

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
Div. 7

FILED BY CLERK
KANSAS DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

2009 JAN -5 A 11:59

STATE OF KANSAS, *ex rel.*,
STEVE SIX, Attorney General

Plaintiff,

v.

AIRBORNE HEALTH, INC.,
doing business as AIRBORNE and
AIRBORNE, INC., *formerly doing business as*
KNIGHT-MCDOWELL LABS; AIRBORNE

HOLDINGS, INC., VICTORIA KNIGHT
MCDOWELL, *individually*, and THOMAS JOHN
MCDOWELL, *individually*,

Defendants.

Case No. 08-C-1861

(Pursuant to Chapter 60)

JOURNAL ENTRY OF CONSENT JUDGMENT

NOW on this _____ day of December, 2008, Plaintiff's Journal Entry of Consent Judgment comes before the Court pursuant to K.S.A. 50-632(b). Plaintiff, the State of Kansas, *ex rel.* Steve Six, Attorney General, appears by and through Emilie Burdette, Assistant Attorney General. Defendants appear by and through Christopher C. Javillonar of Bryan Cave LLP.

1. Plaintiff, the Attorney General of the State of Kansas ("the Attorney General," or "Plaintiff"), having filed its Petition and Defendants Airborne Health, Inc., a Delaware corporation, currently doing business as Airborne, Inc. and "Airborne," and formerly doing business as Knight-McDowell Labs, Airborne Holdings, Inc. (collectively "Airborne" or "Corporate Defendants"), and Victoria Knight-McDowell, individually, and Thomas John McDowell, individually (all collectively "Defendants") stipulate that this Journal Entry of Consent Judgment (hereafter "Judgment") may be signed and entered by a judge.

2. The parties having consented to the entry of this Judgment for the purposes of settlement only without this Judgment constituting evidence against or any admission by any party and without trial of any issue of fact or law. This Judgment does not constitute any admission of liability or wrongdoing, either express or implied, by Defendants or any other party. Further, this Judgment shall not be competent evidence in any judicial or other proceeding of any liability or wrongdoing by Defendants.

3. The parties acknowledge that, in addition to this Judgment, Airborne has simultaneously consented to the entry of Judgments with the Attorneys General of Tennessee, California, Florida, Illinois, Indiana, Nevada, Ohio and Texas. The Attorney General of Kansas and the other states' attorneys general are referred to collectively, hereafter, as the "Settling Attorneys General."

4. The entry of this Judgment has been consented to by Defendants as their own free and voluntary act and with full knowledge and understanding of the nature of the proceedings and the obligations and duties imposed upon them by this Judgment, and they consent to its entry without further notice, and aver that no offer, agreement, or inducements of any nature whatsoever have been made to them by the Plaintiff or their attorneys or any employee of the Attorney General's Office to procure this Judgment.

5. In the event the Court shall not enter this Judgment, this proposed Judgment shall be of no force and effect against the Attorney General of Kansas or any of the Defendants.

6. This Judgment shall bind Defendants, their officers, directors, agents, representatives, parents, affiliates, subsidiaries, and employees, and shall be binding on any and all successors and assigns, future purchasers, acquired parties, acquiring parties, successors-in-interest, shareholders, and their officers, agents, representatives, and employees, directly or

indirectly or through any corporation or anyone acting directly or indirectly on their behalf.

7. Defendants have, by their signatures and the signatures of their respective counsels hereto, waived any right to appeal, petition for certiorari, move to reargue or rehear or be heard in connection with entry of this Judgment concerning past conduct addressed in this Judgment. Further Defendants have, by their signature and of their respective counsels hereto, waived any right to a jury trial or any derivative rights of a jury trial.

8. In exchange for the consideration set forth herein, upon execution of this Agreement, the Attorney General agrees to release Defendants, all of their parent entities, subsidiaries and affiliated entities, and the officers, directors, members, agents, servants, employees of each of them, and shareholders (collectively, "Defendant Parties") from all civil claims, causes of action, suits and demands, of any kind or character for violations of the Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*, arising out of or based upon the matters addressed in this Judgment and the State's Petition that could so be brought by the Attorney General under K.S.A. 50-632.

9. The Court having considered the pleadings and the proposed Judgment executed by the parties and their attorneys and filed herewith, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment may be entered in this matter as follows:

10. Pursuant to the Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*, jurisdiction of this Court over the subject matter and over the Defendants for the purpose of entering into and enforcing this Judgment is admitted. Jurisdiction is retained by this Court for the purpose of enabling the Attorney General or the Defendants to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction and

modification of the injunctive provisions herein, or execution of this Judgment, including punishment for any violation of this Judgment. If the Attorney General is required to file a petition to enforce any provision of this Judgment against any (or all) Defendants, the particular Defendant(s) involved in such petition agree to pay all court costs and reasonable attorneys' fees associated with any successful petition to enforce any provision of this Judgment against such Defendant(s). Pursuant to K.S.A. 50-638, venue as to all matters between the parties relating hereto or arising out of this Judgment is solely in the District Court of Shawnee County, Kansas.

11. The Defendants waive any defect associated with service of the Attorney General's Petition and this Judgment and do not require issuance or service of a Summons.

12. The Corporate Defendants, all suppliers as defined in K.S.A. 50-624(j) sold and continue to sell some or all of the following products: Airborne – Original, Airborne – Pink Grapefruit, Airborne-Lemon-Lime, Airborne-Nighttime, Airborne, Jr., Airborne On-The-Go, Airborne Seasonal (formerly known as Airborne Seasonal Relief), Airborne Soothing Throat Gummi Lozenges (formerly known as Airborne Sore Throat Gummi Lozenges), and Airborne Power Pixies in the State of Kansas. The Individual Defendants, all suppliers as defined in K.S.A. 60-624(j), previously sold Airborne – Original.

PARTIES

13. Defendants represent that they are the proper defendants to this Judgment. Defendant Airborne Health, Inc. and Defendant Airborne Holdings, Inc. represent that they are the true legal names of the corporate entities entering into this Judgment. Defendant Airborne, Inc. was incorporated in California on April 22, 1999 and had a principal place of business in Carmel, California until May 2005. Airborne, Inc. ceased to exist in December 2005 when it merged with and into Airborne Health, Inc., which continued to do business under the original name "Airborne, Inc." Defendant Airborne Health, Inc. was incorporated as a Delaware

corporation on December 22, 2005, and has a principal place of business in Bonita Springs, Florida and offices in Carmel, California and New Jersey. Defendant Airborne Holdings, Inc. wholly owns Airborne Health, Inc. and is also incorporated in Delaware. Defendant Victoria Knight-McDowell represents that this is her true legal name. Defendant Thomas John McDowell represents that this is his true legal name.

14. Defendants further acknowledge that they understand that the Attorney General expressly relies upon these representations, and that if any of them are false, deceptive, misleading or inaccurate, the Attorney General has the right to move to vacate or set aside in whole or in part this Judgment with respect to the pertinent Defendant(s), or request that such Defendant(s) be held in contempt, if the Attorney General so elects.

DEFINITIONS

15. Unless otherwise specified, the following definitions shall apply:

A. **“Advertise,” “Advertisement,” or “Advertising,”** shall mean any oral, written, graphic or pictorial statement or representation, including but not limited to testimonials, endorsements, or other Third Party representations, regardless of the Medium of communication employed, disseminated in or from Kansas by Defendants or by any third party on behalf of Defendants for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of a Product; and includes but is not limited to Product Labels, Labeling, Product literature, television commercials, radio sponsorship or commercials, magazine advertisements, and Internet sites.

B. **“Attorney General”** means the Attorney General of Kansas and the Office of the Attorney General of Kansas.

C. **“Competent and Reliable Scientific Evidence”** shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the

relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

D. “Corporate Defendants” shall mean Airborne Health, Inc. (d/b/a Airborne, Inc. and Knight-McDowell Labs) and Airborne Holdings, Inc., their officers, directors, agents, representatives, parents, subsidiaries, affiliates, and employees, and includes any and all successors and assigns, future purchasers, acquired parties, acquiring parties, successors in interest, and their officers, agents, representatives, and employees, and anyone acting directly or indirectly on their behalf. This definition shall not include independent retailers or independent distributors of any Product.

E. “Dietary Supplement” means a food intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

1. a vitamin;
2. a mineral;
3. an herb or other botanical;
4. an amino acid;
5. a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
6. a concentrate, metabolite, constituent, extract, or combination of any ingredient described in 1-5 above.

F. “FDA” or “Food and Drug Administration” means the Food and Drug Administration of the United States Department of Health and Human Services.

G. “Individual Defendants” means Victoria Knight-McDowell and Thomas John McDowell.

H. **“Judgment”** shall mean this document entitled State of Kansas *ex rel* Kansas v. Airborne Health, Inc., doing business as Airborne and Airborne, Inc., formerly doing business as Knight-McDowell Labs, Victoria Knight-McDowell, individually, and Thomas John McDowell, individually.

I. **“Label”** means a display of written, printed, or graphic matter upon the immediate container of any article.

J. **“Labeling”** means all labels and other written, printed, or graphic matters (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

K. **“Market”** or **“Marketing”** means any act or process or technique of promoting, offering, selling or distributing a product or service.

L. **“Medical Food”** means:

1. a specially formulated and processed product (as opposed to a naturally occurring foodstuff used in its natural state) for the partial or exclusive feeding of a patient by means of oral intake or enteral feeding by tube;
2. that is intended for the dietary management of a patient who, because of therapeutic or chronic medical needs, has limited or impaired capacity to ingest, digest, absorb, or metabolize ordinary foodstuffs or certain nutrients, or who has other special medically determined nutrient requirements, the dietary management of which cannot be achieved by the modification of the normal diet alone;
3. that provides nutritional support specifically modified for the management of the unique nutrient needs that result from the specific disease or condition, as determined by medical evaluation;
4. that is intended to be used under medical supervision; and
5. that is intended only for a patient receiving active and ongoing medical supervision wherein the patient requires medical care on a recurring basis for, among other things, instructions on the use of the medical food.

M. **“Medium”** means any method of communicating or Advertising to the public in or from Kansas whether the message is contained in the written or spoken word, audio, video, recorded or presented live and includes but is not limited to television and closed circuit television such as those found on airplanes, radio, the Internet, short films, movies, newspaper advertisements, magazine advertisements, brochures, web sites, electronic mail, coupons, flyers, or electronic mail.

N. **“Product”** means Airborne – Original, Airborne – Pink Grapefruit, Airborne-Lemon-Lime, Airborne - Nighttime, Airborne, Jr., Airborne On-The-Go, Airborne Seasonal Relief, Airborne Sore Throat Gummi Lozenges, Airborne Soothing Throat Gummi Lozenges, Airborne Power Pixies, any products derived from the ingredients and formulation of Airborne Original, or any substantially similar products that are produced, owned, distributed, or manufactured by any of the Defendants intended for human use.

O. **“Settling Attorneys General”** shall mean the Attorneys General Offices of the States of Alaska, Arkansas, California, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin.

P. **“Structure/Function Claim”** means statements that describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans or that characterize the documented mechanism by which a nutrient or dietary ingredient acts to maintain such structure or function, provided that such statements do not purport to diagnose, treat, cure, or prevent any disease.

PERMANENT INJUNCTION

16. Pursuant to K.S.A. 50-632 *et seq.*, and subject to any jurisdictional limitations of such statute, Corporate Defendants (as defined above), Individual Defendants (as defined above),

and anyone acting indirectly or directly on behalf of the Individual Defendants are hereby permanently enjoined and restrained from:

A. Making any express or implied statement in connection with the Marketing or Advertisement of any Product that is false, or has the capacity, tendency or effect of deceiving or misleading consumers; or omitting any material information such that the express or implied statement deceives or tends to deceive consumers.

B. Making any express or implied claim, in connection with the Marketing or Advertising of its Products, that a Product may be used in the diagnosis, cure, mitigation, treatment or prevention of a disease in humans except as provided in paragraph 17.

C. Making any express or implied Structure/Function Claim in connection with the Marketing or Advertising of its Products unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

D. Making any express or implied claim in connection with the Marketing or Advertising of its Products, concerning the health benefit, performance, efficacy or safety of a Product marketed as a Dietary Supplement unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

E. Making any representation, in connection with the Marketing or Advertising of a Product, about research that has been performed, including but not limited to any representation that a Product has been clinically tested unless at the time the claim is made, Competent and Reliable Scientific Evidence exists substantiating such claim, and except as provided in paragraph 17.

F. Making, in connection with the Marketing or Advertising of a Product, in addition to any and all requirements set forth in this Judgment, any statements or representations concerning a Product that materially contradict or conflict with any other statements or representations the Defendants make about such Product and render such statements or representations misleading and/or deceptive.

G. For any Product Labeled as a Dietary Supplement requiring or demanding, that a Product be placed in the "cough/cold" aisle or department of any retail facility or otherwise influencing a Product's placement in the "cough/cold" aisle or department of any retail facility through direct affirmative action taken by the Individual or Corporate Defendants

H. Making any of the following, or substantially similar, statements, or using any of the following Product names, that imply that Airborne can diagnose, mitigate, prevent, treat, or cure colds, coughs, the flu, an upper respiratory infection, or allergies:

1. Airborne Effervescent Cold Formula;
2. Airborne Cold Remedy;
3. A Miracle Cold Buster;
4. Sick of Catching Colds;
5. Airborne Natural Cold Remedy;
6. Developed by a teacher who was sick of catching colds in class and on airplanes!;
7. Developed by a school teacher who was sick of catching colds in class!;
8. I created Airborne because, as a teacher dealing with young children, I was sick of catching colds in the classroom;
9. Take at the first sign of a cold symptom;
10. Airborne, the #1 selling natural product in the busy cough/cold aisle of all major drug stores;

11. Look in the Cough-Cold aisle of your favorite drug store;
12. Achoo! Take Airborne;
13. "Sore Throat" Lozenge;
14. Provides relief for sore throats; or
15. Airborne Seasonal Relief;

except as provided in paragraph 17 of this Judgment.

I. Making any express or implied claims in connection with the Advertising or Marketing of any Product Labeled as a Dietary Supplement, including using or showing actors, other persons, or cartoon depictions of germs, which directly or indirectly represent or otherwise state that a Product fights germs except as provided in paragraph 17 of this Judgment.

J. Using or showing actors, other persons, or cartoon depictions of individuals, characters, or other figures in any Advertising Medium with a cold, the flu, a cough, other upper respiratory infection, or allergy indicators such as sneezes, coughs, running noses, sniffles, germs or other related indicators including but not limited to grasping at one's throat, blowing one's nose or actions associated with coughing for any Product Labeled as a Dietary Supplement, except as provided in paragraph 17 of this Judgment.

K. Directly suggesting, directing or otherwise calling for an Advertisement or sponsorship of any kind for any Product to be placed in close temporal or physical proximity to a television news story, web page, magazine article, newspaper article, or any other story or article contained in any other Medium about colds, coughs, the flu or upper respiratory infections except as provided in paragraph 17.

L. Having directions for use for any Product that, if followed, would result in an individual ingesting 15,000 International Units of Vitamin A or more per day.

M. Soliciting, using or employing in any Advertising of any Product Labeled as a Dietary Supplement any testimonials by consumers, celebrities, radio talk show hosts, television talk show hosts or any other person that directly or indirectly imply that Airborne's Products can be used to diagnose, mitigate, prevent, treat, or cure a cold, cough, flu, upper respiratory infection, seasonal allergies, or any other disease except as provided in paragraph 17:

17. A. Nothing in this Consent Judgment shall prohibit any person or entity from making any representation, statement, or claim (in Labeling or otherwise), directly or indirectly, for any Product: if the representation, statement or claim is (1) lawful under the Federal Food, Drug, and Cosmetic Act or the Dietary Supplement Health Education Act, (2) lawful under any final regulation promulgated by the Food and Drug Administration, (3) lawful under any new drug application applicable to such Product approved by the Food and Drug Administration, (4) part of the lawful marketing of a homeopathic drug, (5) part of the lawful marketing of a Medical Food under the Orphan Drug Amendments of 1988, or (6) lawful under a FDA monograph for an over-the-counter drug. The failure of the FDA, FTC, or other law enforcement agency to take an enforcement action, or the mere presence of a representation, statement, or claim in the marketplace does not mean a representation, statement, or claim is lawful.

B. Nothing in this Judgment shall prohibit any person or entity from making any lawful 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.

EXISTING INVENTORY

18. A. The Defendants represent that they ceased selling and/or distributing Product in packaging identified in Collective Exhibit A, which contained statements with explicit

references to colds, such as “Take at the first sign of a cold symptom” and/or Product packaging containing cartoon vignettes of individuals sneezing, coughing, or blowing their noses by approximately June 9, 2008. The Defendants understand that the Attorney General expressly relies on this representation and reserves the right to initiate enforcement proceedings and/or move to set aside the Judgment if the representation is false, misleading or deceptive.

B. As of October 31, 2008, Corporate Defendants represent that they ceased selling and/or distributing Product in packaging identified in Collective Exhibit B and associated paper cartons and display trays, and have placed stickers over the white object displayed in the cartoon vignette on the Product packaging to Exhibit C, which is one of the packages that appears in Collective Exhibit B. The Corporate Defendants may not ship or otherwise deliver any inventory of Airborne Products’ packaging identified in Collective Exhibits A or B after October 31, 2008.

COMPLIANCE

19. For a period of five (5) years from the date of entry of this Judgment, pursuant to K.S.A. 50-623 *et seq.*, Corporate Defendants shall, in connection with the Advertising, promotion, offering for sale, or distribution in or from Kansas of any covered Product:

A. Take reasonable steps sufficient to monitor and ensure that Corporate Defendants comply with this Judgment. In conducting periodic monitoring of compliance, Corporate Defendants shall document and retain sufficient evidence to detail and substantiate their monitoring efforts and produce such documentation s as may be requested by the Attorney General within thirty (30) business days of such a request.

B. Conduct periodic reasonable monitoring of representations made by Corporate Defendants concerning any covered Product when the relevant actors are engaged in sales or other customer service functions, including representations made orally or through

electronic communications. In conducting periodic monitoring of the representations made by Corporate Defendants concerning any covered Product, Corporate Defendants shall document and retain sufficient evidence to detail and substantiate their monitoring efforts and produce such documentation to the Attorney General within thirty (30) business days of such a request.

C. Conduct periodic reasonable monitoring of representations made about any covered Product on all Internet websites operated or maintained by the Corporate Defendants or anyone doing so on their behalf. In conducting periodic monitoring of representations made about any covered Product on Internet websites operated or maintained by Corporate Defendants or anyone doing so on their behalf, Corporate Defendants shall document and retain sufficient evidence to detail and substantiate their monitoring efforts and produce such documentation and records as may be requested by the Attorney General within thirty (30) business days of such a request.

D. Take appropriate disciplinary action against any employee or agent who knowingly engages in any conduct prohibited by this Judgment, up to and including termination of any such employment or agency relationship, within a reasonable period of time not to exceed thirty (30) business days after the Corporate Defendants know or should know that such person is or has been engaging in such conduct.

E. Within sixty (60) days after entry of this Order, send an exact copy of the notice attached hereto as Exhibit D to each jobber, distributor or retailer to whom Airborne has sold any Airborne Product since June 1, 2005. The notice shall be sent by first class mail, postage prepaid and return receipt requested. It shall be sufficient for compliance with this paragraph for such notice to be sent to the principal place of business of each such entity.

F. Institute a reasonable program of surveillance which is adequate to reveal whether Corporate Defendants or any of their officers, directors, or employees are disseminating in or from Kansas any Advertising or Marketing material that contain any representation that violates the provisions of this Judgment.

As part of their reasonable program of surveillance, Corporate Defendants shall be required to receive, collect, and produce to the Attorney General within thirty (30) days after a request by the Attorney General the following:

1. All Airborne Advertisements and Marketing materials concerning an Airborne Product disseminated in or from Kansas;
2. Airborne sales presentations made in or from Kansas;
3. Other written communications with consumers in or from Kansas concerning an Airborne Product; and
4. All communication referenced in 19.G.

G. Promptly and in a reasonable manner investigate any information the Corporate Defendants receive that any retailer or other third party in Kansas is using or disseminating any Advertisements or Marketing material, or making any oral statement, that violates the provisions of this Judgment; and send Exhibit E to any retailer or other third party whose Advertisements or Marketing materials of an Airborne Product may violate the terms of this Judgment if made by the Defendants. Attached is a copy of Exhibit E.

CIVIL PENALTIES / PAYMENT TO THE ATTORNEY GENERALS

20. As part of their settlement with the Settling Attorneys General, the Defendants are ordered to pay to the Settling Attorneys General a total of \$7,000,000.00 dollars (Seven Million Dollars) for attorneys' fees and investigative costs, for consumer education, litigation or local consumer aid funds, or for public protection or consumer protection purposes, or any other

purpose allowed by each State's law at the discretion of each State's Attorney General. Of that \$7,000,000.00, Defendants shall pay \$6,000,000 to the Settling Attorneys General by electronic fund transfer made payable to the Office of the Attorney General of Tennessee on or before execution of this Judgment; Defendants shall pay \$500,000 by electronic fund transfer made payable to the Office of the Attorney General of Tennessee by the close of business on February 1, 2009; and, Defendants shall pay the remaining \$500,000 by electronic fund transfer made payable to the Office of the Attorney General of Tennessee by the close of business on May 1, 2009. The Tennessee Attorney General shall divide and distribute these funds as designated by and in the sole discretion of the Settling Attorneys General. Said payment shall be used by the Settling Attorneys General as and for attorneys' fees and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, including future consumer protection enforcement, consumer education, litigation or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, and may be used to fund or assist in funding programs directed at combating over-the-counter or prescription drug abuse, addiction and/or diversion, including, but not limited to, education, outreach, prevention or monitoring programs, or for other uses permitted by state law, at the sole discretion of each Attorney General. Defendants shall be jointly and severally liable for all amounts that are due and owed under this paragraph.

OTHER SETTLEMENT TERMS AND OBLIGATIONS

21. The acceptance of this Judgment by the Attorney General or the non-insistence by the Attorney General on an enforcement action, shall not be deemed approval by the Attorney General of any of the Defendants' Advertising or business practices. Further, neither Defendants nor anyone acting on the Defendants' behalf shall represent, state, or imply or cause to be represented, stated, or implied that the State of Kansas, the Attorney General, or any other

government unit of the State of Kansas has approved, sanctioned, or authorized any practice, act, advertisement or conduct of Defendants, including prospective Advertising.

22. This Judgment may only be enforced by the parties hereto.

23. The titles and headers to each section of this Judgment are for convenience purposes only and are not intended by the parties to lend meaning to any actual provision of this Judgment.

24. Nothing in this Judgment constitutes an agreement by the Attorney General of Kansas concerning the characterization of the amounts paid hereunder for purposes of any proceeding under the Internal Revenue Code or any state tax laws.

25. Defendants waive and will not assert any defenses based in whole or in part on the Double Jeopardy or Excessive Fines Clauses of the Constitution or principles set forth in Hudson v. United States, 118 S. Ct. 488 (1997) and Austin v. United States, 509 U.S. 602 (1993).

26. No waiver, modification, or amendment of the terms of this Judgment shall be valid or binding unless made in writing, signed by the party to be charged, approved by this Honorable Court and then only to the extent set forth in such written waiver, modification or amendment.

27. Any failure by any party to this Judgment to insist upon the strict performance by any other party of any of the provisions of this Judgment shall not be deemed a waiver of any of the provisions of this Judgment, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Judgment and the imposition of any applicable penalties, including but not limited to contempt, civil penalties and/or payment of the attorneys fees of the Attorney General.

28. If any clause, provision or section of this Judgment shall, for any reason, be held illegal, invalid, or unenforceable, such illegality, invalidity or unenforceability shall not affect any other unrelated clause, provision, or section of this Judgment, and this Judgment shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section or other provision had not been contained herein.

29. Nothing in this Judgment shall be construed as relieving Defendants of the obligation to comply with all state and federal laws, regulations or rules, nor shall any of the provisions of this Judgment be deemed to be permission to engage in any acts or practices prohibited by such law, regulation, or rule.

30. Time shall be of the essence with respect to each provision of this Judgment that requires action to be taken by the Defendants within a stated time period or upon a specified date.

31. This Judgment sets forth the entire agreement of the parties, and there are no representations, agreements, or understandings, oral or written, between the parties relating to the subject matter of this Judgment which are not fully expressed herein or attached hereto or set forth in any stipulation filed currently herewith. In any action undertaken by the Parties, no prior versions of this Judgment, no prior versions of any of its terms, that were not entered by the Court in this Judgment, may be introduced for any purpose whatsoever.

32. Nothing in this Judgment shall be construed to waive any claims of Sovereign Immunity the Attorney General may have in an action or proceedings.

33. Upon reasonable written request, Defendants shall provide books, records, or documents (physical or electronic in native format) or formally under oath provide testimony or other information to the Attorney General relating to compliance with this Judgment.

Defendants shall make any requested information available within thirty (30) days of the request at the Office of the Attorney General or at such other location as is mutually agreeable in writing to Defendants and the Attorney General. This Judgment shall in no way limit the Attorney General's right to obtain documents, records, testimony, or other information pursuant to any law, regulation, or rule.

34. Within thirty (30) days of entry of this Judgment, Corporate Defendants shall submit a copy of this Judgment to each of their officers, directors, and sales and marketing employees. Further, for a period of ten (10) years, Airborne shall supply a copy of this Judgment to any Advertising or marketing consulting agency that it employs.

35. Without violating ethical rules governing contacting a represented party, the Attorney General has the right to test shop the Corporate Defendants for the purpose of confirming compliance with this Judgment and state law. The test shoppers are not required to disclose that they are representatives of the Attorney General when making contact with the Corporate Defendants. Further, the Attorney General may record any or all aspects of their solicitations or visit(s) with the Corporate Defendant(s) in audio and/or video form without notice to the Corporate Defendant(s). The Corporate Defendants agree to void any sale and return any monies paid by a test shopper upon notification that such purchase was the result of a test shop conducted by the Attorney General.

36. Except as may be provided under applicable law, nothing in this Judgment shall be construed to grant, affect, restrict, limit or alter any private right of action that a consumer may have against Defendants.

37. This Judgment shall not be construed or used as a waiver or any limitation of any defense otherwise available to the Defendants.

38. Notices to be given under this Judgment and Injunction are sufficient if given by nationally recognized overnight courier service or certified Mail (return receipt requested), or personal delivery to the named party at the address below:

i. If to Airborne Health or Airborne Holdings:

26811 South Bay Drive, Suite 300, Bonita Springs, FL 34134.
100 Clock Tower, Suite 120, Carmel, CA 93923

ii. If to the Attorney General:

State of Tennessee
Office of the Attorney General
Consumer Advocate and Protection Division
Attention: Deputy Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

iii. If to Victoria Knight- McDowell:

26811 South Bay Drive, Suite 300, Bonita Springs, FL 34134.
100 Clock Tower, Suite 120, Carmel, CA 93923

iv. If to Thomas John McDowell:

26811 South Bay Drive, Suite 300, Bonita Springs, FL 34134.
100 Clock Tower, Suite 120, Carmel, CA 93923

39. Notice is effective when delivered personally; or three (3) business days after it is sent by certified Mail; or on the business day after it is sent by nationally recognized courier service for next day delivery. Any party may change its notice address by giving notice in accordance with this paragraph.

COURT COSTS AND FEES

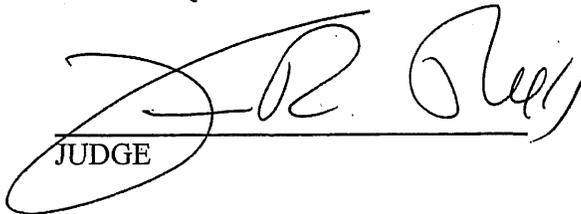
40. Courts costs associated with the filing of this Judgment shall be paid by the Defendant Airborne, Inc.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the

stipulations and agreements of the parties contained herein are adopted and approved as the findings of fact and conclusions of law of the Court and any monies owed hereunder by Defendant immediately become a judgment upon filing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Kansas Consumer Protection Act, K.S.A. 50-632(b), the Court hereby approves the terms of the Consent Judgment and adopts the same as the order of the Court.

ENTERED THIS THE 29th DAY OF December, 2008:


JUDGE

Prepared and approved by:

Attorney for Plaintiff:



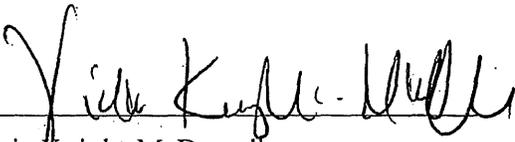
Emilie Burdette, #22094
Assistant Attorney General
Office of Kansas Attorney General Steve Six
120 Southwest 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-3751
Fax: (785) 291-3699

FOR DEFENDANTS:



Thomas John McDowell, Chairman
Individually and on behalf of Airborne Health, Inc., and Airborne Holdings, Inc.

Date: 12-10-08



Victoria Knight-McDowell
Individually and as Acting Chief Executive Officer of Airborne Health, Inc.

Date: 12-10-08



Dana B. Rosenfeld
Bryan Cave LLP
700 13th Street, NW
Washington, DC 20005
(202) 508-6000
(202) -6200 (fax)

Attorney for Defendants



Christopher C. Javillonar, #21929
Bryan Cave LLP
One Kansas City Place
1200 Main Street, Suite 3500
Kansas City, Missouri 64105
(816) 374-3279

Local Counsel for Defendants