood and thoroughly cleansing the body of harmful toxins. It helps break down catabolic tissue and promote the replacement of wasted tissue with healthy new tissue, also leading to a better absorption and assimilation of nutrients.

Testimonials:

The Ojibway
The Ojibway have been described as having a knowledge of herbal healing and spiritual powers as extensive as any other native American tribe. The medicine men gained their knowledge of plants in several ways. It came in the form of spiritual visions, intuition and thousands of years of observation. Observing the behavior of ill and injured animals, they learned which plants the animals consumed to heal themselves. From these sources as well as guidance from the Great Spirit, Kitchi Manitou, they amassed a wealth of knowledge and passed it down from generation to generation.

The Ojibway believe that all plants, as creations of the Great Creator, express their own unique identity. They believe that each plant possesses an incorporeal being, a spiritual substance that gives it physical form, growth potential and healing powers. They also believe that plants have another remarkable power, the power to combine and become a single "united spirit," much more powerful than any of the plants individually. They feel this "united spirit" gives the formula's supernatural healing powers. Not coincidentally, many modern herbalists believe the action of this formula must be the "synergy" of these combined herbs, some

<http://www.herbalformulas.com/renecaissetea.html>

2/29/2008

Complaint

Rene Caisse Herbs

Page 4 of 3

"I was battling lymphoma for 10 years and was in horrendous pain. I began taking Native Essence™ Plus and began feeling better right away. After 4 months my blood was normal and I was not feeling pain anymore. I still take the Native Essence™ Plus everyday and have now been in remission for over a year."
Christiane B.

"I am glad my wife is taking these herbs (Native Essence™ tea) you are giving her. It seems to be working, the cancer cells in her blood stream went from 10 to 1.05. Thank you very much for taking the time to talk with her and encouraging her to get well again."
Bernard G. "My PSA count went down from 6.4 to 3.9 after 3 months and the only thing I did differently was to take the Native Essence™ with Carl's Claw formula. I'm very happy with the progress and I'm going to continue using it."
Roland M.

"Thank you for the Native Essence™ you sent me. I appreciate your thoughtfulness, and also the professionalism and courtesy you extend each time I call."
Jack L.

"Thank you very much for being so kind and thank you for having such a wonderful product. It has helped many, many people."
Rebecca R.

"I had colon and rectal cancer and they could do no more for me as I had 8 weeks of chemo and 11 days of radiation. I could take the radiation no more and they told me the chemo was not reaching the tumor. I started on Native Essence™, 2 ounces three times a day for four months then 2 ounces twice a day. After about six months a large tumor was expelled and after that about five more smaller ones. Comments from my Radiologist: "I've heard wonderful things about Essiac." Comments from my nurse after reading my blood test: "This blood test is awesome for a woman with colon and rectal cancer."
Mary Helen H.

[Click here to learn about the Hoxsey formula](#)

"The Hoxsey formula worked real well for my mom, she had bronchitis for 3 months and it went away in approximately 1 1/2 weeks with the Hoxsey."
Cecilia H.

[Back to the top](#)

"magical" quality emerging when blended together.

Rene Caisse
In 1922, Canadian Nurse Rene Caisse received the Glibway formula from a patient. Giving it the name Essiac (Caisse spelled backwards) she used the herbal remedy many times over the next 50 years and her work with it has been described as "one of the most remarkable stories in all of medicine."

Her life and work have been well documented in several books, as well as countless magazine and newspaper articles, recounting numerous claims and testimonials from people said to have benefitted from this remarkable, safe and simple formula.

Exclusivity:

Some companies claim to have the only recipe for the formula, but it is readily available for everyone to benefit from, as all good things from earth should be. Dr. Gary Glum published a biography of nurse Caisse entitled *Calling of an Angel* (1988). He was given the formula by Mary MacPherson, a close friend of nurse Caisse, and he sends the formula with his book. Likewise, the formula was published in the book *The Essence of Essiac* by Canadian Sheila Snow. Our formula uses the same herbs and the same ratios as nurse Rene Caisse recommended. Native Essence Rene Caisse formulas are prepared in a traditional manner by our trusted herbalist, whom started making the formula for others after curing his own stomach ulcers with it in 1962.

▪ [Order Native Essence](#)

▪ [Product Information](#)

© 2003 Native Essence Herb Co. All Rights Reserved

Important notice:

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance

<http://www.herbalformulas.com/renecaissetea.html>

2/29/2008

Ex. A - page 2

Complaint

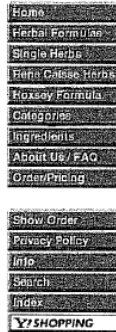
Rene Caisse Herbs

Page 3 of 3

or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

Complaint


**Native Essence Herb Company's
HerbalFormulas.com**
Free Shipping

We are offering free priority mail shipping on all US orders - select priority mail at check out! Estimated delivery 2-3 days

Native Essence (essiac herbs) Ingredients

This is the combination of herbs originally prepared by the Ojibwa Indians and later used so successfully by the late Canadian nurse Rene Caisse and called (Essiac is Caisse backwards). This formula is believed to normalize body systems by purifying the blood and thoroughly cleansing the body of harmful toxins. We call this formula Native Essence™, and we prepare it using only the finest organic quality herbs available.

Ingredients:

Original: Burdock root, Sheep Sorrel herb, Slippery Elm bark, Turkish rhubarb root.
Plus adds: Red Clover, Watercress, Blessed Thistle, Kelp/Bladderwrack.
With Cats Claw adds Cats Claw bark to the Original.

[Click here to order](#)

Burdock root (*Arcium lappa*)

Actions: Alterative, depurative, diuretic, bitter, tonic.

Common Use: This root is well known for its blood cleansing properties and is used in innumerable herbal medicines and blood remedies. Skin eruptions, due to impurities in the blood, are quickly remedied by burdock. It is extensively used in lymphatic, liver, rheumatic and skin diseases. Experiments on burdock have shown it to inhibit tumors, lower blood sugar, and destroy fungal and bacteria cultures. For example, two Hungarian scientists reported "considerable anti-tumor activity" in a purified fraction of burdock. Japanese researchers at Nagoya University found in burdock (aka as Gobo root in Japan) a new type of desmutagen, a substance that is uniquely capable of reducing cell mutation in either the absence or the presence of metabolic activation. This new property is so important, the Japanese scientists named it the B-factor for "burdock factor." In general, it is claimed burdock will help restore the body to a state of integration and health. Burdock is also included in the Rene Caisse (Essiac) formula.

Other formulas containing this herb:

[Dandelion/Milk Thistle Plus](#)
[Devil's Claw/Cat's Claw Plus](#)
[Hoxsey Formula](#)
[Slim Tonic Plus](#)

[Back to the top](#)

Sheep Sorrel herb (*Rumex acetosella*)

Actions: Alterative, diuretic, anthelmintic, antineoplastic, antilithic, antiseptic, astringent, carminative, parasiticide, stomachic, tonic.

Common Use: Throughout the centuries, the sorrels have appeared in historical archives as a folk remedy for cancer in both Europe and America. In the late 1740's, legislation was introduced in Williamsburg, Virginia, that permitted Mrs. Mary Johnson to use this plant as a

<http://www.herbmed.com/caisseinfo.html>

2/29/2008

Complaint

treatment for cancer. In the 1888 Canadian Pharmacy Journal, the leaves of both the sheep sorrel and the taller common sorrel (*Rumex acetosa*) were included in the list of Canadian medicinal plants. In 1926, the National Cancer Institute received a recipe from Canada citing an old Indian cure for cancer using a paste made with bread and the juice of sheep sorrel, applied externally. Thus, it would appear from early literature that the sorrels were used to treat cancer. Sorrel contains a high amount of nutrients including chlorophyll. Chlorophyll closely resembles hemoglobin, the red pigment in human blood, but has at its center a magnesium atom, whereas hemoglobin has an iron atom, and both carry oxygen to every cell of the organism. The chlorophyll molecules that carry oxygen through the bloodstream may do the following: inhibit chromosome damage to effectively block cancer, reduce the damage of radiation burns, kill germs and prevent the growth of harmful bacteria, strengthen the cell walls which may improve the vascular system, heart function, intestines, lungs and uterus, aid in the removal of foreign deposits from the walls of blood vessels, remove inflammation of the pancreas, purify the liver and increase the body's ability to utilize oxygen by raising the oxygen level in the tissue cells. Sheep sorrel is also high in oxalic acid. Dr. N.W. Walker tells us that the human body produces a small amount of oxalic acid every 24 hours and it is excreted through the kidneys. Dr. Edward E. Shook believes that oxalic acid is a powerful oxidizing acid that rouses the human system into activity. It readily combines with calcium to aid in its digestive assimilation and stimulates the peristaltic action of the intestines, thus helping sluggish, prolapsed intestines to regain their normal functions. Oxalic acid also seems to promote faster blood coagulation time, which makes it valuable for hemorrhages. Sheep sorrel has been known to prevent the spread of contagious diseases such as the plague and has overcome fevers caused by cholera and malaria. Its most important healing elements may be chlorophyll and oxalic acid, there is however, much research still to be done to discover the hidden mysteries that make this ubiquitous little plant so vital. This herb is also included in Rene Caisse's Essiac formula.

Other formulas containing this herb:

[Black Walnut/Wormwood Plus](#)

[Back to the top](#)

Slippery Elm bark (*Ulmus fulva* v. *sp.*)

Actions: Demulcent, emollient, mucilage, nutrient, astringent.

Common Use: Slippery elm is very useful in treating digestive conditions with inflamed mucous membrane linings such as gastritis, gastric or duodenal ulcers, enteritis and colitis, where it has a soothing demulcent action. It is often used as a food in convalescence as it is gentle and easily assimilated. As a nutritive tonic it feeds, soothes and strengthens the organs, tissues and mucous membranes, especially the lungs and stomach. By stimulating the growth of new cells, it quickly heals the damaged tissue of burns, cuts, hemorrhaging ulcers and wounds, including those caused by surgery. Slippery elm bark also overcomes debility and emaciation by revitalizing the entire body. The carbohydrates in slippery elm bark, including the starches and sugars, nourish and restore the plasma of the blood and lymph as well as the nervous, respiratory and digestive systems. The tannins provide an astringent quality to contract cell walls and condense tissue, thereby strengthening the muscles and tissues. The powdered bark counteracts excess acids in the stomach and intestines with its powerful alkalizing effect and as a natural antacid, it helps to improve the intestinal flora. Slippery elm bark also produces an antibiotic and antimicrobial effect. This herb is also included in Rene Caisse's Essiac formula. Available in formula only.

[Back to the top](#)

Turkish Rhubarb root (*Rheum palmatum*)

Complaint

Actions: Bitter stomachic, mild purgative, astringent, laxative, cathartic.

Common Use: Rhubarb root is a valuable remedy that incites the activity of the stomach, liver and bowels by increasing the flow of the digestive juices. In small doses it makes an excellent strengthening tonic for the stomach, in large doses it acts as a laxative. Rhubarb root's purgative action is useful in constipation, but also has an astringent effect following this. It therefore has a truly cleansing action on the gut, removing debris and then astringing with antiseptic properties as well.

Other formulas containing this herb:

[Dandelion/Milk Thistle Plus](#)

[Back to the top](#)

Red Clover blossom (*Trifolium pratense*)

Actions: Antineoplastic, alterative, depurative, expectorant, antispasmodic, antiseptic.

Common Use: A very useful remedy for skin problems, especially safe for children, it is also effective against chronic skin problems such as psoriasis. The expectorant and antispasmodic action of red clover make it helpful in the treatment of coughs and bronchitis, but especially in whooping cough. As an alterative with exceptional blood cleansing properties, red clover is indicated in a wide range of problems when approached in a holistic sense.

Other formulas containing this herb:

[Hoxsey Formula](#)

[Back to the top](#)

Watercress herb (*Nasturtium officinale*)

Actions: Depurative, tonic, stimulant.

Common Use: The American Indian used this herb for liver and kidney trouble and to dissolve kidney stones. It is rich in iron and other valuable mineral elements and its blood purifying and system cleansing properties cause it to be used extensively as a blood purifier. J.E. Meyers, Botanical Gardens of Hammond, Indiana informs us that watercress is one of the best sources of vitamin E. This is the fertility vitamin, helping the body use oxygen, which increases physical endurance and stamina and improves heart response. Brazilian research found watercress extract to possess anti-tumor properties while other research found watercress leaf juice to be active against cultures of tubercle bacillus. Avoid prolonged use in large amounts.

Other formulas containing this herb:

[Echinacea/Golden Seal Plus](#)

[Back to the top](#)

Blessed Thistle herb (*Cnicus benedictus*)

Complaint

Actions: Bitter tonic, astringent, diaphoretic, depurative, antibacterial, febrifuge.

Common Use: Primarily used for helping with female problems such as painful menstruation and associated headache. This herb also has bitter properties and has been used (but should not be overused) as a digestive tonic. Works well with burdock root to cleanse the blood. Not recommended if nursing or pregnant.

Other formulas containing this herb:

[Dong Quai/Fo-Ti Plus](#)

[Back to the top](#)

Kelp (*Laminaria species*) or Bladderwrack (*Fucus vesiculosus*)

Actions: Alterative, anti-rheumatic, antibacterial, antibiotic, cardiac tonic, antioxidant.

Common Uses: One of the richest sources of micro-nutrition, minerals, and trace minerals, kelp is especially high in iodine and potassium. It has proved most useful in the treatment of underactive thyroid function and for alkalinizing blood chemistry. The extensive research done on this remarkable sea-weed has shown it to have anti-tumor properties (Japanese researchers have claimed kelp has been "conclusively proven to prevent breast cancer"), as well as antibiotic, antioxidant and antibacterial properties. Kelp also has the ability to protect against environmental toxins, increase circulation and help lower cholesterol, among other benefits.

Other formulas containing this herb:

[Echinacea/Golden Seal Plus](#)

[Hawthorn/Motherwort Plus](#)

[Hoxsey Formula](#)

[Red Root/Cleavers Plus](#)

[Slim Tonic Plus](#)

[Back to the top](#)

Peruvian Cat's Claw (*Uña de Gato*) bark (*Uncaria tomentosa*)

Actions: Deep immune activator, tonic, anti-inflammatory, anti-rheumatic, antimicrobial, antioxidant, antiviral, hypotensive, cardiac tonic.

Common Uses: This amazing vine from the Peruvian rain forest is offered in Peruvian pharmacies, the label states that the curative properties are almost unlimited. This is because the herb is considered a powerful cellular reconstitutor. Studies beginning in 1970 and continuing through today suggest it has applications in the treatment of cancer, arthritis, gastritis, ulcers, rheumatism, acne, organic depression, bursitis, genital herpes and herpes zoster, allergies, systematic candidiasis, diabetes, lupus, chronic fatigue syndrome, PMS, irregularities of the female cycle, environmental toxic poisoning, numerous bowel and intestinal disorders and those infected with the HIV virus. Studies done at the Shanghai College of Traditional Chinese Medicine indicate that rynchophylline, an alkaloid contained in cat's claw bark, has the ability to inhibit platelet aggregation and Thrombosis, which suggests that the compound in this plant may be useful in preventing strokes and reducing the risk of heart attack by lowering blood pressure, increasing circulation, and inhibiting both the formation of plaque on the arterial walls and the formation of blood clots in the brain, heart and arteries. Do not use with anti-ulcer medications. Not recommended if pregnant or nursing.

Complaint

Rene Caisse Formula

Page 8 of 8

Click [HERE](#) to learn more about Cat's Claw bark

Other formulas containing this herb:

[Cat's Claw/Astragalus/Reishi](#)
[Cat's Claw/Pau d Arco Plus](#)
[Devil's Claw/Cat's Claw Plus](#)
[Immun-Essence Plus](#)
[Venus Flytrap/Cat's Claw](#)

[Back to the top](#)

▪ Ingredients

© 2003 Native Essence Herb Co. All Rights Reserved

Important notice:

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

Complaint

Exhibit B

Chaparral

Page 1 of 4

- [Home](#)
- [Herbal Formulas](#)
- [Single Herbs](#)
- [Herb Cattle Herbs](#)
- [Hoxsey Formula](#)
- [Categories](#)
- [Ingredients](#)
- [About Us/FAQ](#)
- [Order/Printing](#)
- [Show Order](#)
- [Privacy Policy](#)
- [Info](#)
- [Search](#)
- [Index](#)
- [Y!SHOPPING](#)**

Native Essence Herb Company's
HerbalFormulas.com

Free Shipping
We are offering free priority mail shipping on all US orders - select "priority mail" at check out! Estimated delivery 2-3 days

Chaparral herb (Larrea v. sp.)

Actions: Antineoplastic, antirheumatic, analgesic, antioxidant, diuretic, immune stimulant.

Common Uses: For centuries, Native Americans have been using chaparral leaves and stems to treat a wide variety of ailments, including cancer, venereal disease, arthritis, rheumatism, tuberculosis, colds, stomach disorders and skin infections to name a few. In folk medicine, chaparral has been used for leukemia and many different types of cancers. Many people with cancer have claimed tumor shrinkage or complete remission using only chaparral. The plant contains immune stimulating polysaccharides and a key ingredient nor-dihydroguaiaric acid (NGDA), which has been shown to have powerful antitumor properties. According to vol. 19 of Biochemical Pharmacology NGDA inhibits electron transport in the mitochondria, or "energy producing factories" within cancer cells, thereby depriving tumors of the electrical energy they require to exist. Chaparral also has been shown to have good antirheumatic properties giving it a role in the treatment of rheumatoid arthritis. This remarkable plant has to many benefits to mention here. 10 to 30 drops 2-3 times daily. Not recommended if nursing or pregnant.

Formulas containing this herb:

- [Devil's Claw/Cat's Claw Plus](#)
- [Hoxsey Formula](#)

All liquid extracts contain pure USP pharmaceutical grade grain alcohol.

8 oz. bottles have no droppers.

Availability: Usually ships the same business day.

2oz. Liquid Chaparral herb CHXS2 \$16.00

Availability: Usually ships the same business day.

4oz. Liquid Chaparral herb CHXS4 \$29.00

Availability: Usually ships the same business day.

8oz. Liquid Chaparral herb CHXS8 \$54.00

© 2003 Native Essence Herb Co. All Rights Reserved

Important notice:

Complaint

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

Complaint

Exhibit C

- Home
- Herbal Formulas
- Single Herbs
- Pure Chinese Herbs
- Hersey Formula
- Categories
- Ingredients
- About Us / FAQ
- Order Pricing
- Show Order
- Privacy Policy
- Info
- Search
- Index
- XY SHOPPING

Native Essence Herb Company's
HerbalFormulas.com

Free Shipping

We are offering free priority mail shipping on all US orders - select specialty mail at check out. Estimated delivery 2-3 days.

Mai-T Mushroom Plus™ Ingredients

Immune, Adaptogenic and Whole Body Tonic. The benefits shown by clinical trials performed on these mushrooms in China and Japan are far too numerous to list here. Among these include: the ability to inhibit many types of tumors, build bone marrow, aid in cancer prevention, stimulate the immune system on all levels, support people undergoing chemotherapy, stimulate circulation and help with coronary/heart disease. The Japanese government has officially listed Reishi as an adjunct herb for cancer and clinical reports seem to indicate its usefulness for people that are HIV positive, as well as for those who have Epstein-Barr Virus and other immune related disfunctions. This formula also makes an excellent adaptogenic and whole body detoxifying and revitalizing tonic.

Ingredients: Maitake mushroom, Reishi mushroom, Shiitake mushroom, Cordyceps fungus, Astragalus root and concentrated Rose Hips extract.

[Click here to order](#)

Japanese Maitake mushroom (*Grifola frondosa*)

Actions: T-cell stimulant, anti-neoplastic, Immune stimulant.

Common Uses: A Maitake extract is being studied in medical clinics in the U.S. for patients with breast and colorectal cancers. In China, an extract of this mushroom demonstrated an anti-cancer effect in 63 patients with lung, stomach, hepatocellular cancers and leukemia. Dr. Joan Priestly MD, reports that her patients with Kaposi's sarcoma and other symptoms of AIDS show improvement when administered the extract. When used consistently (3-5 times weekly), Maitake is said to aid in cancer prevention, immune stimulation in people with cancer, support people undergoing chemotherapy and benefit people with the AIDS virus. It also potentially benefits diabetics and people with hypertension.

[Back to the top](#)

Red Reishi mushroom (*Ganoderma lucidum*)

Actions: Adaptogen, deep immune activator, analgesic, anti-inflammatory, hypotensive, antibacterial, antiviral, cardiac tonic, expectorant, antineoplastic.

Common Use: Reishi is in the most highly rated category of herbs ("Superior"), in terms of multiple benefits and lack of side effects, in Traditional Chinese Medicine. Here is a small list of some of the things it is claimed to benefit. Cancer, side effects of cancer treatments including radiation, chemo-therapy and surgery, high altitude stress, high cholesterol and hyperlipidemia, high blood pressure, chronic (post-viral) fatigue syndrome and AIDS, weakness of the lung, wasting syndromes, difficulty concentrating, poor digestion, insomnia and poorly regulated immune response. The polysaccharides and ergosterols probably work together to stimulate natural immune functions that tend to be suppressed by cancers and immune disorders. Ganoderic acids are responsible for the anti-allergy effects and improved oxygen utilization. Reishi greatly reduced the symptoms (headaches, nausea, vomiting, insomnia, heart palpitations and extreme fatigue) of oxygen deprivation among Chinese workers who traveled to the high plateau of Tibet, climbing 15,000 feet in 3 days in the process. Reishi is also effective in reducing the symptoms of cardiovascular blockage and

Complaint

Mai-I Mushroom PlusTM

Page 2 of 4

disease, including angina, palpitation, fullness in the chest, dizziness and headache, shortness of breath, insomnia and weariness, and loss of memory in 65% or more of the patients in various studies. Reishi is a true adaptogen, enhancing health and normal functions of the body. For example, while it increases some components of immune response for cancer patients, it also inhibits pathological immune functions in auto-immune diseases such as myasthenia gravis. It has been reported to reduce the histamine release associated with allergic reactions, and help prevent anaphylactic reaction. It also increased immunoglobulin-A levels in 2,000 chronic bronchitis patients.

Other formulas containing this herb:

[Cat's Claw/Astragalus/Reishi](#)
[Cat's Claw/Pau 'd Arco Plus](#)
[Immun-Essence Plus](#)

[Back to the top](#)

Shiitake mushroom (*Lentinus edodes*)

Actions: Adaptogen, deep immune activator, antiviral, antineoplastic.

Common Use: Shiitake is used for any and all diseases involving depressed immune function, including cancer, AIDS, environmental allergies, candida infections and frequent colds and flus. It also appears to be beneficial for soothing bronchial inflammations and regulating urine incontinence, as well as for reducing chronic high cholesterol. Shiitake mycelia is rich in carbohydrates, protein, vitamins and minerals. It contains a polysaccharide-protein complex that studies have shown to: accelerate degeneration of tumor cells; activate macrophages, promoting recognition of antigens and information transmission to the helper T-cells and increasing the rate at which objects are engulfed; reinforce interleukin-1 production, activating the helper T-cells; promote the mitosis of B-lymphocytes (and others), increasing their proliferation; increase antibody production; improve health of chronic hepatitis patients; and inhibit the HIV virus, benefiting AIDS patients. This fungi has been extensively studied in the Orient and elsewhere, the reported beneficial findings are detailed and numerous to mention here. For anyone with further interest we recommend reading *Medicinal Mushrooms* by Christopher Hobbs, subjects include reishi, shiitake, maitake, kombucha, and more.

Other formulas containing this herb:

[Immun-Essence Plus](#)
[Milk Thistle/Schizandra Plus](#)

[Back to the top](#)

Cordyceps fungus (*Cordyceps sinensis*)

Actions: Adaptogen, tonic, immune stimulant, restorative.

Common Uses: Caterpillar fungus or Winter Worm - Summer Grass, those are the common names used for the highly prized Chinese tonic herb Cordyceps, which gained national publicity in a mainstream publication (Newsweek) a few years back because of its use by Chinese women athletes engaged in breaking world running records. In ancient China this fungus was used exclusively in the Emperor's Palace because of its scarcity. Approximately 5 grams were stuffed into the stomach of a duck and roasted until well cooked, then the Cordyceps was removed and the duck was slowly eaten, twice daily over a period of 8-10 days, this was thought to be as potent as 50 grams of Panax Ginseng. The New York

<http://www.herbalformulas.com/mitxpinfo.html>

2/29/2008

Complaint

Journal of Medicine reported that Cordyceps has properties similar to Ginseng, being used to strengthen the body after exhaustion or long term illness. It has traditionally been used for impotence, backache, to increase sperm production and to increase blood production. In China, Cordyceps is used medically to regulate and support the gonads and as a lung and kidney tonic. It is used specifically for excess tiredness, chronic cough and asthma, impotence, debility, anemia, to build the bone marrow and reduce excess phlegm. The clinical studies done on Cordyceps in China have been numerous and remarkable, indicating the fungus can improve liver functions, reduce cholesterol, adjust protein metabolism, improve immune functions, inhibit lung carcinoma and has a therapeutic value in the treatment of aging disorders including loss of sexual drive. These are just some of the reported benefits attributed to this remarkable fungus. Not recommended if nursing or pregnant.

Other formulas containing this herb:

[Catuaba/Fo-ti Plus](#)
[Catuaba/Guarana Plus](#)
[Damiana Plus](#)
[Panax Power Plus](#)
[SumaFlex Plus](#)
[SuMasa Plus](#)
[SumaCeps Plus](#)
[Yohimbé Plus](#)

[Back to the top](#)

Chinese Astragalus root (*Astragalus membranaceus*)

Actions: Deep immune activator, diuretic, tonic, hypotensive, vasodilator, anti-stress agent.

Common Use: A digestive aid containing polysaccharides which enhance immune activity and T-cell function. In Traditional Chinese Medicine astragalus is considered a deep immune tonic that increases the "bone marrow reserve", increasing the body's ability to produce more immune effector cells (such as T-cells), protecting us from "pathogens". Also used as a daily tonic when one is not feeling well; it has the ability to build the energy reserves in the body and exhibits several anti-stress properties. Astragalus root has also been indicated as an aid in the side effects of chemotherapy as well as having the ability to inhibit tumor growth. If taken cumulatively, especially with Chinese Ligustrum (Privet) fruit, it shows marked anti-tumor properties.

Other formulas containing this herb:

[Astragalus/Ligustrum 75/25](#)
[Cat's Claw/Astragalus/Reishi](#)
[Cat's Claw/Pau d'Arco Plus](#)
[Echinacean Plus](#)
[Panax Power Plus](#)
[Immun-Essence Plus](#)
[SumaCeps Plus](#)

[Back to the top](#)

Rose Hips (*Rosa canina*)

Actions: Nutrient, mild laxative, mild diuretic, mild astringent.

<http://www.herbalformulas.com/mitxpinfo.html>

2/29/2008

Complaint

Common Use: Rose hips provide one of the best natural sources of vitamin C available. They are also rich in vitamins A, E and Rutin. They contain valuable nutrients believed to combat acute disease. Rose hips is a nutritional herb used to build up the body and strengthen the immune system.

[Back to the top](#)

▪ **Ingredients**

© 2003 Native Essence Herb Co. All Rights Reserved

Important notice:

The information presented here is not presented with the intention of diagnosing any disease or condition or prescribing any treatment. It is offered as information only, for use in the maintenance and promotion of good health in cooperation with a licensed medical practitioner. In the event that any individual should use the information presented on this website without a licensed medical practitioner's approval, that individual will be diagnosing for him or herself. No responsibility is assumed by the author, publisher or distributors of this information should the information be used in place of a licensed medical practitioner's services. No guarantees of any kind are made for the performance or effectiveness of the preparations mentioned on this website.

Furthermore, this information is to be used for educational purposes only and has been based solely on the traditional and historic use of a given herb, or on clinical trials that are generally not recognized by any US government agency or medical organization. This information has not been evaluated by the US Food and Drug Administration, nor has it gone through the rigorous double-blind studies required before a particular product can be deemed truly beneficial or potentially dangerous and prescribed in the treatment of any condition or disease.

Decision and Order

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondents 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1.a. Respondent Native Essence Herb Company (“Native Essence”) is or has been a New Mexico corporation, with its principal office or place of business at 4 Tune Drive, Unit B, El Prado, New Mexico 87529.

1.b. Respondent Mark J. Hershiser is an officer of Native Essence. Individually or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices

Decision and Order

of Native Essence, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Native Essence.

1.c. Respondent Marianne Hershiser is an officer of Native Essence. Individually or in concert with others, she has formulated, directed, controlled, or participated in the policies, acts, or practices of Native Essence, including the acts and practices alleged in this complaint. Her principal office or place of business is the same as that of Native Essence.

2. Respondents have been served with a copy of the complaint issued by the Federal Trade Commission charging them with violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

3. Respondents admit all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondents waive:

- a. Any further procedural steps;
- b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of the 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. Any claim under the Equal Access to Justice Act.

5. This agreement shall not become 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 will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may

Decision and Order

either withdraw its acceptance of this agreement and so notify the respondents, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the Commission's complaint, or that the facts as alleged in the Commission's complaint, other than the jurisdictional facts, are true.

7. 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 Section 3.25(f) of the Commission's Rules, the Commission may without further notice to respondents, (1) issue 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 of the decision containing the agreed-to order to respondents' address as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Respondents waive any right they 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 to contradict the terms of the order.

8. Respondents have read the complaint and the order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Decision and Order

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “respondents” means Native Essence Herb Company, a corporation, its successors and assigns and its officers; Mark J. Hershisier, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and Marianne Hershisier, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation; and each of the above’s agents, representatives and employees.
2. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “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.
4. “Food” and “drug” mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Covered product or service” means any food, dietary supplement, or drug, including, but not limited to, Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any other health-related product, service, or program.

Decision and Order

6. “Endorsement” means as defined in 16 C.F.R. § 255.0(b).

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any substantially similar product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Such product is effective in the treatment or cure of cancer;
- B. Such product prevents or lowers the risk of cancer;
- C. Such product is effective in reducing the size of, or eliminating, cancerous tumors; or
- D. Such product is safe or non-toxic or has no side effects;

unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting

Decision and Order

commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any covered product or service, unless the representation is true, non-misleading, and, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

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

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Nothing in this order shall prohibit respondents 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.

Decision and Order

IT IS FURTHER ORDERED that:

- A. Respondents shall, within seven (7) days after the date of service of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula, on or after January 1, 2005 through the date of service of this order. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;
- B. Within forty-five (45) days after the date of service of this order, respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and
- C. Except as provided in this order, respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any respondent, at any time prior to issuance of this order, in connection with the purchase of Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cats Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus extract. *Provided, however*, that respondents may disclose such identifying information to the FTC pursuant to Part

Decision and Order

V.A, above, or any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that respondents 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. A specimen copy of 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 their 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.

VII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, and its successors and assigns, and respondents Mark J. Hershiser and Marianne Hershiser 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. Respondents 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. Respondents shall maintain and upon request make available to the Federal Trade Commission for

Decision and Order

inspection and copying a copy of each signed statement acknowledging receipt of the order.

VIII.

IT IS FURTHER ORDERED that respondent Native Essence Herb Company, 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.

IX.

IT IS FURTHER ORDERED that respondents Mark J. Hershiser and Marianne Hershiser, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include respondents' new business address and telephone number and a description of the nature of the business or employment and their duties and responsibilities. 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.

X.

Decision and Order

IT IS FURTHER ORDERED that respondents 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 they have complied with this order.

XI.

This order will terminate on May 7, 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 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 respondents 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

Decision and Order

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.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Decision and Order

Attachment A**ATTACHMENT A**
LETTER TO BE SENT BY FIRST CLASS MAIL.
[To be printed on letterhead of Native Essence Herb Company]

[Name and address of recipient] [Date]

Dear [Recipient]:

Our records show that you bought Native Essence (Rene Caisse or essiac herbs) Formula, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, and/or Mai-T Mushroom Plus Formula from one of our websites, www.herbalformulas.com, www.herbmed.com, www.herbalalternative.com, and www.herbremedy.com. We are writing to tell you that the Federal Trade Commission ("FTC") has found that our advertising claims for these products were false or unsubstantiated, and has issued an Order prohibiting us from making those claims in the future. The Order entered against us also requires that we send you the following information about the scientific evidence on these products.

Very little scientific research has been done concerning Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus as a treatment or cure for cancer in humans. The scientific studies that have been done do not demonstrate that Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, or the ingredients in these products, are effective when used as treatments for cancer.

It is very important that you talk to your doctor or health care provider before using *any* alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus. Speaking with your doctor is important to make sure that all aspects of your medical treatment work together. Things that seem safe, such as certain foods, herbs, or pills, may interfere or affect your cancer or other medical treatment, or other medicines you might be taking. Some herbs or other complementary or alternative treatments may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines or in high doses. It also is very important that you talk to your doctor or health care provider before you decide to take any alternative or herbal product, including Native Essence, Native Essence Plus, Native Essence with Cat's Claw, Chaparral herb, Maitake mushrooms, or Mai-T Mushroom Plus, instead of taking conventional cancer treatments that have been scientifically proven to be safe and effective in humans.

If you would like further information about complementary and alternative treatments for cancer, the following Internet web sites may be helpful:

1. The National Cancer Institute: www.cancer.gov/cancertopics/pdq; or
2. The National Center for Complementary and Alternative Medicines: www.nccam.nih.gov

Decision and Order

You also can contact the National Cancer Institute's Cancer Information Service at 1-800-4-CANCER or 1-800-422-6237.

Sincerely,

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 147

Decision and Order

Attachment B

ATTACHMENT B

Native Essence Herb Company
P.O. Box 189
Carson, New Mexico 87517

[name and address of purchaser]

GOVERNMENT ORDERED NOTICE

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Native Essence Herb Company, a corporation, Mark J. Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation, and Marianne Hershiser, individually, d/b/a Native Essence Herb Company, and as an officer of the corporation (“respondents”).

The proposed consent order has been placed on the public record for thirty days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty 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 concerns the respondents’ advertising and promotion of Native Essence (Rene Caisse) Formula tea and extract, Native Essence Plus tea and extract, Native Essence with Cat’s Claw tea and extract, chaparral herb, Maitake mushroom extract, and Mai-T Mushroom Plus Formula extract. The complaint alleges that respondents have made a number of deceptive claims regarding the efficacy of these products in the prevention, treatment or cure of cancer.

Specifically, the Commission’s complaint alleges that respondents have claimed that their Native Essence Original Formula, Native Essence Plus, and Native Essence with Cat’s Claw products are effective in treating and curing cancer, including but not limited to lymphoma, colon cancer, rectal cancer, and prostate cancer. The complaint also alleges that respondents have claimed that these products are effective in reducing the size of, or eliminating, cancerous tumors. The complaint further alleges that respondents have claimed that Native Essence Plus is effective in preventing breast cancer. The complaint alleges that respondents did

Analysis to Aid Public Comment

not have a reasonable basis for these claims. The complaint also alleges that respondents falsely claimed that scientific research proves that Native Essense Plus prevents breast cancer, and that scientific studies prove that Native Essense with Cat's Claw is effective in the treatment of cancer.

Regarding chaparral herb, the Commission's complaint alleges that respondents claimed that chaparral herb is effective in treating and curing cancer, is effective in causing people with cancer to go into complete remission without the need for any other form of treatment, and is effective in shrinking or eliminating cancerous tumors. The complaint alleges that respondents lacked a reasonable basis for these claims.

The complaint also alleges that respondents lacked a reasonable basis for the claims that Mai-T Mushroom Plus is effective in preventing, treating and curing cancer, including but not limited to lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Kaposi's sarcoma; and that Mai-T Mushroom Plus is effective in inhibiting the growth of cancerous tumors. Finally, the complaint alleges that respondents falsely claimed that clinical studies prove that

Maitake mushrooms and Mai-T Mushroom Plus prevent and treat lung cancer, stomach cancer, hepatocellular cancer, leukemia, and Karposi's sarcoma, and inhibit tumor growth.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I requires respondents to have competent and reliable scientific evidence substantiating any claim that Native Essense (Rene Caisse) Formula tea or extract, Native Essense Plus tea or extract, Native Essense with Cat's Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract, or any other covered product or service, is effective in the treatment or cure of cancer; prevents or lowers the risk of cancer; is effective in reducing the size of, or eliminating, cancerous tumors; or is safe or

Analysis to Aid Public Comment

non-toxic or has no side effects. A “covered product or service” is defined as any food, dietary supplement, or drug, including, but not limited to any of the above products, or any other health-related product, service, or program.

Part II requires that any future claim about the efficacy, performance, or health-related benefits of any covered product or service be truthful and supported by competent and reliable scientific evidence. Part III requires that respondents, in connection with the advertising of any product, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part IV of the proposed order provides that the order does not prohibit respondents from making representations for any drug that are permitted in labeling for the drug under any tentative or final Food and Drug Administration (“FDA”) standard or under any new drug application approved by the FDA, and representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part V of the proposed order requires respondents to compile a list of all consumers who purchased Native Essence (Rene Caisse) Formula tea or extract, Native Essence Plus tea or extract, Native Essence with Cat’s Claw tea or extract, chaparral herb (or any product containing chaparral herb), Maitake mushroom extract, or Mai-T Mushroom Plus Formula extract from respondents since July 1, 2005, and to mail a letter (attached to the proposed order as

Attachment A) to each such purchaser describing the scientific evidence related to these products. Part V also prohibits respondents from providing any identifying information about these purchasers to anyone other than the Commission, another law enforcement agency, or as required by law.

Part VI of the proposed order requires respondents to keep copies of relevant advertisements and materials that substantiate claims

Analysis to Aid Public Comment

made in the advertisements. Part VII requires respondents to provide copies of the order to certain of their employees. Part VIII requires the corporate respondent to notify the Commission at least thirty days prior to any change in the corporation that may affect compliance obligations arising under this order. Part IX requires the individual respondents to notify the Commission of their affiliation with any new business or employment. Part X requires respondents to file compliance reports with the Commission. Part XI of the proposed order is a “sunset” provision, dictating that the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of 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.