

**FILED**

DEC 16 2008

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Division of Consumer Affairs

A True Copy

*Sue Regan*

SUE REGAN  
Deputy Clerk of Superior Court

SUPERIOR COURT OF N.J.  
MERCER COUNTY  
RECEIVED AND FILED

DEC 16 2008

*Sue Regan*

SUE REGAN  
DEPUTY CLERK OF SUPERIOR COURT

By: Nicholas Kant  
Deputy Attorney General  
(973) 648-4584

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY  
DOCKET NO. MER-C-\_\_\_\_\_

ANNE MILGRAM, Attorney General of the  
State of New Jersey, and DAVID M.  
SZUCHMAN, Director of the New Jersey  
Division of Consumer Affairs,

Plaintiffs,

v.

AIRBORNE HEALTH, INC., *doing business as*  
AIRBORNE and AIRBORNE, INC., *formerly*  
*doing business as* KNIGHT-MCDOWELL  
LABS, AIRBORNE HOLDINGS, INC.,  
VICTORIA KNIGHT-MCDOWELL, and  
THOMAS JOHN MCDOWELL,

Defendants.

Civil Action

**FINAL CONSENT JUDGMENT**

1. Plaintiffs Anne Milgram, Attorney General of the State of New Jersey ("Attorney General"), and David M. Szuchman, Director of the New Jersey Division of Consumer Affairs ("Director") (collectively, "Plaintiffs"), having filed a Complaint 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"), appearing through counsel, stipulate that this Final Consent Judgment ("Consent Judgment") may be signed and entered by a judge.

2. The Plaintiffs and Defendants (collectively, "Parties") having consented to the entry of this Consent 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 Consent Judgment does not constitute any admission of liability or wrongdoing, either express or implied, by Defendants or any other party. Further, this Consent 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 Consent Judgment, Airborne has simultaneously consented to the entry of Judgment with the Attorneys General 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 Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin. The Attorney General of New Jersey and the other states attorneys general are referred to collectively, hereafter, as the "Settling Attorneys General."

4. The entry of this Consent 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 Consent 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 Plaintiffs or their attorneys or any employee of the Office of the Attorney General of New Jersey to procure this Consent Judgment.

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

6. This Consent 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 Consent Judgment concerning past conduct addressed in this Consent Judgment.

8. In exchange for the consideration set forth herein, upon execution of this Consent Judgment, the Plaintiffs agree 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 New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et seq., arising prior to the date this Consent Judgment is filed and arising out of or based upon the matters addressed in this Consent Judgment and the Plaintiffs' Complaint.

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

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

## JURISDICTION AND VENUE

10. Pursuant to the CFA, jurisdiction of this Court over the subject matter and over the Defendants for the purpose of entering into and enforcing this Consent Judgment is admitted. Jurisdiction is retained by this Court for the purpose of enabling the Plaintiffs 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 Consent Judgment, including punishment for any violation of this Consent Judgment. If the Plaintiffs are required to file a petition to enforce any provision of this Consent 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 Consent Judgment against such Defendant(s). Pursuant to N.J.S.A. 56:8-8, venue is proper in this Court, and venue as to all matters between the parties relating hereto or arising out of this Consent Judgment is solely in the Superior Court of New Jersey, Chancery Division, Mercer County.

11. The Defendants waive any defect associated with service of the Plaintiffs' Complaint and this Consent Judgment and do not require issuance or service of a Summons.

12. The Corporate Defendants 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 Mercer County. The Individual Defendants previously sold Airborne – Original.

## PARTIES

13. Defendants represent that they are the proper defendants to this Consent

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 Consent 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 Plaintiffs expressly rely upon these representations, and that if any of them are false, deceptive, misleading or inaccurate, the Plaintiffs have the right to move to vacate or set aside in whole or in part this Consent Judgment with respect to the pertinent Defendant(s), or request that such Defendant(s) be held in contempt, if the Plaintiffs so elect.

#### **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 New Jersey 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 New Jersey and the Office of the Attorney General of New Jersey.

**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. **“Consent Judgment”** shall mean this document filed in the action titled Anne Milgram, Attorney General of the State of New Jersey, and David M. Szuchman, Director of the New Jersey Division of Consumer Affairs 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.

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 New Jersey 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. “New Jersey”** means the State of New Jersey.

**O. “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.

**P. “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.

**Q.** “**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 the CFA, 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 of this Consent Judgment.

**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 of this Consent Judgment.

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 of this Consent Judgment.

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 of this Consent Judgment.

F. Making, in connection with the Marketing or Advertising of a Product, in addition to any and all requirements set forth in this Consent 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 Consent 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 Consent 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 Consent 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 of this Consent Judgment.

**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 of this Consent Judgment.

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 Consent 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 Plaintiffs expressly rely on this representation and reserve the right to initiate enforcement proceedings and/or move to set aside the Consent 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 Consent Judgment, pursuant to the CFA, Corporate Defendants shall, in connection with the Advertising, promotion, offering for sale, or distribution in or from New Jersey of any covered Product:

A. Take reasonable steps sufficient to monitor and ensure that Corporate Defendants comply with this Consent 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 Plaintiffs 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 Plaintiffs 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 Plaintiffs 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 Consent 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 New Jersey any Advertising or Marketing material that contain any representation that violates the provisions of this Consent Judgment;

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

1. All Airborne Advertisements and Marketing materials concerning an Airborne Product disseminated in or from New Jersey;
2. Airborne sales presentations made in or from New Jersey;
3. Other written communications with consumers in or from New Jersey 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 New Jersey is using or disseminating any Advertisements or Marketing material, or making any oral statement, that violates the provisions of this Consent 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 Consent Judgment if made by the Defendants. Attached is a copy of Exhibit E.

**CIVIL PENALTIES / PAYMENT TO THE ATTORNEYS GENERAL**

20. As part of their settlement with the Settling Attorneys General, the Defendants are ordered to pay to the Settling Attorney 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 state law at the discretion of each Settling 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 Consent 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 Settling 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 Consent Judgment by the Plaintiffs or the non-insistence by the Plaintiffs on an enforcement action, shall not be deemed approval by the Plaintiffs 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 the Attorney General, the Director, or any other government unit of the State of New Jersey has approved, sanctioned, or authorized any practice, act, advertisement or conduct of Defendants, including prospective Advertising.

22. This Consent Judgment may only be enforced by the Parties hereto.

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

24. Nothing in this Consent Judgment constitutes an agreement by the Attorney General of New Jersey 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 Consent 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 Consent Judgment to insist upon the strict performance by any other party of any of the provisions of this Consent Judgment shall not be deemed a waiver of any of the provisions of this Consent 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 Consent 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 Plaintiffs.

28. If any clause, provision or section of this Consent 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 Consent Judgment, and this Consent 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 Consent 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 Consent 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 Consent Judgment that requires action to be taken by the Defendants within a stated time period or upon a specified date.

31. This Consent 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 Consent 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 Consent Judgment, no prior versions of any of its terms, that were not entered by the Court in this Consent Judgment, may be introduced for any purpose whatsoever.

32. Nothing in this Consent 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 Plaintiffs relating to compliance with this Consent 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 Plaintiffs. This Consent Judgment shall in no way limit the Plaintiffs' 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 Consent Judgment, Corporate Defendants shall submit a copy of this Consent 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 Consent Judgment to any Advertising or marketing consulting agency that it employs.

35. Without violating ethical rules governing contacting a represented party, the Plaintiffs have the right to test shop the Corporate Defendants for the purpose of confirming compliance with this Consent Judgment and state law. The test shoppers are not required to disclose that they are representatives of the Plaintiffs when making contact with the Corporate Defendants. Further, the Plaintiffs 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 Plaintiffs.

36. Except as may be provided under applicable law, nothing in this Consent 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 Consent 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 Consent Judgment 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, Florida 34134

100 Clock Tower, Suite 120  
Carmel, California 93923

ii. If to the Plaintiffs:

Nicholas Kant  
Deputy Attorney General  
Division of Law  
Department of Law and Public Safety  
124 Halsey Street – 5<sup>th</sup> Floor  
P.O. Box 45029  
Newark, New Jersey 07101

iii. If to Victoria Knight- McDowell:

26811 South Bay Drive, Suite 300  
Bonita Springs, Florida 34134

100 Clock Tower, Suite 120  
Carmel, California 93923

iv. If to Thomas John McDowell:

26811 South Bay Drive, Suite 300  
Bonita Springs, Florida 34134

100 Clock Tower, Suite 120  
Carmel, California 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.

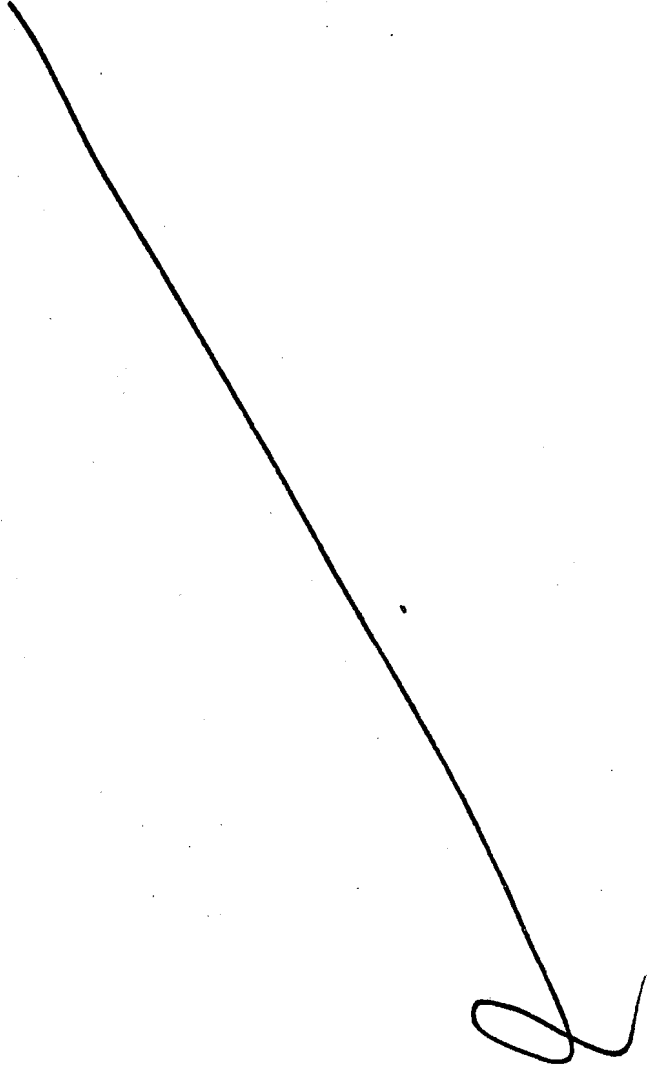
#### **COURT COSTS AND FEES**

40. Courts costs associated with the filing of this Consent Judgment shall be paid by the Defendant Airborne, Inc. No discretionary costs shall be taxed against the Plaintiffs.

**PENALTIES FOR FAILURE TO COMPLY**

41. The Plaintiffs shall have the authority to enforce the injunctive provisions of this Consent Judgment or to seek sanctions for violations hereof or both.

42. The parties agree that any future violations of the injunctive provisions of this Consent Judgment as well as the CFA shall constitute a second or succeeding violation under N.J.S.A. 56:8-13 and that Defendants may be liable for enhanced civil penalties.



IT IS ON THIS 16 DAY OF Dec., 2008 SO ORDERED, ADJUDGED AND  
DECREED.

  
HON. MITCHEL E. OSTRER, J.S.C.

JOINTLY APPROVED AND  
SUBMITTED FOR ENTRY:

FOR THE PLAINTIFFS:

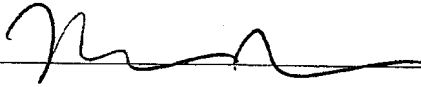
ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

By: Nicholas Kant

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Deputy Attorney General  
Consumer Fraud Prosecution Section  
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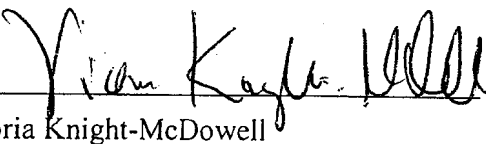
Dated: Dec. 16, 2008

**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

*Crystal L. Brown*

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