

US CONGRESS

Investigation of Unfair Commercial Practices by Amazon

DECLARATION OF JEFF HALEY

Under penalty of perjury under the laws of the State of Washington, Jeff Haley, declares that the following facts are true.

1. I was the President of OraHealth Corporation, a/k/a OraHealth USA, Inc., which was a Washington State company, of which I was the product inventor and founder. OraHealth went out of business in January 2019 when it was merged into another company.
2. OraHealth was a supplier to Amazon of oral care products for resale since OraHealth started business in 2004. Virtually all of the sales were of a single product, XyliMelts for Dry Mouth, rated by dentists as the most effective remedy for dry mouth, the only non-prescription remedy for dry mouth while sleeping which is when dry mouth is worst.
3. In late 2011, between Christmas and New Year's eve, Amazon prevailed upon OraHealth to allow Amazon to take a 10% rebate on goods to be purchased during calendar year 2012 for purposes of "marketing co-op", often referred to by Amazon as "Base Accrual / MDF". The contract expressly applied only to calendar year 2012 but had a provision stating that it would be extended year by year if not expressly cancelled by a party. In a May 9, 2012 e-mail to Amazon and a prior message sent to Amazon via its web site, OraHealth retracted, repudiated, and cancelled the contract at least for years after 2012.
4. For purchases by Amazon for the year 2012, Amazon took deductions from its payments to OraHealth for goods sold by OraHealth to Amazon equal to 10% of the sales. Each deduction was taken within one month after the end of the period to which it applied. Each claim for 10% of the price of each purchase of goods was made by Amazon no later than one month after the end of the calendar quarter in which the purchase took place.

5. During the years 2013, 2014, and 2015, Amazon did not claim or take any 10% “coop” or “base accrual” or “MDF” deductions, which was consistent with OraHealth’s understanding that the “marketing co-op” agreement of late 2011 was indeed cancelled, and the matter appeared to be resolved.

6. Amazon maintains a web site called “Vendor Central” where, Amazon claims, each vendor to Amazon can, at any time, look up a list of all contracts between the parties and, by clicking on a listed contract, read all the terms of that contract. Here is a true copy of the claim by Amazon in May, 2018:

In [Help](#) > [Vendor Orientation](#) >

About Vendor Central

Welcome to Vendor Central. The Vendor Central website helps you conduct business with us smoothly and efficiently. The Vendor Central features and reports help you create a great experience for our customers.

See the [Getting Started Guide](#) for a tour of the main features you will use to manage your business on Vendor Central.

In Vendor Central, you can:

- Create and manage your products.
- Collaborate on inventory management.
- View item level reporting on sales and inventory.
- View the status of invoices and payments.
- Review vendor manuals and agreements.
- Learn how to integrate with EDI and monitor EDI messages.

Our goal is to establish a successful business relationship with minimal supply chain costs so that together we can create the best possible experience for our customers. To understand the processes and find the resources you need to successfully and efficiently conduct business with us, see: [Use Vendor Central to Do Business with Us](#).

7. At all times from January 1, 2013 through March 31, 2017, the Vendor Central website listed no coop or “Base Accrual” or “MDF” contract as applying between OraHealth and Amazon. Here is a true copy of the listing of agreements for OraHealth as shown on May 3, 2018 on Vendor Central which listing shows both current agreements and prior agreements at least as far back as 2014 because the first listed agreement is one that applied to calendar year 2014. The list does not show a “Coop” or “Base Accrual” or “MDF” agreement for any time before April 1, 2017.

Coop Agreements - ORAM7

Agreement Title: ORAHEALTH USA, INC. (ORAM7) - 1.5% - Accrual (Freight Allowance) - 2014-01-01 - 2014-12-31

Agreement Title: 06U0Q Health Personal Care Single Sampling Trial Fee 2017-09-15 to 2017-12-31

Agreement Title: US Base Accrual ORAM7 2017-04-01 to 2018-03-31 USD

Agreement Title: US Freight Allowance ORAM7 2017-04-01 to 2018-03-31 USD

Agreement Title: US Damage Allowance ORAM7 2017-04-01 to 2018-03-31 USD

Agreement Title: US Base Accrual ORAM7 2018-04-01 to 2019-03-31 USD

Agreement Title: Orahealth USA, Inc. - 0.89% - Accrual (Freight Allowance)

Agreement Title: Orahealth USA, Inc. - 0.65% - Accrual (Damage Allowance)

8. At all times from January 1, 2013 through March 31, 2017, through its Vendor Central web site, Amazon expressly stated to OraHealth in writing that there was no agreement between the parties calling for a rebate other than small amounts for a freight allowance and for a damage allowance. For example, during that time, on March 11, 2017, when Amazon requested that OraHealth agree to a 13.65% rebate for “Base Accrual / MDF” going forward, Amazon expressly stated in writing to OraHealth that the then current terms were “0.00%” as shown by the following true copy a web page presented by Vendor Central to OraHealth on that date.

Current Base Accrual/Marketing Development Funds (MDF) : 0.00% Base Accrual

New Base Accrual/Marketing Development Funds (MDF) : 13.65% Base Accrual

MDF reflects funds that Amazon invests to continually improve the customer experience, increase discoverability of your products, and ultimately drive sales. These funds enable us to drive impressions and sales to your products through activities like automated marketing emails, site personalization widgets, traffic drivers related to search engine optimization and improving browse capabilities, paid external marketing directly for your products, faster shipping options for your products that enhance the customer convenience, catalog improvements, brand stores, and vendor self-service tools to manage and promote your products. MDF is calculated to require each vendor to cover a minimum base marketing development investment based on the nature of the products sold.

9. During the years 2013 through 2015, OraHealth relied on the facts that Amazon was not claiming or taking coop deductions and that no coop contract was listed on Vendor Central as

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applying between the parties and that, when Amazon summarized all contractual terms to OraHealth, the summary showed no “Base Accrual” or “Coop” amounts to be rebated.

10. With no prior hint that it would do so, on January 22, 2016, the Amazon audit group surprisingly asserted a claim against OraHealth for \$47,679.44 representing 10% of 2014 sales. Amazon asserted that this claim was based on the alleged 2011 agreement to rebate to Amazon 10% of invoiced amounts.

11. OraHealth promptly disputed this claim in a January 25 e-mail stating: “OraHealth relied on there being no coop-contract and for that reason did not raise prices. If the contract had been in effect, OraHealth would have raised prices as much as the co-op charge. If Amazon wants to take co-op deductions, we will raise our prices by an equal amount.”

12. When Amazon responded implacably, on March 1, 2016 OraHealth sent a letter with proof of delivery stating the following defenses, among others:

- a. The alleged contract was for calendar year 2012. The May 9, 2012 repudiation and cancellation of the contract prevented it from extending into 2013 or 2014 or 2015.
- b. If the contract was ever validly made and was not effectively terminated in 2012, the contract was abandoned by Amazon long ago. Amazon did not timely claim 10% of invoiced sales for 2013 or 2014 or 2015. By failing to exercise its alleged rights under the alleged contract in 2013, 2014, and 2015, Amazon implicitly accepted OraHealth’s cancellation of the alleged contract. Amazon is now estopped by laches from enforcing the alleged contract.
- c. From the end of 2012 until January 22, 2016, OraHealth relied on there being no contract requiring a rebate to Amazon of 10% percent of invoiced sales. If Amazon had asserted a substantial claim under the contract during this period of time, OraHealth would have responded with an immediate repudiation and explicit cancellation and/or raising of prices as much as the “coop” charge. For sales from January 1, 2013 until January 22 of 2016, Amazon did not timely claim coop deductions. This detrimental reliance by OraHealth worked an amendment and cancellation of the contract if it was not previously cancelled.

12. In response to OraHealth disputing the claim by Amazon, in March 2017, Amazon urged OraHealth to agree to a co-op rebate amount going forward. Amazon asked for 13.65%. I offered to agree to a 6% coop amount, provided we would raise the price at that time. Amazon acquiesced to the price increase. Amazon and I agreed to a 6% rebate starting April 1, 2017 and I raised the price to reflect a change from 0% to 6% co-op rebate.

13. The fact that I raised the price at the same time that the 6% co-op rebate took effect is evidence that, from 2013 until March 2017, I had relied on there being no co-op rebate due to Amazon and during that period did not raise the price. Amazon is now saying that the change on April 1, 2017 was not a change from a 0% rebate to a 6% rebate but rather a change from a 10% rebate to a 6% rebate. This cannot be right because, if it were right, OraHealth would not have needed a price increase -- the rebate rate would have been going down rather than up. The facts that I demanded a price increase to go with the new co-op rebate rate and that Amazon agreed to that price increase shows that both parties understood that the rebate rate was going up, not down.

14. Despite OraHealth's prompt assertion of the above defenses to the alleged contract, in late February 2016, without consent and over OraHealth's explicit protest, Amazon seized OraHealth's money by deducting \$47,679.44 from a payment lawfully due to OraHealth for goods sold to Amazon during the prior 60 days. The amount deducted was represented to be 10% of invoiced sales for the year 2014.

15. On August 25, 2016, more than three years after OraHealth began relying on there being no co-op contract between the parties, Amazon asserted another claim for "coop advertising" for 10% percent of invoiced sales for the year 2015. This claim was for \$81,857.16. OraHealth promptly disputed the claim with the same defenses listed above. Amazon also withheld this amount of money due to OraHealth for sales to Amazon during the prior 60 days, bringing the total withheld in 2016 to \$129,536.60.

16. On March 26, 2018, five years after OraHealth began relying on there being no coop contract between the parties, Amazon asserted another claim for "coop advertising" for the first quarter of 2016. This claim was for \$34,328.71, represented to be 10% percent of invoiced sales. OraHealth promptly disputed the claim with the same defenses listed above. Amazon withheld this amount of money due to OraHealth for sales to Amazon, bringing the total amount wrongfully withheld by claiming a 2011 coop contract to \$163,865.31.

17. On or about October 15, 2016, without authorization from OraHealth, Amazon deducted from payments owed to OraHealth \$7,726.14, claiming that it was for “provision for receivables”. OraHealth promptly objected and requested a refund but, to date, Amazon has not responded.

18. On or about May 1, 2018, without authorization from OraHealth, Amazon deducted from payments owed to OraHealth \$23,570.77, again claiming that it was for “provision for receivables”. OraHealth promptly objected and requested a refund but, to date, Amazon has not responded.

19. On a range of dates starting November 26, 2016, without authorization from OraHealth, Amazon wrongfully deducted from payments owed to OraHealth the following amounts which are due. OraHealth promptly objected and requested a refund but, to date, Amazon has not responded.

1081158490VCBSINV cancellation		246.47
1081177664VCBSINV cancellation		264.80
1081158490VCBSINV cancellation		286.51
1081558501VCBSINV cancellation		532.98
1081559692VCBSINV cancellation		264.80
4DD4AGAK	06/21/2017	718.25
5QDB83IZ		1,989.79
6HYROXPX		<u>121.72</u>
	Total	4,425.32

20. Amazon purchased no goods from OraHealth after March, 2018. Payments for all goods purchased should have been made promptly without deductions. The outstanding invoices total \$8,687.10 long past due.

21. Summing the figures above, the total owed by Amazon for goods delivered to Amazon in response to orders by Amazon is \$208,274.64.

Dated this 21st day of January, 2020



Jeff Haley