

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
34TH JUDICIAL DISTRICT

STATE OF TEXAS,
Plaintiff

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VS.

CAUSE NO. 2004-4635

MILKY WAY TRADERS, INC., and
YVON BELLIARD, individually,
Defendants

FINAL JUDGMENT AND AGREED PERMANENT INJUNCTION

Plaintiff, the STATE OF TEXAS, acting by and through Attorney General Greg Abbott (“State”), and MILKY WAY TRADERS, INC., and YVON BELLIARD, individually, (“Defendants”), having consented to the entry of this Final Judgment and Permanent Injunction, and before any testimony is taken in this case and without Defendant admitting to any violations of the Texas Food, Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE ANN. §431.001 *et seq.* (“TFDCA”) or the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.21 *et seq.* (“DTPA”); or any other law, have jointly moved that the Court enter this Judgment.

It is stipulated by the parties that by entering into this Judgment, Defendants admit no wrongdoing and this Judgment does not constitute any evidence or admission of any kind regarding any issues set forth herein, nor does it acknowledge that Defendants have engaged in any unlawful activity, nor shall it be construed as evidence that Defendants have engaged in any methods, acts,

practices, uses or solicitations declared to be unlawful under the TFDCA and the DTPA. Defendants do not admit the truth of any alleged facts, any of the characterizations of Defendants' alleged conduct, or any of the conclusions in Plaintiff's Original Petition, or any amended pleadings pertaining to this matter.

MILKY WAY TRADERS, INC., and YVON BELLIARD further stipulate that the State of Texas' agreement to and the Court's approval of this Final Judgment are expressly premised upon Defendants' compliance with Defendants' obligations 1) not to introduce into commerce food that is adulterated or misbranded, in violation of §431.021 of the TFDCA; 2) not to engage in the manufacture of food in this state or operate as a warehouse operator in this state without having a license as set forth in TFDCA § 431.021; 3) to place a notice clearly and conspicuously on each unit of goods sold that the product is unsafe or unsuitable as food for human consumption, unless it is safe and suitable for human consumption; and 4) to comply with all applicable Texas labeling statutes and regulations; and that these stipulations are specifically relied upon by the State of Texas in negotiating and agreeing to the terms of this Final Judgment.

MILKY WAY TRADERS, INC. agrees to pay the amount of civil penalties, attorneys fees, and investigative costs listed in paragraphs 8, 9 and 10 below, if and only if Defendants fail to comply with paragraphs 6 and 7 below.

MILKY WAY TRADERS, INC. stipulates that its indebtedness to the State of Texas for civil penalties, even though conditional, identified in paragraph 7 below, for violations of the TDPTA and TFDCA, having been found by this court to constitute a civil fine or penalty to and for a governmental unit and not compensation for actual pecuniary loss, would be a debt that would be nondischargeable in a proceeding subsequently filed by Milky Way Traders, Inc. under either

Chapter 7 or Chapter 11 of the U.S. Bankruptcy Code, and that, in the event a voluntary or involuntary Chapter 7 or Chapter 11 bankruptcy proceeding is commenced against it, Milky Way Traders, Inc. stipulates that it shall not contest either directly or indirectly future attempts, if any, by the State of Texas to have such debt declared nondischargeable in accordance with 11 U.S.C. § 523(a)(7).

Defendants MILKY WAY TRADERS, INC. and YVON BELLIARD consent and agree to the entry of this Judgment and that the terms of said agreement are fair, just and equitable. Defendants further agree that Plaintiff's agreement to this Judgment does not constitute an approval by the Plaintiff of Defendants' business practices.

The Court, after reading the pleadings and stipulations of the parties and it appearing to the Court that all parties agree to and have approved its entry of this Judgment, makes the following orders under the provisions of the TFDCA and the DTPA. The Court is of the opinion that, in view of these findings, said agreement should be and is hereby in all things approved, and accordingly that this Judgment should be entered.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED THAT:

1. This Court has jurisdiction, through the TFDCA and the DTPA, over the subject matter and over all parties to this action.
2. Plaintiff's Original Petition states a claim for relief against Defendants.
3. Venue of this matter is proper in El Paso County by virtue of the fact that Defendants are or were engaged in business in El Paso County.
4. Nothing in this Final Judgment and Agreed Permanent Injunction is intended to limit, modify, broaden or otherwise alter the rights and responsibilities of the Defendants to comply with

applicable federal or state regulation or statute, including but not limited to Chapter 431 of the Texas Food, Drug and Cosmetic Act and the Deceptive Trade Practices Act.

5. The following definitions shall be used in construing this Judgment:
 - A. “Adulterate” a drug or food means to manufacture, hold, prepare, or use a drug or food in violation of § 431.111 or § 431.081 of the Texas Food, Drug and Cosmetic Act.
 - B. “Animal feed,” means an article intended for use as food for animals other than man as a substantial source of nutrients in the diet of the animals. The term is not limited to a mixture intended to be the sole ration of the animals.
 - C. "Food" means:
 - (1) articles used for food or drink for man;
 - (2) chewing gum; and
 - (3) articles used for components of any such article.
 - D. “Infant formula” means a food that is represented for special dietary use solely as a food for infants by reason of its simulation of human milk or its suitability as a complete or partial substitute for human milk.
 - E. “Label” means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information that appears on the label shall not be considered to be complied with unless the word, statement, or other information also appears on the outside container or wrapper, if any, of the retail package of the article, or is easily legible through the outside container or wrapper.
 - F. “Labeling” means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.
 - G. “Misbrand” a food or drug means any violation of §431.082 of the Texas Health and Safety Code or §431.112 of the Texas Health and Safety Code, including but not limited to, labeling for a food or drug if it is false or misleading in any particular; advertising of a food or drug if the advertising is false or misleading in any particular; or if a food or drug is sold, distributed, or used in violation of federal regulations.

6. **IT IS FURTHER ORDERED THAT MILKY WAY TRADERS, INC. and YVON BELLIARD**, their agents, servants, employees, assigns and any other person acting in concert or

participation with or on behalf of them and all such persons or entities shall not in the future:

- A. Represent that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have;
- B. Introduce into commerce food that is adulterated, in violation of §431.021(a) of the TFDCa;
- C. Introduce into commerce food that is misbranded, in violation of §431.021(a) of the TFDCa;
- D. Manufacture within this state food that is adulterated or misbranded in violation of 431.021.(h) of the TFDCa;
- E. Engage in the manufacture of food in this state or operate as a warehouse operator in this state without having a license, in violation of 431.021(y) of the TFDCa;
- F. Refuse to permit entry, inspection or taking of samples for testing, by DSHS inspectors in violation of 431.021(g) of the TFDCa;
- G. Fail to place a notice clearly and conspicuously on each unit of goods sold that the product is unsafe or unsuitable as food for human consumption, unless it is safe and suitable for human consumption;
- H. Fail to comply with all applicable labeling statutes and regulations;
- I. Sell or label animal feed as food for humans;
- J. Repackage infant formula and sell it as food without having a license, in violation of 431.021.(y) of the TFDCa; and
- K. Introduce into commerce any food whose labeling is false or misleading and fail to prominently display information and statements required by regulations promulgated under the authority of the TFDCa in such a manner to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

7. **IT IS FURTHER ORDERED THAT** Milky Way Traders, Inc. will pay the total sum of Seven Thousand Dollars (\$7,000.00) to the Office of the Attorney General, with Three

Thousand Dollars (\$3,000.00) designated as civil penalties; Two Thousand Dollars (\$2,000.00) designated as attorneys fees under §431.047 of the TFDCa and the TEX. GOVT. CODE §402.006(c); and Two Thousand Dollars (\$2,000.00) to Texas Department of State Health Services to cover the investigative costs pursuant to §431.047 of the TFDCa. Upon receipt of this payment, the State of Texas shall consider the monetary portion of this Final Judgment, as ordered in paragraphs 8, 9, and 10 below, satisfied in full unless the State obtains evidence that this Final Judgment should be reopened as outlined in paragraph 11 below. The State of Texas then may reopen this Final Judgment for the sole purpose of allowing the State of Texas to modify the monetary liability of the Defendants.

8. **IT IS FURTHER ORDERED THAT** Milky Way Traders, Inc. shall pay and deliver Twenty-five Thousand Dollars (\$25,000.00) to the Office of the Attorney General as civil penalties pursuant to § 431.0585 of the TFDCa and to DTPA §17.47(c)(1), subject to paragraphs 7 and 11 herein.

9. **IT IS FURTHER ORDERED THAT** Milky Way Traders, Inc. shall pay and deliver Sixteen Thousand Dollars (\$16,000.00) to the Office of the Attorney General as attorneys fees and investigative costs under § 431.047 of the TFDCa and the TEX. GOVT. CODE § 402.006(c), subject to paragraphs 7 and 11 herein.

10. **IT IS FURTHER ORDERED THAT** Milky Way Traders, Inc. shall pay Seven Thousand five Hundred Dollars (\$7,500.00) to the Texas Department of State Health Services to cover their investigative costs pursuant to § 431.047 of the TFDCa, subject to paragraphs 7 and 11 herein.

11. **IT IS FURTHER ORDERED** that if the State of Texas obtains evidence that Milky

Way Traders, Inc., is failing to comply with Defendants' obligations listed in paragraphs 6 and 7 above, the State of Texas may reopen this Final Judgment for the sole purpose of allowing the State of Texas to modify the monetary liability of the Defendants. If the Court finds that Defendants failed to comply with the injunctive provisions of paragraph 6 above, or to comply with the above obligations relating to payment of the amounts required in paragraph 7 above, the Court shall reinstate the suspended judgment against Milky Way Traders, Inc. in favor of the State of Texas, in the amounts listed in paragraphs 8, 9, and 10 above. All other terms of this Final Judgment shall remain in full force and effect unless otherwise ordered by the Court. For the purposes of reopening or enforcing this Final Judgment, Milky Way Traders, Inc. waives any right to contest any of the allegations set forth in Plaintiff's Original Petition filed in this matter.

12. **IT IS FURTHER ORDERED** that the Court's approval of this Final Judgment is expressly premised upon the above stipulations by Milky Way Traders, Inc., as relied upon by the State of Texas in negotiating and agreeing to the terms of this Final Judgment.

13. The clerk of the Court is authorized to issue such writs of execution or other process necessary to collect and enforce this Judgment.

14. The Court retains jurisdiction to enforce this Judgment.

15. It is agreed and understood that this Judgment shall in no way affect the rights of individual citizens.

16. All relief not granted herein is hereby denied.

Signed this _____ day of _____, 2005.

JUDGE

THE UNDERSIGNED, WHO HAVE THE AUTHORITY TO CONSENT AND SIGN ON BEHALF OF THE PARTIES IN THIS ACTION, HEREBY CONSENT TO THE FORM AND CONTENTS OF THE FOREGOING FINAL JUDGMENT AND AGREED PERMANENT INJUNCTION AND TO ITS ENTRY:

Signed this _____ day of _____, 2005.

For Plaintiff:

Defendants:

GREG ABBOTT
Attorney General of Texas

MILKY WAY TRADERS, INC.

BARRY R. McBEE
First Assistant Attorney General

By: _____
Title:

EDWARD D. BURBACH
Deputy Attorney for Litigation

YVON BELLIARD, Individually

PAUL D. CARMONA
Chief, Consumer Protection and Public Health
Division

FORM APPROVED:

JAMES A. DAROSS
Assistant Attorney General
Consumer Protection and Public Health
Division

MICHAEL J. SHANE
Gordon Mott P.C.
Post Office Box 1322
El Paso, Texas 79947-1322

**ATTORNEYS FOR THE STATE OF
TEXAS**

ATTORNEYS FOR DEFENDANTS