

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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| In the Matter of |) | |
| |) | |
| CREATIVE HEALTH INSTITUTE, INC., |) | |
| a corporation, and |) | DOCKET NO. |
| |) | |
| KYL L. SMITH, |) | |
| individually and as an officer of Creative Health |) | |
| Institute, Inc. |) | |
| _____ |) | |

COMPLAINT

The Federal Trade Commission, having reason to believe that Creative Health Institute, Inc., a corporation, and Kyl L. Smith, individually and as an officer of Creative Health Institute, Inc. (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Creative Health Institute, Inc. (“Creative Health”) is a Texas corporation with its principal office or place of business at 4451 FM 2181, Suite 100-515, Corinth, Texas 76205.
2. Respondent Kyl L. Smith (“Smith”) is an officer and sole director of respondent Creative Health. Individually or in concert with others, he formulates, directs, controls or participates in the policies, acts, or practices of Creative Health, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Creative Health.
3. Focus Factor is a dietary supplement containing more than forty (40) ingredients, including vitamins, minerals, dimethylaminoethanol, bacopa monnieri extract, huperzine, and phosphatidyl serine.
4. Respondents Creative Health and Smith developed, advertised, labeled, offered for sale, sold, and distributed Focus Factor from at least 1997 to 2000. Since 2000, Vital Basics, Inc., a Maine corporation, has advertised, labeled, offered for sale, sold, and distributed Focus Factor, and respondents Creative Health and Smith have participated in the advertising of Focus Factor.
5. Focus Factor is a “food” or “drug” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

6. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

7. Respondents Creative Health and Smith have participated in the advertising and promotion of Focus Factor, including, but not limited to, through the radio and television infomercials and commercials attached as Exhibits A through G. Those advertisements, which were aired on various broadcast and cable channels, contained the following statements:

Radio Advertising

- a. "Smith: I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.

I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.

In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll feel more alert, more focused, and 'on task.'" [Exhibit A: "Kyl 2" (emphasis in original)]

- b. "Smith: This is Dr. Kyl Smith. . . . My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy.

(Electronic voice mail 'beep')

Ware: This is Marlene Ware. I'm calling on behalf of my son. He's having a tough time at school, and this has made such a difference. He's remembering things. I can't believe it! I wanted to tell you how much of a difference it's made for my son . . . Focus Factor. It has made a tremendous difference.

Smith: Focus Factor is safe, it's natural, and it works. Call now so you can immediately begin improving your memory, concentration, mood, focus and energy." [Exhibit B: "Donut Ware"]

- c. "Smith: I'm Dr. Kyl Smith. I've seen first-hand how *frustrating* it can be when a child has trouble with focus and concentration. Parents come to me because their children are unfocused, distracted . . . and they just don't know what to do about it.

That's why I developed Focus Factor. It's an effective, all-natural supplement with one purpose: to give your child's brain the exact nutrients it needs to function at its very best.

Focus Factor is for students who need help with concentration and memory. In just a few days, your child will feel alert, focused, and mentally sharp.

And by the way, there's also an adult formula I created for grown-ups who want to improve memory, concentration, and mood." [Exhibit C: "School's in Session" (emphasis in original)]

- d. "Host: Well hello again . . . welcome to the Vitalbasics radio program. We bring you vital health information on over 300 great radio stations covering all 50 states . . . and y'know what? I can count on two fingers – literally – the number of times I've actually invited a guest back on this program. Today is one of those times.

Dr. Kyl Smith is back with us at our invitation, and this time he's right here in the studio with us . . .

So these are just a few of the phone messages we received, um . . . Here's a 65-year old woman. . . . She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic . . . she thought she was getting dimwitted . . . and she says 'Focus Factor started working almost immediately. I felt like a different person.' . . . Here's a woman from your stomping grounds, Texas. She says she's in the insurance industry . . . a very fast paced office. Lots of multi-tasking going on. She says 'I've been taking Focus Factor for a couple of weeks and saw a huge difference. Just unbelievable.' And I'm going to do one more here, because this shows how the product can help children as well. . .

Smith: Great . . .

Smith: Most seniors will tell me they've been taking nutritional supplements for maybe years, and never noticed a difference in how they feel. Can you imagine? Well, the thing that seniors tell me that Focus Factor does is it gives them that mental spark, that energy like they used to have. They feel like their memory is more on-task. They can recall things easier with less effort. And the thing I really like to hear is how it improves relationships.

Host: Here's a letter from a 65-year old woman I spoke with. And she says 'I tried ginkgo biloba for months, and it didn't do anything for my memory. But my memory is now wonderful since I've started taking Focus Factor. I noticed the difference within a couple of days.'

And I have some comments from some of the doctors we've spoken with. For example, this is a medical doctor. . . this is an M.D. named Lee Cowden, Dr. Lee Cowden. He's a cardiologist, and internist . . . and he says, uh . . . 'Compared to other supplements on the market, the nutrients in Focus Factor are present at better levels . . . and in the ideal forms more likely to enhance brain function. Taking Focus Factor results in a significant improvement in memory,

concentration, and overall well-being.’ Pretty strong comment from a medical doctor.

Smith: Wonderful.” [Exhibit D: “4600”]

- e. “Host: Hi and welcome to the VitalBasics radio program. I’m Bill Begley. This is the health and wellness program you can hear on over 200 radio stations from coast to coast. We’re in California, Massachusetts, Florida, Texas, Hawaii, Alaska . . . you name it, we’re there, and we appreciate you tuning in today. Thank you very much for joining us.

My guest, on the phone with us today is Dr. Kyl Smith. . . . Thousands and thousands of hours, folks, this man has put into this breakthrough, this secret that we’re going to let you in on today. Dr. Smith, we have so much to talk about . . . it’s a blessing to have you on the program. Welcome.

Kyl: Thank you, Bill. I’m honored to be here.

Host: Anita Sohn is with us. She is a school administrator. And listen to this, this is an amazing story: She put her entire *class* on Focus Factor. Anita, welcome to the program. Can you tell us why you did that and what happened.

Anita: Surely. We were having such great challenges with kids being able to focus and being able to actually sit still and concentrate and do their work. And a year earlier, both my children had gone on the Focus Factor. And we had seen such a marked difference, when the parents would come and say ‘what can we do about this?’ then I would start to tell them, ‘Okay, this is what I would do in this situation. And it couldn’t hurt, it can only help . . . try it.’ So they started, one by one, each child started testing out the Focus Factor. And as a result, my entire class was on the Focus Factor. We have just . . . we’ve had just a wonderful time on it.

Host: So you put ‘em on the product . . . and what you found was that in many cases the kids seemed more attentive, they got better grades some of them?

Anita: Definitely.

Smith: [W]e see a noticeable improvement in the way a person feels it doesn’t matter if it’s a child, a teen or an adult, in 1 to 10 days. Now I typically tell people, stay on Focus Factor each and every day consistently and you’ll notice a difference within 2 weeks. But I’ve got to tell you Bill that most people come back after the first day and they say, ‘Wow, what did you put in this stuff? I haven’t felt this good since I was a teenager.’

Host: All right, we’ll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks,

these are people we spoke with earlier this week. First we're going to hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients – adults, children, seniors – some very interesting comments here. And Jon, if we could, let's roll the tape.

Dr. Shawn Sieracki: I first heard about Focus Factor about a year and a half ago. Dr. Kyl Smith introduced it to me at a seminar. And he passed out a few of the Focus Factor tablets. From that point on I've been hooked on Focus Factor. It helps calm the mind. And it enhances brain function. That is what I am finding it's doing for women, men, and children as well. It's an excellent product just to help enhance the brain function. I believe that Focus Factor is the very best brain support product on the market. Focus Factor helps children or adults with mental fatigue . . . poor focus and irritability . . . it helps to keep that under control. I believe Focus Factor is the best supplement on the market for memory control and memory function – not just with children, not just with adults, and not just with seniors . . . it hits *all* ages, and it gives all ages the right amount of nutrients for the brain.

Dr. Jim Van Meter: This is Dr. Jim Van Meter. Every time I ever research anything, I always try the product on myself. Number one, if I can't be convinced that it's a benefit to me, why in the world would I ever give it to anyone else? My son has been on it, my daughter's been on it, my son-in-law's been on it . . . everyone in my family is on Focus Factor. Number one, yes it has vitamins and minerals in it. It also has essential amino acids and things that are *also* in here that stimulate the brain to make the brain think, focus and recover facts, numbers, words, definitions, etcetera. Where normal multi-vitamins and mineral [sic] has *nothing* to do with it and can't *ever* turn your brain on to thinking. It's a product that everyone can trust, and be wonderfully happy that they are giving their children and their family the very best that can be given to them to be able to achieve every goal they set out for.

Host: So there you have just a few of the many doctors who recommend Focus Factor to their patients. These doctors were not paid in any way for their comments today.

Host: And it is my great honor and pleasure right now to have on the phone with me Representative Rick Green. And Rick is with the state house in the State of Texas. And he uses Focus Factor himself and his family. Representative Green, welcome to the program. Thank you very much for joining us.

Host: Now what's your story with Focus Factor?

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is

not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the times that you do get with the family . . . started taking [Focus Factor] about a year ago and found that was exactly the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of y'know, how . . . you'd be at lunch with one person meeting on one thing, you mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen.

Kyl: We're all having problems with memory today. It's not our fault. We have an innate ability to have an awesome memory. All we have to do is feed our brain the nutrients it's starving for to enhance energy production. And Focus Factor supplies those nutrients. . . .

Host: So it's kind of like memory in a bottle.

Kyl: Exactly.

Host: For over 5 years, Focus Factor has been available only through doctor's [sic] offices. But thanks to a special arrangement with Dr. Kyl Smith, you can now get on a 30-day risk-free trial *direct* from the Creative Health Institute. Mention the VitalBasics radio program when you order, and you can even get a 30-day supply absolutely *free*." [Exhibit E: "Bill #4400" (emphasis in original)]

- f. "Host: This is an incredible story. And I want us to start at the very beginning. Tell us about what inspired you to create Focus Factor?"

Smith: It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time. I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels?* . . . And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, *Hey, what do you do when your patients ask this question? Did I miss something?*

Host: Now tell me this, in your experience, do you see improvements in kids' school work?

Smith: Absolutely. We've even seen dramatic improvements in academic performance. And let me give you an example. A child that comes to mind, his name is Brian. . . . Brian was a child that was kicked out of no less than 4 schools. He would not respond to his parents or any kind of authority outside like, like principals or teachers. After being on Focus Factor, in one year he was on the honor roll . . . and two years later he graduated from high school with honors.

Host: Now, earlier this week we spoke with several people who say Focus Factor has dramatically improved their quality of life. So if you or anyone in your family – anyone you know – could use some help with mood, energy, memory . . . y’know just clearing out those mental cobwebs, you need to listen to this.

Silke Jones: My name is Silke Jones and I have been taking Focus Factor for about six months. The reason I started taking Focus Factor was because of the product benefits. It helps eliminate mood swings. That it gives you a little pick-up, so to speak, during the day to where you don’t get the doldrums in the afternoon. That really got my attention because that is me – right there. I’ve attributed a lot of mood swings or depression here and there, you know, to just the age I’m going through right now, you know being a woman. So when I started taking Focus Factor, I was just surprised how quickly I felt a difference. It was amazing. I notice right away when I don’t take Focus Factor. It’s hard to describe. You just have to try it. And everybody I’ve talked to that I’ve recommended it to has said the same thing.

Kristin Rister-Wheatley: My name is Kristin and since I’ve been taking Focus Factor I have gotten tremendous results. I have more energy. I have a more stabilized mood. I feel like my brain functions better. I am on top of my game. Everyone knows that women, especially women, go through mood swings especially during certain times of the month, certain times of their cycle, and I have noticed that my mood swings are not the highs and lows that they used to be. I am a much more steady, calm person. I think it’s very important that parents try Focus Factor with their children. Personally, it made a dramatic difference in my daughter’s performance, the way she felt in school – the way she’d concentrate. I’ve shared it with my friends. I’ve shared it with my family. They, everyone feels the same way. We all love Focus Factor.” [Exhibit F: “Leisa #4500” (emphasis in original)]

Television Advertising

- g. “Host: Welcome to the Vitalbasics Health Show. . . . Several months ago . . . we interviewed a leading expert in nutrition who is generating controversy with his assertion that there’s a nationwide epidemic called “Brain Starvation” that affects men, women and children alike in this country. According to Dr. Kyl Smith, memory loss, poor concentration, mood swings and fatigue are causing a dangerous drop in effectiveness in the workplace and a higher level of tension and even anger in the home. He also introduced a new dietary supplement called Focus Factor that helps people with these everyday problems. Dr. Smith, welcome to the program again.

Host: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking

Focus Factor and it was about the American revolution and I was able to remember all kinds of things. So I'll you what, let's roll the clip...

Host from previous show: "I started reading this 400 page book . . .very dense, very dry ...and what I found was, I'm remembering everything virtually in this book. I'm remembering the names of British Lords and generals and dukes and battle sites and chains of events that happened. This book literally came alive to me . . . not only as I was reading it, but after, my comprehension was extraordinary."

Host: And I have to say, since that program aired, things just seem to get better and better and better, its sort of a cumulative effect. A couple of things that I notice. First of all, my memory just seems to keep getting better. . . . So one thing I can do is visualize things better, which helps me to remember. The second big thing is multitasking. In the past, when I would get all different projects thrown at me at once, I would panic. Because it just seemed so overwhelming. Since taking Focus Factor what I find is I can more calmly prioritize things. I can focus on each task better,, which means I get it done more quickly generally. And I can just get the projects done faster. So that just eases all of that stress that normally would have come down on me."

Smith: That's great. [Exhibit G: "Bill's Case Studies"]

8. Through the means described in Paragraph 7, respondents Creative Health and Smith have represented, expressly or by implication, that:

- (a) Focus Factor improves the focus, memory, and concentration of healthy adults;
- (b) Focus Factor alleviates stress and combats the fatigue, irritability and mood swings that healthy adults experience;
- (c) Focus Factor makes children and teenagers feel more alert, focused, and mentally sharp;
- (d) Focus Factor improves students' ability to concentrate and their academic performance;
- (e) Focus Factor improves senior citizens' memory, mental clarity, and energy;
- (f) Focus Factor improves adults' ability to absorb information in books and to recall facts, figures and names; and
- (g) Consumers who start taking Focus Factor regularly will feel its effects in as little as one to ten days.

9. Through the means described in Paragraph 7, respondents Creative Health and Smith have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents Creative Health and Smith did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. In the advertising and sale of Focus Factor, respondents Creative Health and Smith have represented, directly or by implication, that various individuals are endorsers of Focus Factor. Respondents have failed to disclose adequately that certain of those individuals had material connections with Focus Factor. Specifically, at the time of providing their endorsements:

- a. Some of those endorsers were the principals in a public relations company that had been retained by Creative Health to promote Focus Factor, and their company earned a commission on sales resulting from its promotional work; and
- b. One of the endorsers was Creative Health's attorney; and
- c. Some of the endorsers were Focus Factor distributors who earned profits based on their sales of the product.

These facts would materially affect the weight and credibility given by consumers to the endorsements and would be material to consumers in their purchase or use of the product. Therefore, the failure to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this _____ day of _____, 2004.

By the Commission.

Donald S. Clark
Secretary

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