

1 DEBRA VALENTINE
General Counsel

2 CHARLES A. HARWOOD
3 Regional Director

4 ELEANOR DURHAM
Federal Trade Commission
5 915 Second Avenue, Suite 2896
Seattle, WA 98174
6 (206) 220-4476

RECEIVED

APR 28 2000

CLERK, U.S. DISTRICT COURT
SPOKANE, WASHINGTON

7 ATTORNEYS FOR PLAINTIFF

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON
10 AT SPOKANE

COPY

11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 v.

Civ. No. CS-99-0063-EFS

14 ROSE CREEK HEALTH PRODUCTS,
15 INC., THE STAFF OF LIFE, INC., and
16 DONALD L. SMYTH,

17 Defendants.

CONSENT DECREE

18 Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), filed a
19 complaint on March 11, 1999, for permanent injunction and other relief, pursuant
20 to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
21 § 53(b) charging defendants with violating Sections 5 and 12 of the FTC Act. The
22 parties have agreed to the entry of this Order by this Court to resolve all matters of
23 dispute between them in this action.

24 NOW, THEREFORE, plaintiff Federal Trade Commission and
25 defendants Rose Creek Health Products, Inc., Staff of Life, Inc., and Donald L.
26 Smyth having requested the Court to enter this Order,

27 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:
28

1 Entry of this Order shall constitute a full and final adjudication of any and
2 all claims of the Commission against the defendants and their, or any of their,
3 employees, distributors, officers, directors, independent contractors, agents and
4 marketers for or in respect of any alleged violations of Sections 5 and 12 of the
5 FTC Act related to the marketing or sale of "Vitamin O."

6 FINDINGS

7 A. This Court has jurisdiction of the subject matter of this case and of
8 the parties consenting hereto;

9 B. Venue is proper as to all parties in the Eastern District of
10 Washington;

11 C. The activities of defendants are in or affecting commerce, as defined
12 in the FTC Act, 15 U.S.C. § 44;

13 D. The Complaint states a claim upon which relief may be granted
14 against defendants under Sections 5, 12 and 19 of the FTC Act, 15 U.S.C. §§ 45,
15 52 and 57b; and

16 E. This Order does not constitute and shall not be interpreted to
17 constitute an admission by defendants that they have engaged in violations of the
18 FTC Act.

19 DEFINITIONS

20 For purposes of this Order, the following definitions shall apply, unless
21 otherwise indicated:

22 A. "Competent and reliable scientific evidence" means tests, analyses,
23 research, studies, or other evidence based on the expertise of professionals in the
24 relevant area, that have been conducted and evaluated in an objective manner by
25 persons qualified to do so, using procedures generally accepted in the professions
26 to yield accurate and reliable results.

27 B. "Clearly and prominently" means as follows:
28

1 1. In an advertisement communicated through an electronic
2 medium (such as television, video, radio, and interactive media
3 such as the Internet and online services), the disclosure shall be
4 presented simultaneously in both the audio and video portions
5 of the advertisement. Provided, however, that in any
6 advertisement presented solely through video or audio means,
7 the disclosure may be made solely through the same means in
8 which the ad is presented. The audio disclosure shall be
9 delivered in a volume and cadence sufficient for an ordinary
10 consumer to hear and comprehend it. The video disclosure shall
11 be of a size and shade, and shall appear on the screen for a
12 duration, sufficient for an ordinary consumer to read and
13 comprehend it. In addition to the foregoing, in interactive
14 media the disclosure shall also be unavoidable and shall be
15 presented prior to the consumer incurring any financial
16 obligation.

17 2. In a print advertisement, promotional material, or
18 instructional manual, the disclosure shall be in a type size and
19 location sufficiently noticeable for an ordinary consumer to
20 read and comprehend it, in print that contrasts with the
21 background against which it appears. In multi-page
22 documents, the disclosure shall appear on the cover or first
23 page.

24 C. “Food” and “drug” means “food” and “drug” as those terms are
25 defined by Section 15 of the FTC Act, 15 U.S.C. § 55.

26 D. “Advertisement” or “advertising” means any written or verbal
27 statement, illustration or depiction that is disseminated to promote the
28 sale, or create interest in the purchasing, of goods or services,

1 whether it appears in an article, brochure, newspaper, magazine,
2 pamphlet, leaflet, circular, mailer, book, book insert, free standing
3 insert, letter, report, catalog, poster, chart, billboard, public transit
4 card, point of purchase display, package insert, package label, film or
5 slide; it is broadcast over the radio, television, or cable television,
6 including program length commercials, *i.e.* "infomercials;" or it is
7 transmitted over the Internet or other commercial online computer
8 service, electronic mail, telephone systems, or any other medium.

9 INJUNCTION

10 I.

11 **IT IS THEREFORE ORDERED** that Rose Creek Health Products, Inc.,
12 and Staff of Life, Inc. and their successors and assigns, and Donald L. Smyth,
13 whether acting directly or through any corporation, subsidiary, division or other
14 device, are permanently restrained and enjoined from representing, in any manner,
15 expressly or by implication, in connection with the labeling, advertising,
16 promotion, offering for sale, sale, or distribution of "Vitamin O," or any other
17 substantially similar product, that:

18 A. The product prevents or is an effective treatment for life-threatening
19 diseases, including, but not limited to, cancer, cardiovascular disease, and
20 pulmonary disease; or

21 B. The effectiveness of the product is established by medical or
22 scientific research or studies;
23 unless at the time such representation is made defendants possess and rely upon
24 competent and reliable scientific evidence that substantiates the representation.

25 **PROVIDED** that nothing in this Order shall prohibit defendants from
26 making any representation for any drug that is permitted in labeling for such drug
27 under any tentative final or final standard promulgated by the Food and Drug
28 Administration ("FDA"), or under any new drug application approved by the

1 FDA; and that nothing in this Order shall prohibit defendants from making any
2 representation for any product that is specifically permitted in labeling for such
3 product by regulations promulgated by the FDA pursuant to the Nutrition Labeling
4 and Education Act of 1990.

5 II.

6 **IT IS FURTHER ORDERED** Rose Creek Health Products, Inc., and Staff
7 of Life, Inc. and their successors and assigns, and Donald L. Smyth, whether
8 acting directly or through any corporation, subsidiary, division or other device, are
9 permanently restrained and enjoined from representing, in any manner, expressly
10 or by implication, in connection with the labeling, advertising, promotion, offering
11 for sale, sale, or distribution of any food, drug, or dietary supplement, the health
12 benefits, performance, efficacy or safety of such product, unless at the time the
13 representation is made defendants possess and rely upon a reasonable basis that
14 substantiates the representation, and which for health and safety claims shall be
15 competent and reliable scientific evidence.

16 III.

17 **IT IS FURTHER ORDERED** that Rose Creek Health Products, Inc., and
18 Staff of Life, Inc. and their successors and assigns, and Donald L. Smyth, whether
19 acting directly or through any corporation, subsidiary, division or other device, are
20 permanently restrained and enjoined from representing, in any manner, expressly
21 or by implication, in connection with the labeling, advertising, promotion, offering
22 for sale, sale, or distribution of any food, drug, or dietary supplement, that any
23 academic, scientific, or government organization, or any individual with medical
24 or scientific training, uses, is affiliated with, or otherwise endorses or supports,
25 defendants or such product unless the representation is true.

26 IV.

27 **IT IS FURTHER ORDERED** that Rose Creek Health Products, Inc., and
28 Staff of Life, Inc. and their successors and assigns, and Donald L. Smyth, whether

1 acting directly or through any corporation, subsidiary, division or other device, are
 2 permanently restrained and enjoined from representing, in any manner, expressly
 3 or by implication, in connection with the labeling, advertising, promotion, offering
 4 for sale, sale, or distribution of any food, drug, or dietary supplement, that the
 5 experience represented by any user testimonial or endorsement of the product
 6 represents the typical or ordinary experience of members of the public who use
 7 the product, unless:

- 8 A. The representation is true and, at the time it is made, defendants
 9 possess and rely upon a reasonable basis that substantiates the
 10 representation; or
- 11 B. Defendants disclose, clearly and prominently, and in close proximity
 12 to the endorsement or testimonial, either:
 - 13 1. what the generally expected results would be for users of the
 14 product, or
 - 15 2. the limited applicability of the endorser's experience to what
 16 consumers may generally expect to achieve, that is, that
 17 consumers should not expect to experience similar results.

18 For purposes of this Order, "endorsement" shall mean as defined in 16 C.F.R. §
 19 255.0(b).

20 **V.**

21 **IT IS FURTHER ORDERED** that Rose Creek Health Products, Inc., and
 22 Staff of Life, Inc. and their successors and assigns, and Donald L. Smyth, whether
 23 acting through any corporation, subsidiary, division, or other device, shall:

- 24 A. Not disseminate to any distributor of any product covered by this
 25 Order, any material containing any representation prohibited by this Order;
- 26 B. Not, directly or indirectly, authorize any distributor of any product
 27 covered by this Order to make any representations prohibited by this Order;

28

1 C. Send by mail within thirty (30) days after the date of service of this
2 Order, an exact copy of the injunctive provisions of this Order (Pages 1 and 12
3 through 13, and Paragraphs I through IV), to each distributor of any product
4 covered by this Order with whom defendants are continuing to do business at that
5 time; and

6 D. Send by mail for a period of three (3) years following service of this
7 Order, an exact copy of the injunctive provisions of this Order (Pages 1 and 12
8 through 13, and Paragraphs I through IV), to each distributor of any product
9 covered by this Order with whom defendants do business after the date of service
10 of this Order who has not previously received the notice. Such copy of this Order
11 shall be sent within one (1) week from the first shipment of product to the
12 distributor.

13 E. For a period of three (3) years following service of this Order,
14 maintain and upon request make available to the Commission for inspection and
15 copying, records showing each distributor who was mailed a copy of this Order
16 and the date the Order was mailed to each such distributor as required by
17 Paragraphs V. C and D.

18 CONSUMER REDRESS

19 VL

20 **IT IS FURTHER ORDERED** that:

21 A. Defendants shall pay into an interest-bearing escrow account
22 designated by plaintiff, under the control of the Commission's designated agent,
23 the sum of \$375,000.00. Defendants shall wire transfer the payment into an
24 interest-bearing escrow account designated by plaintiff, within ten (10) days of the
25 date of entry of this Consent Decree. The payment of this sum shall fully satisfy
26 all monetary claims asserted by the Commission in the complaint filed herein and
27 shall constitute and be used to provide redress to consumers who purchased
28 "Vitamin O" from defendants and pay any attendant expenses of administration. If

1 the Commission determines, in its sole discretion, that redress to purchasers is
2 wholly or partially impracticable, any funds not so used shall be deposited into the
3 United States Treasury or be used by the Commission to educate consumers
4 affected by the defendants' practices. No portion of the payment as herein
5 provided shall be deemed a payment of any fine, penalty, or punitive assessment.
6 Defendants shall be notified as to how funds are disbursed, but shall have no right
7 to contest the manner of distribution chosen by the Commission.

8 VII.

9 **IT IS FURTHER ORDERED** that, by agreeing to this Order, defendants
10 affirm and attest to the truthfulness, accuracy, and completeness of the financial
11 statements that were provided to the FTC on December 21, 1999, as amended by
12 letter of February 3, 2000, and which are 1) The Staff of Life Inc. and Rose Creek
13 Health Products, Inc. Combined Statement of Assets, Liability and Equity -
14 Income Tax Basis as of December 9, 1999; 2) Rose Creek Health Products, Inc.
15 Statement of Assets, Liability and Equity - Income Tax Basis as of December 9,
16 1999; 3) The Staff of Life, Inc. Statement of Assets, Liability and Equity - Income
17 Tax Basis as of December 9, 1999; and 4) Personal Financial Statement of Donald
18 L. and Helen Smyth dated as of December 9, 1999 (hereinafter collectively
19 referred to as the "Financial Statements"). The Financial Statements are
20 confidential and shall not be disclosed by the FTC. The Commission's agreement
21 to this Order is expressly premised upon the truthfulness, accuracy, and complete-
22 ness of defendants' financial condition as represented in the Financial Statements
23 referenced above, which contain material information upon which the Commission
24 relied in negotiating and agreeing to the terms of this Order, including the
25 monetary redress provided for by this Order. If, upon motion by the Commission,
26 this Court finds that defendants failed to disclose any asset with a value in excess
27 of \$10,000, or materially understated the value of any asset disclosed in the
28 Financial Statements, the Court may reopen the judgment for the purpose of

1 requiring additional monetary consumer redress in an amount to be determined by
2 the Court, provided, however, that in all other respects, this Order shall remain in
3 full force and effect unless otherwise ordered by this Court; and provided further
4 that proceedings instituted under this Paragraph are in addition to, and not in lieu
5 of, any other civil or criminal remedies as may be provided by law, including any
6 other proceedings the Commission may initiate to enforce this Order.

7 Notwithstanding the foregoing, the parties acknowledge that the valuation of the
8 real property of Donald L. and Helen Smyth set forth in the Financial Statements
9 was a good faith estimate by the defendants and the FTC agrees that this judgment
10 shall not be reopened by reason of any error in said valuation.

11 GENERAL REQUIREMENTS

12 VIII.

13 **IT IS FURTHER ORDERED** that Rose Creek Health Products, Inc., and
14 Staff of Life, Inc. and their successors and assigns, and Donald L. Smyth, whether
15 acting directly or through any corporation, subsidiary, division or other device,
16 shall, for three (3) years after entry of this Order, maintain and upon request make
17 available to the Commission for inspection and copying:

18 A. All advertisements and promotional materials that contain any
19 representation covered by this Order;

20 B. All substantiation materials that were relied upon in making such
21 representation;

22 C. All tests, reports, surveys, or other evidence in their possession or
23 control that contradict, qualify, or call into question the claims, including
24 complaints and other communications with consumers or with governmental or
25 consumer protection organizations.

26 IX.

27 **IT IS FURTHER ORDERED** that:
28

1 A. Within thirty (30) days of entry of this Order defendants shall provide
2 a copy of this Order to, and obtain a signed and dated acknowledgment of receipt
3 of same from each individual who as of the date of entry of this Order serves as an
4 officer or director, who serves in a management capacity, who is involved in
5 responding to consumer complaints or inquiries, who works as sales personnel,
6 excluding distributors, whether designated as employee, consultant, independent
7 contractor or otherwise;

8 B. For a period of three (3) years from the date of entry of this Order
9 defendants shall provide a copy of this Order to, and obtain a signed and dated
10 acknowledgment of receipt of same from each individual who serves as an officer
11 or director, who serves in a management capacity, who is involved in responding
12 to consumer complaints or inquiries, who works as sales personnel, excluding
13 distributors, whether designated as employee, consultant, independent contractor
14 or otherwise, immediately upon employing or retaining any such person, for any
15 business where (1) any defendant is the majority owner of the business or directly
16 or indirectly manages or controls the business, and (2) the business is engaged in
17 the sale of food, drug, or dietary supplement products, or in assisting others
18 engaged in such business; and

19 C. Maintain for a period of three (3) years, and upon reasonable notice,
20 make available to representatives of the Commission, the original signed and dated
21 acknowledgments of the receipt of copies of this Order, as required in Paragraphs
22 IX.A and B.

23 **X.**

24 **IT IS FURTHER ORDERED** that, in order that compliance with the
25 provisions of this Order may be monitored:

26 A. Sixty (60) days after the date of entry of this Order, defendant Donald
27 L. Smyth shall provide a written report to the Commission, sworn to under penalty
28 of perjury, setting forth in detail the manner in which defendants Rose Creek

1 Health Products, Inc., Staff of Life, Inc., and Donald L. Smyth have complied and
2 are complying with the injunctive provisions of this Order;

3 B. For a period of three (3) years from the date of entry of this Order,
4 defendants Rose Creek Health Products, Inc., Staff of Life, Inc., and Donald L.
5 Smyth shall notify the Commission of the following:

6 1. Any changes in the employment status (including
7 self-employment) of Donald L. Smyth within ten (10) days of
8 such change. Such notice shall include the name and address of
9 each business involving food, drugs, or dietary supplement
10 products with whom Donald L. Smyth is affiliated as an
11 employee, agent or independent contractor, a statement of the
12 nature of the business, and a statement of his duties and
13 responsibilities in connection with the business or
14 employment; and

15 2. Any proposed change in the corporate structure of any
16 corporate defendant, or any proposed change in the structure of
17 any business entity involving food, drugs, or dietary
18 supplements owned or controlled by the individual defendant,
19 such as creation, incorporation, dissolution, assignment, sale,
20 merger, creation or dissolution of subsidiaries, filing of a
21 bankruptcy petition, or change in the corporate name or
22 address, or any other change that may affect compliance
23 obligations arising out of this Order, thirty (30) days prior to
24 the effective date of any proposed change; *provided, however,*
25 that, with respect to any proposed change in the corporation
26 about which any defendant learns less than thirty (30) days
27 prior to the date such action is to take place, such defendant
28

shall notify the Commission as soon as is practicable after learning of such proposed change;

C. For the purposes of this Order, defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications or other communications to the Commission to:

Charles A. Harwood
Director, Northwest Region
Federal Trade Commission
915 2nd Avenue, Room 2896
Seattle, WA 98174

XI.

IT IS FURTHER ORDERED that within five (5) business days after receipt by defendants of this Order as entered by the Court, Donald L. Smyth shall submit to the Commission a truthful sworn statement, in the form shown on Attachment A, that shall acknowledge receipt of this Order.

XII.

IT IS FURTHER ORDERED that each party shall be responsible for payment of their own costs and fees.

XIII.

IT IS FURTHER ORDERED that this Court will have jurisdiction of this matter for the purpose of enabling any of the parties to this Order to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Order, the enforcement of compliance therewith or the punishment of violations thereof.

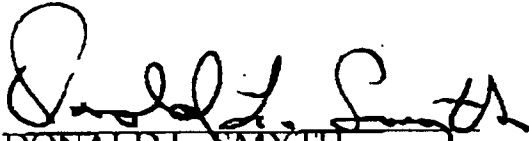
SO ORDERED, this _____ day of _____, 2000.

HONORABLE EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

1 The parties hereby consent to the terms and conditions of the Consent
 2 Decree as set forth above and consent to the entry thereof. The parties waive any
 3 rights that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412,
 4 amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996).

5 **FOR DEFENDANTS**

FOR PLAINTIFF

6
 7 

8 DONALD L. SMYTH
 9 Individually and as President of
 10 Rose Creek Health Products, Inc., and
 11 Staff of Life, Inc.



12 ELEANOR DURHAM
 13 Federal Trade Commission
 14 915 2nd Avenue, Rm. 2896
 15 Seattle, WA 98107
 16 206-220-4476

17
18
19
20
21
22
23
24
25
26
27
28