

File No. CT-2001/001

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE COMPETITION ACT, R.S., 1985, c. C-34,
as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii)
of the *Competition Act* relating to the marketing practices of P.V.I.

AND IN THE MATTER OF an Application by the Commissioner of
Competition for an order pursuant to section 74.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

**P.V.I. International Inc.,
Michael Golka and Darren Golka**

Respondents

NOTICE OF RESPONSE TO APPLICATION

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
FILED	APR 3 2001 <i>JL</i>
REGISTRAR - REGISTRAIRE	
OTTAWA, ONT.	# 002

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1. The Respondents oppose the Application by the commissioner of Competition herein.
2. The Respondents deny each and every allegation of fact and claim in the Notice of Application, and put the Applicants to the strict proof thereof.
3. Without in any way limiting the generality of the foregoing, the Respondents expressly deny:
 - a. making any false or misleading statements or representation pertaining in any way to the P.V.I. or any similar device, as alleged in the Notice of Application; or otherwise.
 - b. that Respondent, or any one of them, have engaged in any reviewable conduct as described in the Competition Act, the Notice of Application herein, or otherwise;
 - c. making any representations which create any false or misleading impression with regard to the P.V.I., as alleged in the Notice of Application, or otherwise;
4. The Respondents state and the fact is that all representations made by the Respondents with regard to P.V.I. are supportable by scientifically proven test data.
5. The Respondents state and the fact is that if any of the representations made by the Respondents with regard to the P.V.I. were incorrect, which is not admitted but specifically denied, then the Respondents state that all representations made have been made honestly, and based upon reasonable inferences drawn from properly obtained scientific test data.
6. The Respondents state, and the fact is, that twenty-one years ago, in 1980 the Consumer Protection Division of the United States Postal Service (the United States equivalent to the Canadian Competition Bureau) began a five year litigation on precisely these same issues, which litigation resulted in a complete dismissal of all claims suggesting misrepresentation, and resulted in the imposition of a heavy cost penalty against the Government body alleging those misrepresentations. We have enclosed for your study the three final documents from that litigation.
 - a. Judge Skinner's February 1984 (Memorandum) Final Decision on the case.
 - b. Judge Skinner's January 1985 Fee Award under the Law of Equal Access to Justice can only be awarded if there is no more than zero per cent justification to the government's position. In other words, the fee can only be awarded if the entire case was government harassment.
 - c. A copy of the check which the Postal Service cut upon its acceptance of Judge Skinner's decisions.

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7. The Respondents will request a voire dire examination of each of the Applicants expert witnesses.
8. The Respondents request that this proceeding be conducted in the English language.
9. The Respondents request that the hearing of this Application be heard in Toronto, although we are prepared to accept Ottawa.
10. Wherefore, the Respondents request that the Applicants Application be dismissed with solicitor and his own client indemnity costs payable to the Respondents forthwith.

Dated at Edmonton, Alberta, this 2nd day of April, 2001.

PVI International Inc.
5829-103 Street
Edmonton, AB T6H 2H3

Michael J. Golka
#50, 53049, Range road 220
Ardrossan, AB T8E 2C8

Darren Golka
#E 104, 319 Saddleback Road
Edmonton, AB T6G 4M5

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOEL ROBINSON d/b/a NATIONAL
FUELSAVER CORPORATION,
Plaintiff,

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CIVIL ACTION
NO. 83-2306-S

V.

UNITED STATES POSTAL SERVICE,
Defendant

MEMORANDUM AND ORDER

February 28, 1984

SKINNER, D.J.

The plaintiff in this action seeks a declaratory judgment voiding a decision of the United States Postal Service which concluded that the plaintiff engaged in a scheme to obtain money through the mail by means of materially false statements. He also seeks injunctive relief from a "postal stop order" preventing the plaintiff's use of the United States mail in connection with the marketing of his product. Both parties have moved for summary judgment.

The plaintiff invented and markets a product called GASAVER which brings about more complete combustion and better gas mileage in automobile engines by means of platinum catalysis. The Postal Service, proceeding under 39 U.S.C. 3005, alleged that

Robinson made false statements about GASAVER. Following an administrative hearing before an administrative law judge ("ALJ"), another judge of this court remanded the case to the Postal Service for a de novo hearing. In the second administrative hearing, the Postal Service alleged that the plaintiff had made four misrepresentations with respect to GASAVER. On August 13, 1981, the ALJ found that "it is more probable than not that GASAVER would produce a 5% improvement in fuel economy" (ALJ's April 26, 1983 Memorandum, p. 30), but ordered the issuance of a postal stop order (Order No. 83-74) on the basis that three misrepresentations at issue were false. The three alleged misrepresentations were:

(a) The installation of GASAVER on an automobile will cause a dramatic increase in gas mileage of up to 48% or better;

(b) GASAVER has passed the Environmental Protection Agency's ("EPA") R-74 test (emission reduction) and was granted the EPA's approval to market GASAVER;

(c) The fuel economy claims for GASAVER are supported by scientific research tests.

The plaintiff then filed his complaint in this court seeking judicial review of the ALJ's decision. On September 23, 1983, I found that the plaintiff had a likelihood of success on the merits and issued a preliminary injunction against enforcement of the postal stop order.

The applicable standard of review in this case require affirmance of the ALJ's ruling if it is supported by substantial evidence. See, Unique Ideas, Inc. v. United States Postal Service, 416 F.Supp. 1142, 1144-1145 (S.D. N.Y. 1976). After careful consideration of the administrative record, I have concluded that the ALJ's findings regarding the misrepresentations alleged by the Postal Service are not supported by substantial evidence.

I. The "dramatic increase" representation.

The ALJ accepted the Postal Service's argument that the plaintiff claimed that GASAVER "will cause a dramatic increase in gas mileage of up to 48% or better". The primary basis for this conclusion is a chart representing results of a test conducted by the plaintiffs and others. The chart shows that vehicles adding the GASAVER mechanism obtained on average a 28.3% fuel savings, with results ranging from a 48.3% increase in efficiency to a 12.4% decrease. (Complainant's Exhibit 5). The Postal Service does not suggest that the test was fraudulent. The chart contains a disclaimer that "[o]ther variables which may have influenced this study have not been defined". Id. Although some media accounts perhaps have overemphasized the importance of the 48.3% figure, there is no evidence whatsoever that the plaintiff used this number except in the careful manner presented in the

chart. Since the chart does not state or suggest that GASAVER will increase fuel savings by 48.3%, the chart does not provide substantial evidence to support this allegation.

The government also argues that the plaintiff's statement that a "few [customers] are getting as much as 6 to 8 more miles per gallon" provides evidence to support the government's allegation of misrepresentation. (Defendant's brief, pp. 4-5). This argument is entirely without merit. First, the statement attributed to the plaintiff is entirely consistent with the tests of the plaintiff and others. Second, the statement that a "few" are obtaining the upper limit of six to eight miles per gallon improvement hardly translates into a promise that one will obtain a dramatic improvement. Third, the government's argument relies on the assumption that vehicles get only eight to sixteen miles per gallon. This assumption is pulled out of thin air; if one makes the equally plausible assumption that vehicles get twenty-five miles per gallon, the six to eight mile per gallon improvement claimed for a few customers is consistent with available testing data.

II. The EPA claim.

The ALJ found that the plaintiff had represented that GASAVER had passed the EPA H-74 emission reduction test, and that EPA had approved the system for marketing. He also found that

these representations were false. The record indicates that the EPA does inquire whether devices such as the plaintiff's increase pollutants, and, upon finding that they do not, reports that it will not interfere with the sales of such products. (Transcript of July 22-23 hearing, pp. 228-231).

The dispute between the parties on this issue concerns whether the plaintiff's statements are a fair characterization of the EPA's practices and actions. I do not feel it is necessary to reach this issue because it is both trivial and moot. The misrepresentation, if indeed there was one, was a minor one unlikely to have a significant impact on consumers. The defendant has conceded this point. Moreover, the plaintiff voluntarily stopped making the claim which the Postal Service finds offensive long before the Postal Service or any other government agency raised an objection to it.

III. The scientific research test representation.

The government's entire defense of the ALJ's finding on this issue reads as follows:

A fair reading of the Boston Phoenix (R. 389) and In Business (R. 402) articles reveals that Robinson ties the research activities of Mobil and the Brookhaven Laboratory into the efficacy of the GASAVER.

Unless this court is prepared to substitute its judgment for that of the administrative agency, the decision of Judge Dicus should be affirmed, (Defendant's brief, pp. 7-8).

The agency's judgment in this case was unsupported by substantial evidence. The Postal Service has not put forward one shred of evidence which even suggests that the plaintiff misrepresented the nature of his tests. *The plaintiff and various independent parties have used a variety of methodologies to test the value of GASAVER. These independent parties often make stronger claims for GASAVER than the plaintiff makes. See, e.g., Complainant's Exhibit 3. In addition, the record indicates that testing by Brookhaven and Mobil concluded that platinum is an effective catalyst in the ignition of gasoline vapor, the theory that GASAVER is based upon. Neither the plaintiff nor any journalist has claimed that these laboratories have tested the plaintiff's device, although a Mobil scientist has made positive statements about the plaintiff's work. (Complainant's Exhibit 4).

Accordingly, the plaintiff's motion for summary judgment in his favor is ALLOWED and the defendant is enjoined permanently from enforcing or otherwise implementing the provisions of Order No. 83-74 or any similar provisions.

*This decision, in general, and the next two sentences, in particular, are Judge Skinner's response to the following statement in the government's brief: "The central issue in this case is the extent to which the installation of a Gasaver will cause an improvement in fuel economy. Plaintiff (National Fuelsaver Corp.) contends that the device will typically increase fuel economy by 15 to 30%, and in some instances even more."

Walter Jay Skinner
United States District Judge
(Computer generated signature,
Original signature on file.)

JOEL ROBINSON d/b/a NATIONAL	*	
FUELSAVER CORPORATION,	*	
Plaintiff,	*	CIVIL ACTION
	*	NO. 83-2306-S
V.	*	
	*	
UNITED STATES POSTAL SERVICE,	*	
Defendant	*	

FINDINGS AND ORDER OF
APPLICATION FOR FEES AND EXPENSES UNDER 28 U.S.C. 2412
 January 7, 1985

SKINNER, D.J.

I find that the government's position in this litigation was not substantially justified. Even though the Assistant United States Attorney behaved correctly, as he states, the underlying position of the Postal Service which created the litigation was unjustified.

I find the work performed was necessary and skillfully performed and the hourly rate charge of \$73.00 an hour is well below market rates for a lawyer of Mr. Cowin's experience. There were no unusual aspects of this case but skill and experience were required. I have considered this application in view of the guidelines contained in King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977) and make the following award:

For attorney's fees	\$18,391.75
Disbursements	926.05
Expert witness fees	2,735.00
Expert's expenses	<u>694.71</u>
Total	\$22,747.51

~~Walter Jay Skinner~~
 United States District Judge
 (Computer generated signature,
 Original signature on file.)

U.S. POSTAL SERVICE POST OFFICE AT WASH, D.C.

Postmaster: Treasurer of the United States

PAY TO THE ORDER OF Joe Robinson

d/b/a National Fuelstar Corporation

THE SUM OF Twenty two thousand seven hundred forty seven and 57/100 cents

ADVANCE OF FUNDS

NO. 5738903 SYMBOL 9500

POSTAL SERVICE WASHINGTON, D.C. 20501-51

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