

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

SEPTEMBER 23, 1983

SKINNER, D.J.

This complaint for declaratory judgment and injunctive relief is in substance an application for judicial review of a decision of the Postal Service that plaintiff has been engaged in a scheme to obtain money through the mail by means of materially false statements and of an order preventing delivery of related mail to the plaintiff. Plaintiff seeks a preliminary injunction against the enforcement of the order pending consideration of the merits.

Plaintiff has two difficult burdens to surmount. The first is the requirement in this Circuit that a preliminary injunction will be issued only if the plaintiff establishes a likelihood of success on the merits, a likelihood of irreparable harm if the injunction is not issued and a likelihood that public policy will not be subverted by the issuance of the injunction. Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981).

The second is that the applicable standard of review requires affirmance of the Postal Service ruling if it is supported by substantial evidence. Unique Ideas, Inc. v. United Postal Service, 416 F.Supp. 1142.

The Associate Judicial Officer found that the Postal Service as complainant had established three of its four complaints against Robinson, the plaintiff in this action. Those three allegations were that in the offering through the mails of a device for saving fuel in automobiles Robinson had falsely represented that

- (a) The device will produce fuel savings of over 48%;
- (b) The device had been approved for marketing by the EPA;
- (c) The fuel economy claims for the device were supported by scientific tests.

In my opinion, Robinson is likely to succeed on the merits for the following reasons:

Robinson's representation was that one vehicle tested by an independent transportation company had in fact registered such a savings. This is not shown to be false. Its use was always in connection with an explication of the entire test in which other vehicles had different rates of savings and one vehicle had worse fuel consumption with the device than without. Moreover,

Robinson made it clear in his promotional materials that some of his customers had realized no fuel savings with the device and that he had refunded the purchase price.

While I agree with the Associate Judicial Officer that the General Motors and Brookhaven tests were clearly depicted as scientific tests although not explicitly so labelled, there is not substantial evidence showing that a person of ordinary intelligence and sensibility would have concluded that these tests established the efficacy of Robinson's device. All Robinson claims they establish is that platinum is an effective catalyst in the combustion of gasoline or diesel fuel vapor. This general proposition is conceded to be true.

It is conceded that Robinson included a statement of EPA approval in his promotional material until August 1980. He then voluntarily discontinued it prior to any proceeding against him. (There was some factual justification for the use of this statement but it was not accurate.) The Postal Service admits that the use of this statement in the past, standing alone, would not justify the issuance of the False Representation Order barring delivery of mail to Robinson.

I am further of the opinion that the order preventing delivery of certain mail to Robinson is likely to cause him irreparable harm. The order prevents the delivery of responses to Robinson's advertising, including letters, postal money orders and other forms of payment for the fuel saving device. The

Postal Service argues that mere delay in receiving money does not constitute irreparable damage. In this case, in my opinion, there is likely to be irreparable harm to Robinson's credibility and reputation for reliable delivery if the orders are not allowed to go through.

I further find that the issuance of a preliminary injunction will not subvert the public interest because, as the Associate Judicial Officer found, it is likely that Robinson's device is an effective fuel saving device and purchasers will in fact be receiving what they bargained for.

Accordingly, a preliminary injunction shall issue as prayed for.

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

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DISTRICT OF MASSACHUSETTS

JOEL ROBINSON d/b/a NATIONAL	*	
FUELSAVER CORPORATION,	*	
Plaintiff,	*	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") H-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 J ay Skinner  
United States District Judge  
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Original signature on file.)

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DISTRICT OF MASSACHUSETTS

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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 J ay Skinner  
United States District Judge  
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