

gift cards and failed to disclose that, after two years of non-use, Kmart would deduct a \$50 fee from the gift card and a \$2.10 monthly fee thereafter. We concur in the Commission's decision to bring an action against Kmart, but dissent in part from the proposed consent agreement because we believe the remedy should include disgorgement of ill-gotten profits. Otherwise, Kmart will remain unjustly enriched by a substantial amount of buried "dormancy fees" while many consumers will have lost the chance for reimbursement because they long ago threw out their seemingly worthless gift cards in frustration.²

Gift cards have become enormously popular with consumers and generated nearly \$28 billion in sales during the 2006 holiday season.³ Gift card dormancy fees and expiration dates are material restrictions that affect the value of the cards. These restrictions must be clearly disclosed so that consumers can make informed decisions, whether they are purchasing the cards or receiving them as a gift.

The proposed order settles the Commission's allegations that Kmart deceptively advertised its gift cards by, among other things, misrepresenting the existence of any expiration dates or fees associated with the cards. Not only did Kmart claim that the gift cards could be used "like cash at all Kmart locations," but its Web site also affirmatively misled consumers by stating that the Kmart gift cards "never expire." We agree that Kmart's alleged conduct justifies the order's injunctive provisions.

But we believe the order should go further. It should require Kmart to disgorge the profits of its unlawful behavior, provide more complete consumer redress, or a combination of both.⁴ More than three decades ago, in

² Kmart applied a dormancy fee of \$2.10 per month to the balance of every Kmart gift card that went unused for 24 months—both retroactively (\$50.40) and prospectively. Consequently, cards worth \$50 or less were rendered worthless if unused for two years. Imagine stashing a \$10, \$25 or \$50 gift card in a drawer and then pulling it out two years later for a trek to shop at Kmart, only to learn at the check-out counter that the card had no value. Kmart recently discontinued charging this dormancy fee after learning about the FTC's investigation, but only on a prospective basis.

³ Press Release, Nat'l Retail Fed'n, *Gift Card Spending Surpassed Expectations as Last-Minute Shoppers Looked for Quick, Easy Gifts; Most Consumers Have Spent Less Than Half of Card Values* (Jan. 23, 2007).

⁴ Commission consent orders have required advertisers to pay redress, offer refunds, or disgorge profits, and it is appropriate to do so here. See, e.g., *Hi-Health Supermart Corp.*, FTC Dkt. No. C-4136 (May 12, 2005) (requiring \$450,000 in redress); *ValueVision Int'l, Inc.*, FTC Dkt. No. C-4022 (Aug. 24, 2001) (requiring company to offer refunds to all

sponsoring the Magnuson-Moss Act extending the Commission's authority under Section 19 to obtain monetary remedies, Senator Magnuson explained that the Commission cannot "rely merely upon a slap of the violator's wrist to maintain fair play in the marketplace" and that "[a] mere cease-and-desist order has frequently let a wrongdoer keep his ill-gotten gains."⁵ The same rationale holds true today.

In this case, Kmart deducted dormancy fees from consumers' gift cards. It failed to give adequate notice. In many instances, Kmart's actions rendered unused or partially used cards valueless, at significant monetary benefit to Kmart but considerable monetary detriment to consumers. The proposed consent order, in our opinion, stops the deceptive practices but does not completely cure the consumer injury or fully excise Kmart's ill-gotten gains. Pursuant to the order, Kmart may not assess additional dormancy fees on previously activated gift cards and must reimburse previously assessed dormancy fees if consumers complain and can provide the gift card number. Many consumers no doubt already have thrown out their gift cards and will have no remedy under this settlement. Moreover, the order does not require Kmart automatically to restore previously deducted dormancy fees (absent consumer inquiries) or disgorge the windfall profits it made from these fees. Although Kmart's reimbursement practices have been improved by the Commission's efforts, in our opinion the refund policy, without additional monetary relief, is still too little, too late.

We commend staff for pursuing Kmart's failure to disclose its gift card dormancy fees and for challenging Kmart's affirmative misrepresentations that its gift cards do not expire. For the foregoing reasons, however, we respectfully dissent in part from the proposed order.

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purchasers of the challenged products); *Weider Nutrition Int'l, Inc.*, FTC Dkt. No. C-3983 (Nov. 17, 2000) (requiring \$400,000 in redress); *Dura Lube, Inc.*, FTC Dkt. No. D-9292 (May 5, 2000) (requiring \$2 million in redress); *Apple Computer, Inc.*, FTC Dkt. No. C-3890 (Aug. 6, 1999) (requiring company to honor representation that customers would receive free support for as long as they own the product); *Azrak-Hamway Int'l, Inc.*, 121 F.T.C. 507 (1996) (requiring toymaker to offer refunds); *L & S Research Corp.*, 118 F.T.C. 896 (1994) (requiring \$1.45 million in disgorgement).

⁵ 119 Cong. Rec. 29480 (1973).

FEDERAL TRADE COMMISSION

[File No. 061 0026]

Missouri Board of Embalmers and Funeral Directors; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before April 9, 2007.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to "Missouri Board of Embalmers and Funeral Directors, File No. 061 0026," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room 135-H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled "Confidential," and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).¹ The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form as part of or as an attachment to e-mail messages directed to the following e-mail box: consentagreement@ftc.gov.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive

¹ The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov>. As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

FOR FURTHER INFORMATION CONTACT:

Mark D.S. Peterson (202-326-3731), Joel Christie (202-326-3297), or Grace Kwon (202-326-2560), Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 9, 2007), on the World Wide Web, at <http://www.ftc.gov/os/2007/03/index.htm>. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors ("the Board" or "Respondent"). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, through particular acts and practices described below. The Agreement has been placed on the

public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (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 consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the proposed Respondent that it violated the law or that the facts alleged in the Complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The Conduct Addressed by the Proposed Consent Order

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: "No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: * * * (C) sale or rental to the public of funeral merchandise, services or paraphernalia."² Under the laws of the State of Missouri, however, licensing

qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.³

The proposed Complaint alleges that the Board's regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,⁴ the Commission found that funeral-director-imposed "casket handling fees" excluded competition from third-party casket sellers, and the record evidence indicated that the fees "prevent[ed] potential price competition and reduce[d] consumer choice."⁵ The Commission further found that "the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less."⁶

The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed "a significant barrier to competition in the casket market" and "harm[ed] consumers in their pocketbooks."⁷ A district court in Oklahoma found that "[a]s long as independent sellers stay in the market, casket sales from independent sources * * * place downward pressure on

³ See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120-2.060(18)(C) effective September 2006.

⁴ The FTC's Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 FR 1592 (1994).

⁵ 59 FR at 1603-04.

⁶ *Pa. Funeral Directors Ass'n, Inc. v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Aug. 29, 2002).

⁷ *Craigsmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002).

² 4 CSR 120-2.060(18).

casket prices as a result of increased competition.”⁸ A district court reviewing a similar statute in Mississippi also concluded that such requirements result in less price competition and consumer choice in selecting a casket.⁹

The Missouri statute that created the Board and grants it the authority to act was not intended to displace competition in the sale of funeral merchandise with regulation. Indeed, it appears that Missouri intended to preserve price competition with respect to the retail sale of funeral caskets by excepting from application of the at-need funeral statute “any person engaged simply in the furnishing of burial receptacles for the dead.”¹⁰

III. Terms of the Proposed Consent Order

The Board has signed a consent agreement containing the proposed consent Order. The proposed Order would prevent the Board from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or conduct.

The proposed Order requires the Board to publish in the Newsletter of the Board of Embalmers and Funeral Directors, the full text of Mo. Rev. Stat. § 333.251 (2005), the Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri.”

The proposed Order also requires the Board to display an advisory on its public website stating that it has settled FTC allegations regarding restrictions and prohibitions on the sale of funeral merchandise or caskets, and to provide a link to the Board’s website that contains the full text of Mo. Rev. Stat. § 333.251 (2005), a link to Mo. Code Regs. Ann. tit. 20, § 2120–2.060 (2006), and a link to this Order. The proposed Order further requires the Board to publish notice of the Order and settlement in three consecutive issues of Missouri Funeral Directors’ Association Magazine and in the Missouri State Board of Embalmers and Funeral

Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all licensees within one (1) year from the date the Order becomes final.

The proposed Order includes requirements that the Board notify the Commission at least thirty (30) days prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board’s rules or regulations, or prior to proposing any change in Respondent that may affect compliance obligations. The proposed Order contains standard provisions requiring the filing of regular written reports of the Board’s compliance with the terms of the Order for each of the next five years. The Order will expire in ten (10) years.

By direction of the Commission.

Donald S. Clark,

Secretary.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Allied Chemical Corporation Plant in Metropolis, Illinois, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On February 1, 2007, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Atomic Weapons employees who were monitored or should have been monitored for exposure to ionizing radiation while working at Allied Chemical Corporation Plant in Metropolis, Illinois, from January 1, 1959 through December 31, 1976, and who were employed for a number of work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on March 3, 2007, as provided for under 42 U.S.C. 7384(14)(C). Hence, beginning on March 3, 2007, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT:

Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to OCAS@CDC.GOV.

Dated: March 12, 2007.

John Howard,

Director, National Institute for Occupational Safety and Health.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Harshaw Harvard-Denison Plant in Cleveland, Ohio, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On February 1, 2007, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Atomic Weapons employees who were monitored or should have been monitored while working at the Harshaw Harvard-Denison Plant located at 1000 Harvard Avenue in Cleveland, Ohio from August 14, 1942 through November 30, 1949, and who were employed for a number of work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on March 3, 2007, as provided for under 42

⁸ *Powers v. Harris*, 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

⁹ *Casket Royale, Inc. v. Mississippi*, 124 F.Supp. 2d 434, 440 (S.D. Miss. 2000).

¹⁰ Mo. Rev. Stat. § 333.251 (2005).