

LODGED

ORIGINAL

2000 AUG 13 AM 10:48

CLERK, U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
RIVERSIDE

JS-6

1 WILLIAM BLUMENTHAL  
General Counsel

2 CHRISTINE J. LEE (CA Bar No. 211462)  
3 THEODORE H. HOPPOCK  
4 GREGORY W. FORTSCH  
Federal Trade Commission  
600 Pennsylvania Avenue NW, NJ-3212  
5 Washington, DC 20580  
Phone: 202-326-2095 (Lee), -3087 (Hoppock), -3617 (Fortsch)  
6 Fax: 202-326-3259

7 [LOCAL COUNSEL]  
Federal Trade Commission  
8 10877 Wilshire Boulevard, Suite 700  
Los Angeles, CA 90024  
9 Phone: (310) 824-4343  
Fax: (310) 824-4380

10 Attorneys for Plaintiff  
11 Federal Trade Commission

12 UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

13 FEDERAL TRADE COMMISSION,

CV

08 - 05300

VAP  
PA

FMCK

14 Plaintiff,

15 v.

16  
17 AIRBORNE HEALTH, INC., also d/b/a  
AIRBORNE, INC., also d/b/a KNIGHT-  
18 MCDOWELL LABS; AIRBORNE  
HOLDINGS, INC.; VICTORIA KNIGHT-  
19 MCDOWELL, also d/b/a AIRBORNE,  
INC., also d/b/a KNIGHT-MCDOWELL  
20 LABS; and THOMAS JOHN  
MCDOWELL, a/k/a RIDER MCDOWELL,  
21 also d/b/a AIRBORNE, INC., also d/b/a  
KNIGHT-MCDOWELL LABS;

STIPULATED FINAL JUDGMENT  
AND ORDER FOR INJUNCTIVE AND  
OTHER EQUITABLE RELIEF

22 Defendants.

23  
24 Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed a  
25 Complaint for Injunctive and Other Equitable Relief against Defendants Airborne Health,  
26 Inc., also d/b/a Airborne, Inc., also d/b/a Knight-McDowell Labs; Airborne Holdings, Inc.;

1 Victoria Knight-McDowell; and Thomas John McDowell, pursuant to Section 13(b) of the  
2 Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), alleging deceptive acts or  
3 practices and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15  
4 U.S.C. §§ 45(a) and 52.

5 The Commission and Defendants Airborne Health, Inc., also d/b/a Airborne, Inc.,  
6 also d/b/a Knight-McDowell Labs; Airborne Holdings, Inc.; Victoria Knight-McDowell; and  
7 Thomas John McDowell (collectively, “Defendants”), without Defendants admitting or  
8 denying liability for any of the conduct alleged in the Complaint, have stipulated to entry of  
9 the following agreement for permanent injunction and settlement of claims for monetary  
10 relief in settlement of the Commission’s allegations against Defendants.

11 The Court, having been presented with this Stipulated Final Judgment and Order for  
12 Injunctive and Other Equitable Relief (“Order”), finds as follows:

13 **FINDINGS**

14 1. This Court has jurisdiction over the subject matter of this case and jurisdiction  
15 over all parties. Venue in the Central District of California is proper.

16 2. The acts and practices of Defendants are in or affecting commerce, as defined  
17 in Section 4 of the FTC Act, 15 U.S.C. § 44.

18 3. The Complaint states a claim upon which relief can be granted under Sections  
19 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and the Commission has the  
20 authority to seek the relief it has requested.

21 4. Defendants waive all rights to seek judicial review or otherwise challenge or  
22 contest the validity of this Order. Defendants also waive any claim that they may have held  
23 under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this  
24 action to the date of this Order.

25 5. This Order reflects the negotiated agreement of the Commission and  
26 Defendants, and Defendants have entered into this Order freely and without coercion.

1           6.       The Commission and Defendants stipulate and agree to entry of this Order  
2 under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), without trial or final adjudication of  
3 any issue of fact or law to settle and resolve all matters of dispute arising from the conduct  
4 alleged in the Complaint to the date of this Order. This stipulation is for settlement purposes  
5 only and nothing contained in this Order shall constitute, nor shall be construed as, an  
6 admission of fact, except for jurisdictional facts, or a finding that any law has been violated  
7 or of any other wrongdoing by Defendants.

8           7.       This action and the relief awarded herein are in addition to, and not in lieu of,  
9 other remedies as may be provided by law.

10          8.       Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this  
11 Order are binding upon Defendants and their officers, agents, servants, employees, and all  
12 other persons or entities in active concert or participation with them who receive actual  
13 notice of this Order by personal service or otherwise.

14          9.       Nothing in this Order obviates the obligation of Defendants to comply with  
15 Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52.

16          10.      The Commission's action against Defendants is an exercise of the  
17 Commission's police or regulatory power as a governmental unit.

18          11.      The paragraphs of this Order shall be read as the necessary requirements for  
19 compliance and not as alternatives for compliance, and no paragraph serves to modify  
20 another paragraph unless expressly so stated.

21          12.      Each party shall bear its own costs and attorneys' fees.

22          13.      Entry of this Order is in the public interest.

23          14.      The Plaintiff and Defendants, by and through their counsel, have agreed that  
24 entry of this Order resolves all matters in dispute between them arising from the facts and  
25 circumstances alleged in the Complaint in this action, up to the date of entry of this Order.  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**ORDER**

**DEFINITIONS**

- 1. "Defendants" shall mean
  - a. Airborne Health, Inc., also d/b/a Airborne, Inc., also d/b/a Knight-McDowell Labs ("Airborne Health") and its divisions, parents, subsidiaries, successors, and assigns;
  - b. Airborne Holdings, Inc. ("Airborne Holdings") and its divisions, parents, subsidiaries, successors, and assigns;
  - c. Victoria Knight-McDowell ("Knight-McDowell"), also d/b/a Airborne, Inc., also d/b/a Knight-McDowell Labs; and
  - d. Thomas John McDowell ("McDowell"), also d/b/a Airborne, Inc., also d/b/a Knight-McDowell Labs.

2. "Corporate Defendants" shall mean Airborne Health and Airborne Holdings.

3. "Individual Defendants" shall mean Knight-McDowell and McDowell.

4. "Advertising" and "promotion" shall mean any written or verbal statement, illustration, or depiction designed to effect a sale or create interest in the purchasing of goods, whether it appears in a brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, audio program transmitted over a telephone system, program-length commercial ("infomercial"), the Internet, email, press release, video news release, or in any other medium.

5. "Commerce" shall mean as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

6. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant

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

4 7. "Airborne Original" shall mean orange-flavored Airborne Original  
5 Effervescent Health Formula, Airborne Lemon-Lime Effervescent Health Formula, and  
6 Airborne Pink Grapefruit Effervescent Health Formula.

7 8. "Airborne Products" shall mean Airborne Original, Airborne Jr. Effervescent  
8 Health Formula, Airborne On-the-Go, Airborne Power Pixies, and Airborne Nighttime  
9 Effervescent Health Formula.

10 9. "Covered Product" shall mean any dietary supplement, food, or drug,  
11 including, but not limited to, the Airborne Products.

12 10. "Endorsement" shall mean "endorsement" as defined in 16 C.F.R. § 255.0(b).

13 11. "Food" and "drug" shall mean "food" and "drug" as defined in Section 15 of  
14 the FTC Act, 15 U.S.C. § 55.

15 12. "Commission" shall mean the Federal Trade Commission.

16 13. A requirement that Defendants "notify," "furnish," "provide," or "submit" to  
17 the Commission shall mean that Defendants shall send the necessary information via  
18 **overnight courier**, costs prepaid, to:

19 Associate Director for Enforcement  
20 Federal Trade Commission  
21 600 Pennsylvania Avenue, N.W.  
22 Washington, DC 20580  
23 Attn: *FTC v. Airborne Health Inc., et al.* (C.D. Cal.).

24 14. The terms "and" and "or" in this Order shall be construed conjunctively or  
25 disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than  
26 exclusive.

15 15. The term "including" in this Order shall mean "including without limitation."



1           *Provided however*, that Defendant Airborne Health may continue to deplete its  
2 existing inventory of Airborne Products plastic tube packaging. *Provided further*, that  
3 Airborne Health may continue to deplete its existing inventory of Airborne Products paper  
4 cartons and display trays specified in Attachments A1 and A2, for a period of 90 days after  
5 the entry of this Order, or until October 31, 2008, whichever is sooner. Airborne Health may  
6 not ship any existing inventory of Airborne Products packaging not specified in this Part  
7 after the date of entry of this Order.

8                                           **II.**

9                                           **PROHIBITED REPRESENTATIONS**

10                                          **REGARDING TESTS OR STUDIES**

11           IT IS FURTHER ORDERED that the Individual Defendants, directly or through any  
12 corporation, partnership, subsidiary, division, trade name, or other device, and their officers,  
13 agents, servants, employees, and all persons or entities in active concert or participation with  
14 them who receive actual notice of this Order, by personal service or otherwise, in connection  
15 with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or  
16 distribution of any Covered Product, in or affecting commerce, are hereby permanently  
17 restrained and enjoined from misrepresenting, in any manner, expressly or by implication,  
18 including through the use of any product name or endorsement, the existence, contents,  
19 validity, results, conclusions, or interpretations of any test, study, or research.

20                                           **III.**

21                                          **FDA-APPROVED CLAIMS**

22           IT IS FURTHER ORDERED that:

23           A.       Nothing in this Order shall prohibit Defendants from making any  
24 representation for any drug that is permitted in labeling for such drug under any tentative or  
25 final standard promulgated by the Food and Drug Administration, or under any new drug  
26 application approved by the Food and Drug Administration; and

1 B. Nothing in this Order shall prohibit Defendants from making any  
2 representation for any product that is specifically permitted in labeling for such product by  
3 regulations promulgated by the Food and Drug Administration pursuant to the Nutrition  
4 Labeling and Education Act of 1990.

5 **IV.**

6 **MONETARY JUDGMENT AND CONSUMER REDRESS**

7 IT IS FURTHER ORDERED THAT:

8 A. JUDGMENT IS HEREBY ENTERED in favor of the Commission and  
9 against Defendants, jointly and severally, in the amount of thirty million dollars  
10 (\$30,000,000).

11 *Provided, however,* that this judgment shall be suspended and shall be deemed to be  
12 fully satisfied upon completion of the requirements in Subsection B and, to the extent  
13 applicable, Subsection C, of this Part. If, upon motion by the Commission, the Court finds  
14 that the defendants failed to comply fully with those requirements, the monetary judgment  
15 shall be deemed unsatisfied and the entire judgment shall be immediately due and payable.  
16 Should this judgment be modified as to the monetary liability of Defendants, this Order in all  
17 other respects shall remain in full force. Any proceedings instituted under this Part shall be  
18 in addition to and not in lieu of any other proceedings the Commission may initiate to  
19 enforce this Order. Solely for the purposes of enforcing this Order, Defendants waive any  
20 right to contest any of the allegations set forth in the Complaint filed in this matter or the  
21 monetary judgment referenced above.

22 B. In the event that the Wilson Class Action Settlement (the “Wilson  
23 Settlement”) is finally approved by the court:

- 24 1. If the aggregate amount of valid settlement members’ claims, court-  
25 approved attorneys’ fees and litigation costs, and any court-approved  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

incentive payment to the named plaintiff in the Wilson Class Action (“Wilson Class Action Payments”) exceeds \$23.51 million:

a. Defendants shall deposit into a segregated interest-bearing escrow account an amount necessary to satisfy valid settlement members’ claims, up to a maximum deposit of six million five hundred thousand dollars (\$6,500,000) (the “FTC Redress Payment”). Such deposit shall be made on or before October 13, 2008.

b. In the event that defendants choose to deposit the FTC Redress Payment prior to October 13, 2008, the balance of the escrow account, up to a maximum of the amount of the FTC Redress Payment that is not necessary to satisfy valid settlement members’ claims, shall be returned to Defendants within thirty (30) days after completion of the Wilson Class Action Payments.

c. Any portion of the FTC Redress Payment that is not ultimately disbursed due to the failure of class members to cash claims checks shall be disgorged to the Commission, within thirty (30) days of the expiration date of the checks.

2. If the Wilson Class Action Payments total \$23.51 million or less, Defendants shall have no obligation to make any additional payments.

3. Any funds deposited under Subsection B(1) of this Part shall be made available to the Wilson Class Action Claims Administrator to timely pay valid settlement members’ claims in accordance with the procedures set forth in Sections 2 through 4, inclusive, of the Wilson

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Stipulation and Agreement of Settlement, and Paragraphs 13 through 15, inclusive, of the Wilson Class Action Preliminary Approval Order.

C. In the event that valid claims of Wilson settlement class members are not paid within thirty (30) days of the time provided under the finally approved Wilson Class Action Settlement or payment by Defendants of at least \$23.5 million is not made by December 31, 2009 in connection with a class action proceeding challenging conduct similar to that challenged by the Commission in this proceeding, except in the instance in which the obligation to make such payment has not become effective because of the pendency of an appeal, the time to appeal has not been exhausted, or similar procedural bases:

1. Defendants shall transfer the balance of any funds deposited pursuant to Subsection B(1) of this Part into an account administered by the Commission (“the FTC redress fund”). Defendants shall deposit additional funds into the FTC redress fund as necessary to total either i) \$30 million, if no other class action settlement has become final; or ii) \$30 million less the gross amount of such settlement (the aggregate amount of valid settlement class members’ claims, court-approved attorneys’ fees and litigation costs, and any other court-approved expenses for the benefit of the class and/or its counsel). Any such transfer and deposit shall be made within thirty (30) days of the earlier of: i) failure to timely pay valid class members’ claims under a finally approved Wilson Class Action Settlement, or ii) failure to timely pay at least \$23.5 million in a class action proceeding challenging conduct similar to that challenged by the Commission in this proceeding, where the class action settlement has been finally approved on or before December 31, 2009.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

2. The FTC redress fund shall be used by the Commission or its agents for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. A consumer shall have the right to participate in the redress distribution only upon signing a waiver of rights to make any subsequent claim against defendants for the amount of the refund received. Defendants shall have no right to contest the manner of distribution chosen by the Commission.
3. Within ten (10) days of the deposit of the FTC redress funds, Airborne Health shall provide to the Commission all information in its possession relating to valid consumer claims submitted in the Wilson Class Action.
4. Within 30 (thirty) days of completion of the Commission-administered redress program and payment of administration costs, the Commission shall authorize closure of the FTC redress fund and the return of any remaining balance, up to a maximum of \$6,500,000, to the Defendants. The Commission shall deposit any remaining funds to the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Part.

D. If this judgment set forth above is not suspended, or such judgment is reinstated based on defendants' failure to complete fully the requirements set forth in Subsection B and, to the extent applicable, Subsection C above, the following provisions shall apply:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1. The full amount of that judgment shall immediately become due, plus interest from the date of entry of this Order pursuant to 28 U.S.C. § 1961, less any payments already made.
2. In the event of default on any obligation to make payment under this Order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date payment is due, the entire amount shall immediately become due and payable. Defendants shall be jointly and severally liable for all payments required by this Order and any interest on such payments.
3. All funds paid to the Commission pursuant to this Subsection shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Subsection. Defendants shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

4. Defendants relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Defendants shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any Defendant, Defendants acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.
5. Defendants agree that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this Order, including but not limited to a non-dischargeability complaint in any bankruptcy case.
6. In accordance with 31 U.S.C § 7701, Defendants are hereby required, unless they have done so already, to furnish to the Commission their taxpayer identifying numbers and/or social security numbers, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.
7. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this Order.

1 E. Defendants shall pay all amounts due to be paid to the Commission under this  
2 Order in cash by electronic funds transfer to the Commission, or to such agent as the  
3 Commission may direct, pursuant to instructions provided by the Commission.

4 V.

5 **COMPLIANCE MONITORING BY THE COMMISSION**

6 IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating  
7 compliance with any provision of this Order:

8 A. Within ten (10) days of receipt of written notice from a representative of the  
9 Commission, Defendants each shall submit additional written reports, sworn to under penalty  
10 of perjury; produce documents for inspection and copying; appear for deposition; and/or  
11 provide entry during normal business hours to any business location in such Defendant's  
12 possession or direct or indirect control to inspect the business operation, *provided that*  
13 Defendants, after attempting to resolve a dispute without court action and for good cause  
14 shown, may file a motion with this Court seeking an order including one or more of the  
15 protections set forth in Fed. R. Civ. P. 26(c).

16 B. In addition, the Commission is authorized to monitor compliance with this  
17 Order by all other lawful means, including but not limited to the following:

- 18 1. Obtaining discovery from any person, without further leave of court,  
19 using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36,  
20 and 45; and
- 21 2. Posing as consumers, marketers, manufacturers, suppliers,  
22 wholesalers, retailers, distributors, or other product-related entities to  
23 any Defendant, its employees, or any other entity managed or  
24 controlled in whole or in part by any Defendant, without the necessity  
25 of identification or prior notice.

1 C. Defendants each shall permit representatives of the Commission to interview  
2 any officer, director, employee, employer, consultant, independent contractor, representative,  
3 or agent who has agreed to such an interview, relating in any way to any conduct subject to  
4 this Order. The person interviewed may have counsel present.

5 *Provided, however,* that nothing in this Order shall limit the Commission's lawful use  
6 of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-  
7 1, to obtain any documentary material, tangible things, testimony, or information relevant to  
8 unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15  
9 U.S.C. § 45(a)(1)).

## 10 VI.

### 11 COMPLIANCE MONITORING BY DEFENDANTS

12 IT IS FURTHER ORDERED that for a period of five (5) years after the date of entry  
13 of this Order, Defendants, in connection with the manufacturing, labeling, advertising,  
14 promotion, offering for sale, or distribution of any Covered Product, in or affecting  
15 commerce, shall take reasonable steps sufficient to monitor and ensure that all of their  
16 employees and agents engaged in sales, order verification, or other customer service  
17 functions comply with the provisions of this Order. Such steps shall include adequate  
18 monitoring of all advertisements, promotions, sales presentations, and other oral and written  
19 communications between the Defendants and their customers regarding Covered Products.  
20 Defendants, at a minimum, shall:

- 21 A. Conduct periodic monitoring of representations concerning any Covered  
22 Product made by persons engaged in sales or other customer service  
23 functions, including representations made orally or through electronic  
24 communications, on behalf of Defendants; and  
25  
26

- 1 B. Conduct periodic monitoring of representations made about any Covered  
2 Product on all Internet websites operated or maintained by Defendants or their  
3 agents.

4 The term “agents” as used in this Part does not include distributors, resellers, or retailers.

5 **VII.**

6 **COMPLIANCE REPORTING**

7 IT IS FURTHER ORDERED that, in order that compliance with the provisions of  
8 this Order may be monitored:

- 9 A. For a period of three (3) years from the date of entry of this Order,

- 10 1. Defendants Airborne Health and Airborne Holdings shall notify the  
11 Commission in writing of any changes in the corporate structure of  
12 Airborne Health, Airborne Holdings, or any other business entity that  
13 one or both directly or indirectly control, or have an ownership interest  
14 in, that may affect compliance obligations arising under this Order,  
15 including but not limited to a dissolution, assignment, sale, merger, or  
16 other action that would result in the emergence of a successor entity;  
17 the creation or dissolution of a subsidiary, parent, or affiliate that  
18 engages in any acts or practices subject to this Order; the filing of a  
19 bankruptcy petition; or a change in the corporate name or address, at  
20 least thirty (30) days prior to such change, *provided that*, with respect  
21 to any proposed change in the corporation about which Airborne  
22 Health or Airborne Holdings learn less than thirty (30) days prior to  
23 the date such action is to take place, the Commission shall be notified  
24 as soon as is practicable after obtaining such knowledge.
- 25 2. Individual Defendants shall notify the Commission in writing of the  
26 following:



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

- a. Any changes in residence, mailing addresses, and telephone numbers, within ten (10) days of such change;
- b. Any changes in employment status (including self-employment) and any change in ownership in any business entity, within ten (10) days of such change. Such notice shall include the name and address of each business that he or she is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of his or her duties and responsibilities in connection with the business or employment;
- c. Any changes in the Defendant's name or use of alternate names; and
- d. Any changes in the corporate structure of any business entity that an Individual Defendant directly or indirectly controls, or has an ownership interest in, 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 entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided that*, with respect to any proposed change about which an Individual Defendant learns less than thirty (30) days prior to the date such action is to take place, the Commission shall be

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

notified as soon as is practicable after obtaining such knowledge.

B. Sixty (60) days after the date of entry of this Order, each Defendant shall provide a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order, including identification of all Covered Products that they advertise or sell, and copies of all their current advertising for such Covered Products. This report shall include, but not be limited to:

- 1. For all Defendants:
  - a. A copy of each acknowledgment of receipt of this Order obtained pursuant to Part XI and the list of recipients of the notices distributed pursuant to Parts IX and X; and
  - b. Any other changes required to be reported under Subsection A of this Part.
- 2. For each Individual Defendant:
  - a. Then-current residence address, mailing addresses, and telephone numbers; and
  - b. Then-current employment and business addresses and telephone numbers; a description of the business activities of each such employer or business, and his or her title and responsibilities, for each such employer or business.

C. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with each Defendant.

1 **VIII.**

2 **RECORD-KEEPING PROVISIONS**

3 IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry  
4 of this Order, Defendants and their agents, employees, officers, and corporations, and any  
5 business (1) in which any Individual Defendant is a majority owner or otherwise directly or  
6 indirectly controls the business, and where (2) the business is engaged, directly or indirectly,  
7 in the advertising, marketing, promotion, offering for sale, distribution, or sale of any  
8 Covered Product, are hereby permanently restrained and enjoined from failing to create and  
9 retain the following records:

- 10 A. Accounting records that reflect the cost of Covered Products sold, revenues  
11 generated, and the disbursement of such revenues;
- 12 B. Personnel records accurately reflecting the name, address, and telephone  
13 number of each person employed in any capacity by such business, including  
14 as an independent contractor; that person's job title or position; the date upon  
15 which the person commenced work; and the date and reason for the person's  
16 termination, if applicable;
- 17 C. Customer files containing the names, addresses, phone numbers, dollar  
18 amounts paid, quantity of Covered Products purchased, and description of  
19 Covered Products purchased, to the extent such information is obtained in the  
20 ordinary course of business;
- 21 D. Complaint and refund requests (whether received directly, indirectly, or  
22 through any third party), including but not limited to reports of adverse  
23 incidents claimed to be associated with the use of a Covered Product, and any  
24 responses to those complaints or requests;
- 25 E. Copies of all advertisements, promotional materials, sales scripts, training  
26 materials, websites, or other marketing materials utilized in the advertising,

1 marketing, promotion, offering for sale, sale, or distribution of any Covered  
2 Product;

3 F. All materials that were relied upon in making any representations contained in  
4 the materials identified in Subsection E of this Part, including all documents  
5 evidencing or referring to the accuracy of any claim therein or to the efficacy  
6 of any Covered Product, including, but not limited to, all tests, reports,  
7 studies, demonstrations, or other evidence that confirm, contradict, qualify, or  
8 call into question the accuracy or efficacy of each such product, including  
9 complaints and other communications with consumers or with governmental  
10 or consumer protection agencies;

11 G. Records accurately reflecting the name, address, and telephone number of  
12 each manufacturer or laboratory engaged in the development or creation of  
13 any testing obtained for the purpose of manufacturing, labeling, advertising,  
14 marketing, promoting, offering for sale, selling, or distributing any Covered  
15 Product;

16 H. Copies of all contracts concerning the manufacturing, labeling, advertising,  
17 marketing, promotion, offering for sale, sale, or distribution of any Covered  
18 Product; and

19 I. All records and documents necessary to demonstrate full compliance with  
20 each provision of the Order, including but not limited to, copies of  
21 acknowledgments of receipt of this Order and all reports submitted to the  
22 Commission pursuant to this Order.

23 **IX.**

24 **NOTICE TO DISTRIBUTORS, RESELLERS, AND RETAILERS**

25 IT IS FURTHER ORDERED that Airborne Health, alone or in conjunction with  
26 Airborne Holdings, shall send as soon as practicable, but in no event later than thirty (30)

1 days after entry of this Order, by first-class mail, postage prepaid and return receipt  
2 requested, an exact copy of the notice attached hereto as Attachment B, showing the date of  
3 mailing, to each distributor, reseller, and retailer who purchased or otherwise received any  
4 Airborne Product directly from Corporate Defendants on or after June 1, 2005, and who  
5 continues to market Airborne Products. This notice shall also be sent, as described above,  
6 for the next five (5) years from the date of entry of this Order, to each new distributor,  
7 reseller, and retailer who purchases or otherwise receives any Airborne Product directly from  
8 Corporate Defendants after the date of entry of this Order; such notice must be received  
9 before or at the same time as the new distributor, reseller, or retailer receives its first  
10 shipment of Airborne Product(s). The notice required by this paragraph shall not include any  
11 other document or enclosures and may be sent to the principal place of business of each such  
12 distributor, reseller, or retailer.

13 **X.**

14 **DISTRIBUTION OF ORDER**

15 IT IS FURTHER ORDERED that, for a period of three (3) years from the date of  
16 entry of this Order, Defendants shall deliver copies of the Order as directed below:

17 A. Airborne Health and Airborne Holdings shall deliver a copy of this Order to  
18 all of its principals, officers, directors, and managers, and to all current or newly hired  
19 employees, agents, representatives, consultants, and independent contractors who engage in  
20 conduct related to the subject matter of this Order. For current personnel, delivery shall be  
21 within five (5) days of service of this Order upon Defendants. For new personnel, delivery  
22 shall occur prior to their assuming a position or engaging in conduct related to the subject  
23 matter of this Order.

24 B. Individual Defendant As Control Person: For any business that is controlled,  
25 directly or indirectly, by any Individual Defendant or in which any Individual Defendant has  
26 a majority ownership interest, that Individual Defendant shall deliver a copy of this Order to

1 all principals, officers, directors, and managers of such business, and to all current or newly  
2 hired employees, agents, representatives, consultants, and independent contractors who  
3 engage in conduct related to the subject matter of this Order. For current personnel, delivery  
4 shall be within five (5) days of service of this Order upon Defendants. For new personnel,  
5 delivery shall occur prior to their assuming a position or engaging in conduct related to the  
6 subject matter of this Order.

7 C. Individual Defendant Not As Control Person: For any business in which an  
8 Individual Defendant is not a control person but otherwise engages in conduct related to the  
9 subject matter of this Order, that Individual Defendant shall deliver a copy of this Order to  
10 all principals and managers of such business with supervisory authority over the Defendant  
11 before engaging in such conduct.

12 D. Defendants shall obtain a signed and dated statement acknowledging receipt  
13 of the Order, within thirty days of delivery, from all persons receiving a copy of the Order  
14 pursuant to this Part.

15 **XI.**

16 **ACKNOWLEDGMENT OF RECEIPT OF ORDER**

17 IT IS FURTHER ORDERED that each Defendant, within seven (7) business days  
18 after receipt of this Order as entered by the Court, shall submit to the Commission a truthful  
19 sworn statement acknowledging receipt of this Order.

20  
21  
22  
23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**XII.**

**RETENTION OF JURISDICTION**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

**SO ORDERED:**

Dated: Sept 5 2008

Virginia L M  
UNITED STATES DISTRICT JUDGE

**SO STIPULATED:**

Christine J. Lee  
CHRISTINE J. LEE  
THEODORE H. HOPPOCK  
GREGORY W. FORTSCH  
600 Pennsylvania Avenue NW, NJ-3212  
Washington, DC 20580  
Tel: 202-326-2095  
Fax: 202-326-3259  
Attorneys for Plaintiff  
Federal Trade Commission

Victoria Knight-McDowell  
VICTORIA KNIGHT-MCDOWELL,  
Individually, and as Former Co-Owner,  
President, and Secretary of AIRBORNE,  
INC.

Thomas John McDowell  
THOMAS JOHN MCDOWELL,  
Individually, and as Former Co-Owner, and  
Chief Executive Officer of AIRBORNE,  
INC.

Airborne Health, Inc.  
AIRBORNE HEALTH, INC.,  
also d/b/a AIRBORNE, INC.  
By: ELISE DONAHUE, CEO

Joan Z. Bernstein  
Dana B. Rosenfeld  
JOAN Z. BERNSTEIN  
DANA B. ROSENFELD  
Bryan Cave LLP  
700 13<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel: 202-508-6000  
Fax: 202-508-6200  
Attorneys for Victoria Knight-McDowell  
and Thomas John McDowell

Airborne Holdings, Inc.  
AIRBORNE HOLDINGS, INC.  
By: ELISE DONAHUE, CEO

Helene D. Jaffe  
Bruce A. Colbath  
HELENE D. JAFFE  
BRUCE A. COLBATH  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212-310-8000  
Fax: 212-310-8007  
Attorneys for Airborne Health, Inc., and  
Airborne Holdings, Inc.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**XII.**

**RETENTION OF JURISDICTION**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

**SO ORDERED:**

Dated: \_\_\_\_\_

UNITED STATES DISTRICT JUDGE

**SO STIPULATED:**

CHRISTINE J. LEE  
THEODORE H. HOPPOCK  
GREGORY W. FORTSCH  
600 Pennsylvania Avenue NW, NJ-3212  
Washington, DC 20580  
Tel: 202-326-2095  
Fax: 202-326-3259  
Attorneys for Plaintiff  
Federal Trade Commission

VICTORIA KNIGHT-MCDOWELL,  
Individually, and as Former Co-Owner,  
President, and Secretary of AIRBORNE,  
INC.

THOMAS JOHN MCDOWELL,  
Individually, and as Former Co-Owner, and  
Chief Executive Officer of AIRBORNE,  
INC.

AIRBORNE HEALTH, INC.,  
also d/b/a AIRBORNE, INC.  
By: ELISE DONAHUE, CEO

JOAN Z. BERNSTEIN  
DANA B. ROSENFELD  
Bryan Cave LLP  
700 13<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel: 202-508-6000  
Fax: 202-508-6200  
Attorneys for Victoria Knight-McDowell  
and Thomas John McDowell

AIRBORNE HOLDINGS, INC.  
By: ELISE DONAHUE, CEO

HELENE D. LAFFE  
BRUCE A. COLBATH  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212-310-8000  
Fax: 212-310-8007  
Attorneys for Airborne Health, Inc., and  
Airborne Holdings, Inc.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

XII.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED:

Dated: 7/24/08

UNITED STATES DISTRICT JUDGE

SO STIPULATED:

CHRISTINE J. LEE  
THEODORE H. HOPPOCK  
GREGORY W. FORTSCH  
600 Pennsylvania Avenue NW, NJ-3212  
Washington, DC 20580  
Tel: 202-326-2095  
Fax: 202-326-3259  
Attorneys for Plaintiff  
Federal Trade Commission

VICTORIA KNIGHT-MCDOWELL,  
Individually, and as Former Co-Owner,  
President, and Secretary of AIRBORNE,  
INC.

*Elise Donahue*

AIRBORNE HEALTH, INC.,  
also d/b/a AIRBORNE, INC.  
By: ELISE DONAHUE, CEO

THOMAS JOHN MCDOWELL,  
Individually, and as Former Co-Owner, and  
Chief Executive Officer of AIRBORNE,  
INC.

*Elise Donahue*

AIRBORNE HOLDINGS, INC.  
By: ELISE DONAHUE, CEO

JOAN Z. BERNSTEIN  
DANA B. ROSENFELD  
Bryan Cave LLP  
700 13<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel: 202-508-6000  
Fax: 202-508-6200  
Attorneys for Victoria Knight-McDowell  
and Thomas John McDowell

HELENE D. JAFFE  
BRUCE A. COLBATH  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212-310-8000  
Fax: 212-310-8007  
Attorneys for Airborne Health, Inc., and  
Airborne Holdings, Inc.

XII.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED:

Dated: \_\_\_\_\_


UNITED STATES DISTRICT JUDGE

SO STIPULATED:



VICTORIA KNIGHT-MCDOWELL,  
Individually, and as Former Co-Owner,  
President, and Secretary of AIRBORNE,  
INC.

CHRISTINE J. LEE  
THEODORE H. HOPPOCK  
GREGORY W. FORTSCH  
600 Pennsylvania Avenue NW, NJ-3212  
Washington, DC 20580  
Tel: 202-326-2095  
Fax: 202-326-3259  
Attorneys for Plaintiff  
Federal Trade Commission



THOMAS JOHN MCDOWELL,  
Individually, and as Former Co-Owner, and  
Chief Executive Officer of AIRBORNE,  
INC.

AIRBORNE HEALTH, INC.,  
also d/b/a AIRBORNE, INC.  
By: ELISE DONAHUE, CEO



JOAN Z. BERNSTEIN  
DANA B. ROSENFELD  
Bryan Cave LLP  
700 13<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel: 202-508-6000  
Fax: 202-508-6200  
Attorneys for Victoria Knight-McDowell  
and Thomas John McDowell

AIRBORNE HOLDINGS, INC.  
By: ELISE DONAHUE, CEO

HELENE D. JAFFE  
BRUCE A. COLBATH  
Weil, Gotshal & Manges LLP  
767 Fifth Avenue  
New York, NY 10153  
Tel: 212-310-8000  
Fax: 212-310-8007  
Attorneys for Airborne Health, Inc., and  
Airborne Holdings, Inc.

**ATTACHMENT A1**  
**EXISTING AIRBORNE PRODUCTS PACKAGING**  
**INVENTORY SUBJECT TO PART I**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1. All finished goods inventory paper cartons of Airborne Original (all flavors) with a substantially similar label to that depicted in Attachment A2.
2. All finished goods inventory paper cartons of Airborne Jr. Effervescent Health Formula and Airborne Nighttime Effervescent Health Formula.
3. All finished goods cardboard display trays already packaged with cartons of Airborne Products specified in Paragraphs 1 and 2, above.

ATTACHMENT A2



**Airborne**  
ORIGINAL ZESTY ORANGE  
EFFERVESCENT HEALTH FORMULA  
A DIETARY SUPPLEMENT

The original immune-boosting tablet that helps your body fight germs.†

CREATED BY A SCHOOL TEACHER!

CONTENTS: 1 TUBE

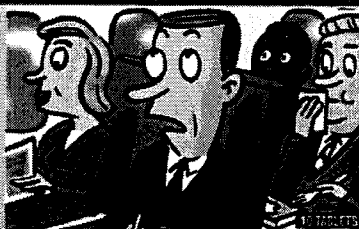
**Airborne**

ORIGINAL ZESTY  
ORANGE

- 1,000mg of Vitamin C†
- Seven Herbal Extracts†
- Antioxidants†
- Electrolytes†
- Amino Acids†
- Tastes Great!

FOR USE IN:

- ▶ Airplanes
- ▶ Offices
- ▶ Schools
- ▶ Restaurants
- ▶ Health Clubs
- ▶ Theaters...



Directions: For adults and children 12 years and older: Simply drop 1-2 AIRBORNE tablets in 4-8 oz. of water. Mix and drink (about 15-20 minutes) and drink. Repeat every 3-4 hours as necessary, no more than 3 times per day. Do not take 2 packets of effervescent tablets, you have consumed 1 equivalent. As with all dietary supplements, please consult your physician if you have any medical conditions, are on medication or wish to know if you should take it with a prescription drug. See also a complete product page for your information. May be used in hot or cold water.

EFFERVESCENT TECHNOLOGY OFFERS FASTER ABSORPTION

HAVE YOU TAKEN YOUR AIRBORNE?

Call us at 1-800-390-4796  
Visit us at www.AirborneHealth.com



"Thank you for using Airborne! I created Airborne because, as a teacher, I needed help supporting my immune system, especially in the classroom."†

—Victoria Knight-McDowell, 2nd grade teacher & developer of Airborne Formula.



**AIRBORNE**  
EFFERVESCENT ORIGINAL ZESTY ORANGE

Next time, play the "Next Time, Play the" game. Next time you are in a crowded environment, including offices, airplanes, schools, restaurants, health clubs, theaters, etc., take 1-2 AIRBORNE tablets. Your immune system will help you fight germs that are in the air. Your immune system will help you fight germs that are in the air. Your immune system will help you fight germs that are in the air.

**Supplement Facts**

Amount Per Tablet	% Daily Value
Vitamin A (as Retinyl Palmitate)	<1%
Vitamin C (Ascorbic Acid)	1000 mg
Vitamin E (as dl-Alpha Tocopherol)	30 IU
Nicotinamide (Vitamin B3)	20 mg
Calcium (as Calcium Citrate)	100 mg
Zinc (as Zinc Oxide)	10 mg
Magnesium (as Magnesium Oxide)	40 mg
Iron (as Iron Pyrophosphate)	10 mg
Fluoride (as Sodium Fluoride)	1 mg
Other Ingredients	

†Based on a diet of 2,000 calories. \*Percent Daily Values are based on a diet of 2,000 calories. †Based on a diet of 2,000 calories.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**ATTACHMENT B**  
**GOVERNMENT-ORDERED DISCLOSURE**  
[on Airborne Health, Inc. letterhead]

[Insert Date]

[Addressee]

Dear Airborne Health, Inc. Distributor, Reseller, or Retailer:

In a recent lawsuit, the Federal Trade Commission (FTC) charged our company with making deceptive claims for Airborne Effervescent Health Formula and other Airborne branded products. According to the FTC, we lacked scientific evidence that our products prevent colds, protect against germs, reduce the severity or duration of colds, or protect against colds, sickness, or infection in crowded places. Although we dispute the FTC's charges, we have agreed to settle the lawsuit.

To comply with the court's order in this case, we instruct you to immediately refrain and/or stop using advertising or promotional materials that claim that Airborne Effervescent Health Formula (all flavors), Airborne Jr., Airborne On-the-Go, Airborne Power Pixies, or Airborne Nighttime:

- reduces the risk of or prevents colds, sickness, or infection;
- protects against or helps fight germs;
- reduces the severity or duration of colds; or
- protects against colds, sickness, or infection in crowded places like airplanes, offices, or schools.

You may continue to sell your existing inventory of current Airborne products.

If you have any questions, please call [insert name and telephone numbers of the responsible Airborne Health, Inc. Attorney or Officer].

Sincerely,  
Elise Donahue, Chief Executive Officer  
Airborne Health, Inc.