

Republic of the Philippines
Supreme Court
Manila

DEPARTMENT OF HEALTH	
Office of the Secretary	
Received by:	<i>Mel</i>
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**PHARMACEUTICAL and HEALTH CARE
ASSOCIATION of the PHILIPPINES,**
Petitioner,

- versus -

**Health Secretary
FRANCISCO T. DUQUE III;
Health Undersecretaries
DR. ETHELYN P. NIETO,
DR. MARGARITA M. GALON,
ATTY. ALEXANDER A. PADILLA,
& DR. JADE F. DEL MUNDO;
and Assistant Secretaries
DR. MARIO C. VILLAVERDE,
DR. DAVID J. LOZADA, AND
DR. NEMESIO T. GAKO,**

Respondents.

G.R. No. 173034
For: Certiorari &
Prohibition with Prayer for
the Issuance of a
Preliminary Injunction
&/or Temporary
Restraining Order

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MOTION FOR RECONSIDERATION

(Of Order Dated 11 July 2006)

COMES NOW PETITIONER, by counsel, to the Honorable Court respectfully states that:

1. This involves a *Petition for Certiorari and Prohibition* challenging the patently unconstitutional and unlawful provisions of **Administrative Order No. 2006-0012** entitled "*Revised Implementing Rules and Regulations of Executive Order No. 51, Otherwise Known as The "Milk Code," Relevant International Agreements, Penalizing Violations Thereof, and for Other Purposes*" (hereinafter referred to as the "RIRR"), which was signed by Respondents Department of Health officials on 15 May 2006.

2. Included in the *Petition* is a prayer for issuance of a Temporary Restraining Order considering that the questioned RIRR was to take effect fifteen (15) days after publication and the same was published on page A-27 of the Philippine Star on 22 June 2006¹ and page A-3 of the Malaya Newspaper on the same date.² Consequently, the RIRR became effective fifteen (15) days after said publication,³ or on **7 July 2006**.

3. On 11 July 2006, however, the Honorable Court issued a *Resolution*⁴ denying the prayer of the Petitioner for the issuance of a temporary restraining order. A copy of the said *Order* was received by Petitioner on 19 July 2006.

Ground for Motion

4. Petitioner most respectfully MOVES for a reconsideration of the said *Resolution* on the ground that the implementation of the **patently unconstitutional and unlawful** provisions of the RIRR will cause grave and irreparable damage to the Milk Industry in the form of alarmingly excessive logistic costs and expenses which must be shouldered by the Milk Industry **even prior to the final determination of this High Court of the constitutionality of its questioned provisions**.

¹ A copy of the pertinent page of the Philippine Star is hereby attached as **Annex A**.

² A copy of the pertinent page of the Malaya Newspaper is hereby attached as **Annex B**.

³ Section 59 RIRR.

⁴ A copy of the *Resolution* dated 11 July 2006 is attached herein as: **Annex C**.

**Timeliness of this
Motion for Reconsideration**

5. The *Resolution* dated 1 July 2006 was received by the Petitioner on 19 July 2006. Pursuant to Section 1 Rule 56, in relation to Section 1 of Rule 52 of the Revised Rules of Civil Procedure, the Petitioner has fifteen (15) days from service of the said *Order*, or until 3 August 2006, to submit the instant *Motion for Reconsideration*.

Discussion

6. It is irrefutable that the Milk Industry has consistently and unflinchingly supported the Milk Code and its objectives, in recognition of the fact that breastmilk is and continues to be the gold standard for infant feeding. This support will continue and will not waver even in the event that the Milk Code is LAWFULLY AMENDED.

7. The power to lawfully amend the Milk Code, however is exclusively lodged with Congress and not with the Respondents Department of Health Officials, who, by promulgating the questioned RIRR, clearly arrogated upon themselves a power which is undoubtedly not theirs to exercise. Such act is in complete and utter violation of the rule laid down by this High Court that **the authority of administrative officials to promulgate rules in the exercise of their power of subordinate legislation is necessarily limited by what is provided for in the legislative enactment.**

8. In fact, the Department of Health, in an article entitled "BAN ON MISLEADING MILK ADS EYED," published on page A-8 of

the Manila Bulletin dated 11 July 2006,⁵ hailed their success by audaciously referring to the RIRR as the “**Revised Milk Code**” or the “**New Code.**”

9. Likewise, the Department of Trade and Industry (hereinafter the “DTI”) itself admits and concedes in its Position Paper dated 18 May 2006 that the disputed RIRR contains questionable provisions which prohibit acts not otherwise proscribed and penalized by the Milk Code.⁶

9.1. The DTI cites **Section 4(f)** of the RIRR which “prohibits advertising, promotions, or sponsorships of breastmilk substitutes and infant formula; and **Section 11** of the same RIRR, which “disallows the advertising, promotions, sponsorships or marketing materials and activities of breastmilk substitutes...and other related products...as they tend to convey or give subliminal messages or impressions that undermine breastmilk and breastfeeding or exaggerate their own unsubstantiated claim or worth.”

9.2. It is the **DTI’s position** that the aforementioned provisions are **contrary to the Milk Code** as no ban or prohibition against advertising and promotion of breastmilk substitutes can be found therein.

9.3. The Department furthermore noted, as the Petitioner has consistently stressed, that the intention of the

⁵ A copy of page A-8 of the Manila Bulletin dated 11 July 2006 is herein attached as **Annex D.**

⁶ A copy of the Position Paper of the DTI is herein attached as **Annex E.**

Milk Code is to **regulate the use of breastmilk substitutes.** Hence, the RIRR should be "in harmony with the provisions of the law" and "cannot go beyond what the law provides."

9.4. The DTI moreover echoed the fear of the Petitioner that if the above-mentioned provisions were to be allowed, this may give rise to "an **infringement of the fundamental right of consumers to information and freedom of choice,**" and "damage of the infant formula sub-sector which employs a **substantial number of Filipino employees.**"

10. On the basis of the patent unconstitutionality of the RIRR alone, it is respectfully submitted that the Petitioner is clearly entitled to the issuance of a temporary restraining order in order to prevent the unlawful and unjust exercise of the power to issue supplementary legislation by Respondents.

11. Moreover, failure to restrain the highly irregular provisions of the RIRR will **entail great cost of logistic impact even PRIOR to any definitive ruling of this High Court** regarding the constitutionality of its disputed provisions.

11.1. According to the information supplied by participating PHAP member companies to the PHAP Secretariat, withdrawal and destruction of non-compliant promotional materials and samples will entail expenses amounting to **One Hundred Million Pesos (Php100,000,000.00).**

11.2. Also, expenses required for the destruction of existing non-compliant inventory, withdrawal and destruction of

trade stock due to non-compliant labels, and write-off of existing and pre-ordered packaging materials including, among others, tin cans, tin plates, plastic caps, labels, cartons, will amount to **Three Billion, Five Hundred Million Pesos (Php3,500,000,000.00)**.

11.3. Moreover, the cost of lost sales for an estimated production period of three to four months, as well as the production and reintroduction of fully compliant products, will cost milk companies about **Six Billion Pesos (Php6,000,000,000.00)**.

11.4. Even more alarming and disturbing, compliance with the RIRR will result in the appalling displacement of **One thousand, Five hundred (1,500) employees**, including sales force, merchandisers and indirect contractual employees, and will thereby force milk companies to disburse **Three Hundred Fifty Million Pesos (Php350,000,000.00)** for severance of permanent employees, among others.

11.5. Finally, milk companies will be compelled to shell out funds for logistics, labor cost for destruction and unbundling, and rent of warehouses for storing returned goods, in the amount of **Ten Million Pesos (Php 10,000,000.00)**.

12. Based on the above information, it is apparent that the burden imposed on the member-companies of PHAP, as well as other milk companies, to comply with the highly unconstitutional, prohibitive and confiscatory provisions of the RIRR will entail

expenses totaling to around **Nine Billion, Nine Hundred Sixty Million Pesos (Php9,960,000,000.00)**.

13. From the foregoing discussion, it is respectfully submitted that Petitioner is clearly entitled to the issuance of a temporary restraining order to prevent the grave and irreparable damage that its member-companies shall suffer from the implementation of the challenged RIRR.

14. It is a well-entrenched rule laid down by this High Court that the issuance of a temporary restraining order is proper "**in cases of extreme urgency; where the right is very clear; where considerations of relative inconvenience bear strongly in complainant's favor; where there is a willful and unlawful invasion of plaintiff's right against his protest and remonstrance,** the injury being a continuing one xxx."⁷ Indeed the issuance of said order "should not be denied the complainant when he makes out a clear case free from doubt and dispute."⁸

15. With the adamant opposition raised against the RIRR, Respondents, in a letter dated 18 July 2006 and addressed to the Petitioner,⁹ agreed to give the Milk Industry a grace period within which to comply with the questioned provisions of the same. This concession, however, does not erase or correct the patent defect which the RIRR suffers from, nor does it prevent the grave and irreparable damage which the Milk Industry will unjustly sustain.

⁷ Alvaro vs. Zapata, 118 SCRA 722 (1982).

⁸ Commissioner of Customs vs. CLoribel, et al., 19 SCRA 234 (1967).

⁹ A copy of the letter is herein attached as **Annex F**.

16. Without doubt, any intention to give the Milk Code more teeth may not be done by the promulgation of unconstitutional implementing rules and regulations. We have a lawful process for amending laws which the Respondents, regardless of the public office which they hold, are duty-bound to observe and respect.

17. **The proper recourse of the Respondents in this instance is to lobby for the amendment of the law itself by Congress.** In this regard, Petitioner would like to bring to the Honorable Court's attention that Congress has already taken steps to make the desired amendments to the Milk Code through **House Bill No. 5314,⁹ Senate Resolution 215,¹⁰ and Senate Resolution 223.¹¹** On this basis, it is patent that the amendatory process is already underway. Hence, the Respondents' resort to an unconstitutional exercise of their power of subordinate legislation is patently unwarranted.

18. **To recapitulate, administrative agencies should not be allowed to act with such deliberate disregard of well-entrenched jurisprudential principles and the highly valued provisions of the Constitution, expecting that the burden of putting a stop to such an unconstitutional act will be shifted to other parties.**

⁹ **House Bill No. 5314**, entitled "*An Act to Protect, Promote, and Support Proper Infant and Young Child Feeding, Penalizing Violations Thereof, and for Other Purposes, Amending Thereby Executive Order No. 51, the National Milk Code of 1986,*" has been referred in plenary on first reading.

¹⁰ **Senate Resolution No. 215** was filed in the Senate by Senator Mar Roxas, urging the Committee on Health and Demography, chaired by Sen. Pia Cayetano, to conduct an inquiry, in aid of legislation, into the use of infant formula in the country.

¹¹ **Senate Resolution No. 223** was filed by Senator Pia Cayetano, directing the Senate to conduct an inquiry on the implementation of Executive Order 51, which is The Milk Code, and Republic Act 7600, or the Rooming-in and Breastfeeding Act of 1992.

19. For the reasons aforementioned, it is respectfully submitted that there is a clearly paramount and overriding need for this High Court to reconsider its *Resolution* dated 11 July 2006, and thereafter immediately issue a temporary restraining order or a status quo order which shall restrain the Respondents and their representatives from implementing the patently unconstitutional and unlawful provisions of the questioned RIRR.

PRAYER

WHEREFORE premises considered Petitioner respectfully prays:

1. That a **Temporary Restraining Order** be issued by the Honorable Court prohibiting and enjoining Respondents from implementing the unconstitutional and unlawful provisions of the Revised Implementing Rules and Regulations of the Milk Code; or
2. In the alternative, that the Honorable Court issue a **Status Quo Order**, pending the resolution of the issues raised before this Court.

Petitioner prays for all other legal, just and equitable relief.

Pasig City for Manila, 24 July 2006.

YORAC* ARROYO CHUA*
CAEDO & CORONEL Law Firm
Unit 3103-A West Tower
Philippine Stock Exchange Centre
Exchange Road Ortigas Center Pasig

* *Haydee B. Yorac (1941-2005).*
* *William T. Chua (1955-2004).*

By:




FELICITAS AQUINO-ARROYO

Roll No. 32182

IBP No. 669020/Makati/10-09-06

PTR No. 2953085/Pasig City/01-09-06

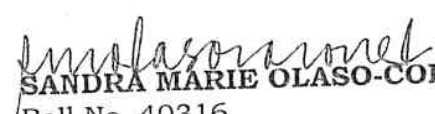


MA. PILAR MARTINEZ-CAEDO

Roll No. 35220

IBP No. 669022/Rizal/01-19-2006

PTR No. 2953084/Pasig/01-06-2006



SANDRA MARIE OLASO-CORONEL

Roll No. 40316

IBP No. 669021/Rizal/01-09-06

PTR No. 2953083/Pasig/01-06-06



GRACE VERONICA C. REYES

Roll No. 52698

IBP No. 682932/RSM/05-03-06

PTR No. 3105982/Pasig/01-13-06

Copy Furnished by registered mail:

Secretary Francisco Duque III
Department of Health
New Executive Building
Malacañang Palace, Manila

Dr. Ethelyn P. Nieto
Dr. Margarita M. Galon
Atty. Alexander A. Padilla
Dr. Jade F. Del Mundo
Department of Health
New Executive Building
Malacañang Palace, Manila

Dr. Mario C. Villaverde
Dr. Nemesio T. Gako
Department of Health
New Executive Building
Malacañang Palace, Manila

Nota Bene: Other parties will be furnished a copy of this pleading by registered mail due to lack of material time and manpower. Proof of service by registered mail is hereto attached. This explanation is being made in compliance with the requirement of Section 11, Rule 13 of the 1997 Revised Rules of Procedure.

AFFIDAVIT OF SERVICE

I, **CLARO C. PANUELOS**, Filipino, of legal age, after being duly sworn, depose and say:

That on July 25, 2006, I served a copy of the following pleading/paper

MOTION FOR RECONSIDERATION
(Of Order dated 11 July 2006)

in G.R. No. 173034 entitled "Pharmaceutical and Health Care Association of the Philippines vs. Health Secretary Francisco T. Duque III; Health Undersecretaries Dr. Ethelyn P. Nieto, Dr. Margarita M. Galon, et al." pursuant to Sections 11, 12 and 13 of Rule 13, and Sections 4, 5, 6 and 9 of Rule 15, Revised Rules on Civil Procedure as follows:

By Registered Mail to:

✓ Secretary Francisco Duque III
Department of Health
New Executive Building
Malacanang Palace, Manila

✓ Dr. Ethelyn P. Nieto
✓ Dr. Margarita M. Galon
✓ Atty. Alexander A. Padilla
✓ Dr. Jade F. Del Mundo
Department of Health
New Executive Building
Malacanang Palace, Manila


✓ Dr. Mario C. Villaverde
✓ Dr. Nemesio T. Gako
Department of Health
New Executive Building
Malacanang Palace, Manila

By depositing a copy on July 25, 2006 in the post office at _____ as evidenced by Registry Receipt Nos. _____, _____ and _____ hereto attached and indicated after the name of the addressees and with instructions to the postmaster to return the mail to the sender after ten (10) days if undelivered.

Quezon City. July 25, 2006.


CLARO C. PANUELOS
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of July 2006, affiant exhibiting to me his CTC No. 08134195 issued at Pasig City on 01-13-06.


NOELLE RIZA D. CASTILLO
Notary Public
Until December 31, 2007
PTR No. 7167801/Pasig/01-05-06
Roll No. 49443

Doc. No. 309;
Page No. 63;
Book No. V;
Series of 2006.

DEPARTMENT OF TRADE AND INDUSTRY

DTI Position on the Draft

**Revised Implementing Rules and Regulations of Executive Order No. 51
Adopting a National Code of Marketing of Breastmilk Substitutes,
Breastmilk Supplements and Related Products, Penalizing Violations
Thereof, and for Other Purposes**

The Department generally supports the proposed revised IRR for the promotion of breastfeeding and ensuring the proper use of breastmilk substitutes, supplements and other related products. These proposed guidelines will ensure the provision of safe and adequate nutrition for infants and young children.

While we agree that "breastfeeding is good for babies up to two years", we also recognize that the practice of breastfeeding is slowly becoming uncommon, as supported by a report of the World Health Organization showing Filipinos spending P21.5 billion yearly on infant formula.

The DTI, meanwhile, charged with the mandate to protect the rights and welfare of the consumers have to balance the mandate of the law with a friendly environment conducive to the growth of business.

Cognizant of this mandate, the following are our specific comments:

- Section 4 (f) prohibits advertising, promotions, or sponsorships of breastmilk substitutes and infant formula; and
- Section 11 disallows the "advertising, promotions, sponsorships or marketing materials and activities of breastmilk substitutes... and other related products... *as* they tend to convey or give subliminal messages or impressions that undermine breastmilk and breastfeeding or exaggerate their own unsubstantiated claim or worth." (*Emphasis supplied*)

EO 51 or the Milk Code does not contain any provision, which prohibits or bans the advertising and promotion of breastmilk substitutes. As we understand it, the Milk Code aims "to protect and promote breastfeeding and to inform the public about the proper use of breastmilk substitutes and supplements and related products through adequate, consistent and objective information and appropriate **regulation** of the marketing and distribution of said substitutes, supplements and related products." It may be noted then that the *intention* of the Code is to **regulate**. If this is the intent of the law, the proposed revised guidelines or IRR should be regulatory as it cannot go beyond what the law provides. If the above-mentioned provision of the IRR of EO 51 be allowed, it may result to an infringement of the fundamental right of consumers to information and freedom of choice. Verily, the declared policy of the Consumer Act to provide "information and education to facilitate sound choice and the proper exercise of right by the consumer" may remain in vain. Settled is the rule that administrative regulations must be in harmony with the provisions of the law.

Moreover, we believe that the policies of the State must be liberalized to give industry players, local or foreign, the right to promote their products within the scope of the Code. Otherwise, said restrictive provisions as cited herein might result to the damage of the infant formula sub-sector which employs a substantial number of Filipino employees.

To align, therefore, with the real intention of the Code and with the other provisions of the proposed IRR, we suggest that the word "as" between "allowed" and "they" in Section 11 be changed to "if" to reflect that certain advertising or promotional materials and activities on breastmilk substitutes are allowed, provided, they comply with the guidelines set by the Inter-Agency Committee (IAC) created under the Code. This will make it consistent with the succeeding sections.

Relatively, Section 12 of the proposed revised IRR empowers the IAC to come up with substantive and procedural guidelines to screen and review all advertising, promotion and other marketing materials for products within the scope of the Code. This is enough safeguard measure or comfort level to protect the consumers' basic right to choose the appropriate product for their young children. Under the principle of "truth in advertising" practiced worldwide, as long as the advertisement is truthful, factual and scientific, there is no need to prohibit/ban the advertising of a product, and in this case, infant formula.

- We find the guidelines on labeling and content information on the containers or packaging of the subject products, in line with the provisions of the Consumer Act of the Philippines on protection against deceptive, unfair and unconscionable sales acts and practices. The same are also in consonance with the WHO/UNICEF International Code of Marketing of Breastmilk Substitutes.

As to the other provisions of the draft revised IRR pertaining to health information, research and development, and nutrition, we defer to DOH's position since these are under their jurisdiction and prerogative.

On other legal concerns and issues, which may be raised on the draft IRR, we defer to the opinion of the Department of Justice (DOJ), which incidentally is also a member of the Inter-Agency Committee (IAC) created under EO 51.

Rajapinkey
Office of Policy Research
18 May 2006

(ANNEX F)



Republic of the Philippines
Department of Health
OFFICE OF THE SECRETARY

Department of Health, 3rd Bldg. 1
San Lazaro Compound, Sta. Cruz, 1003 Manila
☎ (632) 743-87-01 loc. 1109
☎ 711-6061

18 July 2006

Mr. EDWIN D. FEIST
President, PHAP
Pharmaceutical and Healthcare
Association of the Philippines

Dear Ed,

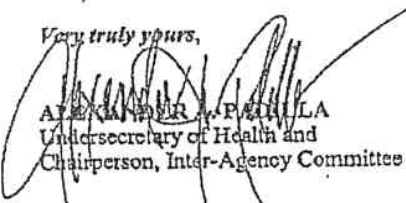
Thank you for your letter, dated 08 July 2006, expressing concerns of the industry on the implementation of the revised Implementing Rules and Regulations (IRR) of the Milk Code.

In this regard, it is not the intention to further burden the industry with the effectivity of the IRR last July 7, 2006; hence the Department is amenable to having existing inventories already in the market or produced before said date, to be disposed of in the usual manner until such stocks have been exhausted. It is of course understood that any new production or labeling or promotional materials shall already be in full compliance with the mandated changes after the same date. In so far as advertising applications already approved, including those to be covered under the new regulations, the same may continue to be shown or displayed for a period of three (3) months or until such time the necessary guidelines have been issued and published by the IAC, whichever comes sooner. Finally, since it is neither the desire of the Department to cause immediate displacement to your medical representatives and again in the spirit of a smooth transition, a status quo would be maintained up to and until the IAC has come out with its new published guidelines. In the interim, it is likewise suggested that perhaps they be adequately re-tooled to service other products not otherwise covered by the Code. Should the industry have other suggestions as would smoothen compliance and so long as it does not run counter to the intent, spirit and letter of the revised regulations, this Office will always leave its doors open.

Eventually, it is the Department's intent to schedule a separate audience with you and the industry sometime in August to fully thresh out other transition issues including how best to implement and comply with the provisions of the RIRR in coordination with one another. The Inter Agency Committee is earlier scheduled to convene where these matters will be similarly discussed. We shall accordingly notify you of the date of our scheduled date for consultation.

With that, let me thank you for your usual support and cooperation.

Very truly yours,


ALEXANDER P. PADILLA
Undersecretary of Health and
Chairperson, Inter-Agency Committee