

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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<b>In the Matter of</b>	)	<b>FILE NO. 102 3080</b>
	)	
<b>NBTY, INC.,</b>	)	<b>AGREEMENT CONTAINING</b>
<b>a corporation,</b>	)	<b>CONSENT ORDER</b>
	)	
<b>NATURESMART LLC,</b>	)	
<b>a limited liability company, and</b>	)	
	)	
<b>REXALL SUNDOWN, INC.,</b>	)	
<b>a corporation.</b>	)	
	)	
	)	

The Federal Trade Commission (“Commission”) has conducted an investigation of certain acts and practices of NBTY, Inc., a corporation, NatureSmart LLC, a limited liability company, and Rexall Sundown, Inc., a corporation (“proposed respondents”). Proposed respondents, having been represented by counsel, are willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between NBTY, Inc., NatureSmart LLC, and Rexall Sundown, Inc., by their duly authorized officers, and counsel for the Federal Trade Commission that:

1. Proposed respondent NBTY, Inc. is a Delaware corporation with its principal place of business located at 2100 Smithtown Ave., Ronkonkoma, New York 11779.
2. Proposed respondent NatureSmart LLC is a Colorado limited liability company with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779.
3. Proposed respondent Rexall Sundown, Inc., also doing business as Sundown, Inc., is a Florida corporation with its principal place of business at 2100 Smithtown Ave., Ronkonkoma, New York 11779.
4. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint.
5. Proposed respondents waive:
  - a. Any further procedural steps;

- b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and
  - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.
6. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of thirty (30) days and information about it will be publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.
7. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft complaint, or that the facts as alleged in the draft complaint, other than the jurisdictional facts, are true.
8. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time frame provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and the decision and order to proposed respondents' addresses as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.
9. Proposed respondents have read the draft complaint and consent order. Proposed respondents understand that they may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

## **ORDER**

### **DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondents” means NBTY, Inc., NatureSmart LLC, and Rexall Sundown, Inc., also doing business as Sundown, Inc., and their successors and assigns, and their officers, and each of the above’s agents, servants, representatives, and employees.
2. The “NBTY Products” means, collectively, the children’s multivitamin and mineral chewable tablet products manufactured, promoted, advertised, distributed, and sold by respondents under the names Disney Princess Complete and Marvel Heroes Complete and the following children’s multivitamin and mineral gummy products: Disney Princess Gummies; Disney Pixar Cars Gummies; Disney Winnie the Pooh Gummies; Disney Tigger & Pooh Gummies; Disney Pixar Finding Nemo Gummies; Disney Pixar Wall-E Gummies; Disney Pixar Toy Story Gummies; and Marvel Heroes Gummies.
3. “Commerce” means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. “Product” means any good that is offered for sale, sold or distributed to the public by respondents, their successors and assigns, under any brand name of respondents, their successors and assigns, or under the brand name of any third party. “Product” also means any product sold or distributed to the public by third parties under any brand name of respondents, or under private labeling agreements with respondents, their successors and assigns. “Product” shall include, but not be limited to, the NBTY Products.
5. “Food” and “drug” mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
6. “DHA” means docosahexaenoic acid, a polyunsaturated Omega-3 fatty acid.
7. The term “including” in this order means “including without limitation.”
8. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

### **I.**

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Product, in or affecting commerce, shall not misrepresent, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that such Product contains a specific ingredient or a specific numerical amount of any ingredient.

## II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Product, in or affecting commerce, shall not make, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation about the health benefits, performance, or efficacy of any Product, including, but not limited to, representations that DHA or any other substantially similar ingredient in such Product promotes brain or eye health, unless the representation is non-misleading, and, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

## III.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondents from making any representation for:

- A. Any drug that is permitted in labeling for such drug under any tentative or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. 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.

## IV.

IT IS FURTHER ORDERED that within five (5) days from the date of service of this order, respondents, jointly and severally, shall pay to the Commission by electronic funds transfer the sum of **two million, one hundred thousand dollars (\$2,100,000)** in accordance with instructions provided by the Commission.

- A. 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 that payment is due, the entire amount shall immediately become due and payable. Respondents shall be jointly and severally liable for all payments required by this Subpart and any interest on such payments.

- B. All funds paid to the Commission pursuant to this order 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, including restitution, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers (which shall be the first priority for dispersing the funds set forth above) is wholly or partially impracticable or funds remain after the redress to consumers 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 respondents' practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Respondents shall have no right to challenge the Commission's choice of remedies under this Part. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under this Part herein shall be deemed a payment of any fine, penalty, or punitive assessment.
- C. Respondents relinquish all dominion, control, and title to the funds paid pursuant to this Part to the fullest extent permitted by law. Respondents shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise. In the event of bankruptcy of any respondent, respondents acknowledge that the funds paid are not part of the debtor's estate, nor does the estate have any claim or interest therein.
- D. Respondents 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 under this Part, including, but not limited to, a nondischargeability complaint in any bankruptcy case.
- E. 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.

## V.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

## VI.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having more than a *de minimis* responsibility with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## VII.

IT IS FURTHER ORDERED that each respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing or filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, each respondent, and its successors and assigns, shall notify the Commission as soon as is practicable after obtaining such knowledge. For the purposes of this order, respondents shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier or U.S. Postal Express Mail all reports and notifications to the Commission that are required by this order to:

Associate Director for Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
RE: *In the Matter of NBTY, et al.*, FTC File No. 102 3080

Provided that, in lieu of overnight courier, respondents may send such reports or notifications by first-class mail, but only if respondents contemporaneously send an electronic version of such report or notification to the Commission at [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

## VIII.

IT IS FURTHER ORDERED that respondents, and their successors and assigns, each shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents shall submit additional true and accurate written reports.

## IX.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Signed by:

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Dated

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Harvey Kamil, President  
NBTY, INC.;  
NATURESMART LLC; and  
REXALL SUNDOWN, INC.

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JOHN R. FLEDER  
HYMAN, PHELPS & McNAMARA, P.C.  
Counsel for Respondents

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DEVIN W. DOMOND  
ANDREW D. WONE  
Counsel for the Federal Trade Commission

APPROVED:

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MARY K. ENGLE  
Associate Director  
Division of Advertising Practices

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DAVID C. VLADECK  
Director  
Bureau of Consumer Protection