

IN THE MATTER OF

THE GOOD GUYS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3388. Complaint, July 31, 1992--Decision, July 31, 1992*

This consent order requires, among other things, a California-based chain of consumer electronics stores to comply with the Magnuson-Moss Warranty Act and the Pre-Sale Availability of Written Warranty Terms Rule, which require retailers to make manufacturers' warranty information available to consumers, either (1) by displaying the text of the warranty near the warranted product, or (2) by furnishing the text of the warranty to customers upon request prior to sale, and prominently displaying signs advising customers of the availability of such warranties.

*Appearances*

For the Commission: *Jeffrey Klurfeld* and *Gerald Wright*.

For the respondent: *Kevin O'Brien, Thelen, Marrin, Johnson & Bridges*, San Francisco, CA.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Good Guys, Inc., a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in

Rule 702, 16 CFR 702.1 promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent The Good Guys, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 601 Van Ness Avenue, San Francisco, California.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail consumer electronic stores in California and Nevada. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, electronic appliances, including but not limited to television receivers, video cassette recorders, stereo equipment, and video cameras, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3(a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR Part 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Good Guys, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 601 Van Ness Avenue, San Francisco, California.

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

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

#### I.

*It is ordered,* That respondent The Good Guys, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

#### II.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

## III.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

## IV.

*It is further ordered,* That respondent shall instruct all future retail store managers and assistant managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

## V.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

## VI.

*It is further ordered,* That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and assistant managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily

available by respondent's retail store outlets for examination by prospective buyers on request.

#### VII.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

#### VIII.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order on it, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

## IN THE MATTER OF

## VIRAL RESPONSE SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9245. Complaint, February 4, 1991--Decision, July 31, 1992*

This consent order prohibits, among other things, a Connecticut-based corporation and its president from making false and unsubstantiated claims regarding the efficacy of their "Viralizer System," a hand-held device for treating colds and allergies, and also prohibits respondents from misrepresenting the existence, content, validity, results, conclusions, or interpretations of any test or study.

*Appearances*

For the Commission: *Matthew D. Gold.*

For the respondents: *Pro se.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Viral Response Systems, Inc., a corporation, and Robert S. Krauser, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Viral Response Systems, Inc., is a Delaware corporation. It has its principal office and place of business at 34 East Putnam Avenue, Greenwich, Connecticut.

(b) Robert S. Krauser is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporation.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents have engaged in the manufacture, promotion, offering for sale, sale, and distribution to the public of a heated nebulizer-sprayer described as, among other things, "Viralizer" and "Viralizer System" (hereinafter, "the Viralizer System").

PAR. 3. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertising and promotional materials, including, but not limited to, the advertising and promotional materials referred to herein, to promote the sale of the Viralizer System. As advertised, respondents' Viralizer System consists of, among other things, devices and drugs, as "devices" and "drugs" are defined in Section 15 of the Federal Trade Commission Act.

PAR. 4. Respondents operate in various states of the United States and in the District of Columbia. Respondents' manufacturing, labeling, packaging, offering for sale, promoting, sale and distribution of the Viralizer System constitute the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements and promotional materials for the Viralizer System by various means in or affecting commerce, including, *inter alia*, the placement of advertisements in newspapers distributed through the mail and across state lines. Such advertisements and promotional materials were for the purpose of inducing, and were likely to induce, directly or indirectly, the purchase by the public of respondents' Viralizer System.

PAR. 6. Typical examples of respondents' advertisements and promotional materials, disseminated as previously described, but not necessarily all inclusive thereof, are the advertisements and promotional materials attached hereto as Exhibits A through E. Specifically, these advertisements and promotional materials have contained the following statements:



## (a) "THE VIRALIZER SYSTEM"

"HEATED NEBULIZER-SPRAYER with Vira-Spray"

"A fast, effective treatment for allergy, sinusitis, runny nose, sore throat, and common cold symptoms . . . in most cases, complete relief of symptoms within 24 hours. It's doctor tested, doctor recommended."

\* \* \*

"Scientific tests (in vitro) have proven that the common cold virus self-destructs when heated at temperatures of approximately 110° F.

"The amazing Viralizer System offers this kind of controlled dry heat (hyperthermia) to penetrate the nose and throat. The temperature creates a hostile environment for the viruses and allergy related IGE antibodies...while healthy cells remain undamaged....

"The Viralizer System takes the treatment one step further by conveniently dispensing Vira-Spray I and Vira-Spray II pre-measured sprays that supply analgesic/bactericidal and decongestant medications. Scientific tests (in vitro) demonstrate that Viralizer heat will kill the Rhinoviruses, and Vira-Spray I solution will kill secondary bacterial infections." (Exhibit A)

(b) "Fast, effective COLD, ALLERGY and SINUS symptom relief, like no other treatment in the world!"

\* \* \*

"Independent tests on human subjects have demonstrated the Viralizer system to be better than 90% effective in eliminating nasal cold symptoms in one day or less." (Exhibit B)

(c) "In scientific tests at Europe's renowned Pasteur Institute, a Nobel prize-winning virologist concluded that the rhinovirus literally self-destructs when precise heat is inhaled into the nose. And now, the safe, affordable Viralizer system brings this remarkable therapy into your home, for possibly the most effective cold symptom relief your family has ever experienced. The Viralizer system attacks the cold virus with a mix of precise heat and medicated mists designed to knock that cold right out.

\* \* \*

"By raising the temperature, we destroy the virus. Simply. You just kill it. If you kill it, it's not there, and the symptoms of the cold will thus be eliminated.

\* \* \*

"The heat basically kills the viruses.

\* \* \*

"The pollen create the IGE antibodies which are heat sensitive, and you heat your nasal passages up with the Viralizer and it kills these little antibodies and then you don't stimulate the runny nose and the sneezing." (Exhibit C)

(d) "Now a major scientific breakthrough prepares you for the onslaught of the cold season with this effective new method for relieving the stuffy heads, and persistent sneezes that plague cold and allergy sufferers -- the Viralizer System.... The Viralizer is based on medical fact: the cause of the common cold is the Rhinovirus family which lives and multiplies in the nose and throat, but cannot thrive in temperatures over 110° F.... Now use the Viralizer to help prevent infectious re-runs and the go-round of children's colds.... Proven in clinical tests 90% effective on eliminating the symptoms of upper respiratory infection in 24 hours or less... " (Exhibit D)

## (e) "THE VIRALIZER SYSTEM"

"Now proven relief from congestion, runny nose, sore throat, & allergies."

"Finally there has been a significant breakthrough in treating colds, sinus infections and allergy symptoms. This system attacks both the cause and the symptoms."

"The Viralizer System has been tested extensively under medical supervision and has proven to be effective in eliminating nasal cold symptoms within one day or less."

"The Viralizer System offers controlled heat to attack the elusive cold virus...and then takes the treatment for the common cold one step further by combining it with cold medication." (Exhibit E)

PAR. 7. Through the use, *inter alia*, of the statements set forth in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth therein, respondents have represented, directly or by implication, that the Viralizer System can or will:

- (a) Eliminate or help eliminate cold symptoms in one day or less;
- (b) Destroy, disable, or help destroy or disable the viruses responsible for colds;
- (c) Prevent or help prevent the spread or transmission of colds;
- (d) Provide or help provide permanent or long term relief from allergy symptoms; and
- (e) Destroy, disable, or help destroy or disable the antibodies that play a part in the manifestation of allergic reactions.

PAR. 8. Through the use, *inter alia*, of the statements set forth in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in paragraph seven, they possessed and relied upon a reasonable basis for those representations.

PAR. 9. In truth and in fact, at the time of making the representations set forth in paragraph seven, respondents did not possess and rely upon a reasonable basis for making the representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Through the use, *inter alia*, of the statements set forth in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth therein, respondents have represented, directly or by implication, that:

(a) Competent and reliable scientific tests have established that the Viralizer System will eliminate or help eliminate cold symptoms in one day or less; and

(b) Competent and reliable scientific tests have established that the Viralizer System will destroy, disable, or help destroy or disable the viruses responsible for colds.

PAR. 11. In truth and in fact,

(a) No competent and reliable scientific tests have established that the Viralizer System will eliminate or help eliminate cold symptoms in one day or less; and

(b) No competent and reliable scientific tests have established that the Viralizer System will destroy, disable, or help destroy or disable the viruses responsible for colds.

Therefore, the representations made by respondents as set forth in paragraph ten were, and are, false and misleading.

PAR. 12. The aforesaid acts or practices of respondents were and are to the prejudice and injury of the public and constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act and false advertisements in violation of Section 12 of the Federal Trade Commission Act.

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Complaint

EXHIBIT A

**"HOORAY... I KNEW SOMETHING GREAT WOULD HAPPEN IN MY LIFETIME."** - D.J.S., Kildeer, IL.

## THE VIRALIZER® SYSTEM

HEATED NEBULIZER-SPRAYER with Vira-Spray

A fast, effective treatment for allergy, sinusitis, runny nose, sore throat, and common cold symptoms... In most cases, complete relief of symptoms within 24 hours. It's doctor tested, doctor recommended.

### Here's what other satisfied users are saying:

- "My doctor suggested this when I showed him the ad. I am happy I did get it." — M.H., Minnesota, MI
- "A very big thank you. We really do feel that this system is helpful. We have 3 chronic sinus sufferers — and it does seem to relieve a great deal." — C.W.B., Phoenix, MD
- "My sore throat (which is usually severe) was diminished in 1 day, almost all other symptoms in 3 days." — R.B., San Diego, CA
- "Instant relief of nasal congestion — relieved that lousy feeling. Really like Viraizer." — D.N., San Juan Capistrano, CA
- "Doctors have had no suggestions for me except surgery. Tetracycline or Cortisone. I'm spreading the word. Do you need a sales person in Florida?" — H.D., Venice, FL
- "I had read of the theory and was pleased to find it works for me." — G.G., Columbia Heights, MN
- "For me I think this is the total answer. While I don't look forward to colds, I feel I'm ready for the next one!" — S.D.K., Ashtabula, CA
- "It seems to really help chronic rhinitis that causes colds. I feel I'm grateful." — R.L.W., LaGrange, CA
- "I was amazed at the difference after 3 days of treatment. I was cleared up inside my nose." — M.C., Cincinnati, OH
- "Relief after 24 hours was good — faster over getting rid of sore throat." — A.H.C., Evanston, IL
- "Complete relief in 24 hours. My cold usually last 3 weeks, and I usually feel badly about one week before my nose stops running." — S.J.L., Indian Head Park, IL
- "We used this on two occasions with a child. In both cases, the symptoms disappeared after one treatment." — L.S., Memphis, TN
- "Helped allergy symptoms!" — E.R., Woodstock, AL
- "Surprised and pleased at degree of relief. Sinus stopped after day 1." — R.L.M., Maple, MI
- "It really works. Every minute just should own one. Please call our Right Reason!" — Capt. R.N., Greenwich, CT
- "I am very pleased with the Viraizer — I am recommending your device to all my friends." — R.R.T., Glenview, IL
- "Read about this last year — was very interested — wrote up!" — R.L.K., McKinney, IL
- "What a great device! I'm telling all my friends about it. Thank you for your ingenuity." — E.S., Mayfield Hts., OH
- "Good! It works!" — M.A., Edgewood, MD
- "Just great! Can I buy some stock?" — R.C.B., Riverside, CT
- "Oh — successful!" — A.J.M., Chicago, IL
- "Was amazed at the quick relief it gave me!" — J.A., Peaslee, IL
- "Good stuff, it helps, it relieved me!" — D.W., Chicago, IL
- "Very satisfied — treatment very helpful!" — M.S., Detroit, MI
- "I think it is the greatest!" — V.K., Kenner, LA
- "I am pleased with the results." — C.M.C., Noroton Heights, CT
- "Very successful response — no cold after two days' treatment." — M.S., Lakeside, IL
- "Seems to do exactly what it proposes — amazing!" — M.S., Ipswich, MA
- "It's heaven sent! Have even been to allergist, and even that didn't help and Viraizer does!" — E.L.T., Indpls, IN
- "3 people in our family used Viraizer with both Vira-Spray I and II with excellent results." — J.B.M., Dearborn, MI
- "I feel it gave us both relief after the first treatment. I feel it is very good!" — F.L., Palmdale, CA
- "My daughter was surprised the treatment worked so quickly. She felt much better immediately." — M.I., Westport Park, IL
- "Our 10 year old has since used the Viraizer and had almost complete relief in 48 hours." — S.L., Schaumburg, IL
- "Helped to unplug head cold!" — J.R., Aroma Park, IL
- "I was skeptical — I can't believe how effective this was. I had to be sure to pass on the good word! I would not be blowing my nose without using the product!" — J.G., Greenwich, CT
- "Used at the beginning of symptoms, it great relief and stops the problem from getting worse." — C.A., Norwalk, CT
- "Good product — effective!" — L.A.G., Ramona, CA
- "This may be the great doom to the 7-day cold!" — L.W., Studio City, CA
- "It is a great invention — I love it!" — G.V., Kenner, LA
- "The only relief I have gotten other than drugs." — E.A.R., Grains, LA
- "So far, so good — pleased — thank you." — A.R., Deer Park, NY

### VIRAL RESPONSE SYSTEMS INC.

24 EAST PUTNAM AVENUE GREENWICH CT 06030 (203) 661-1330

Scientific tests (in vitro) have proven that the common cold virus self-destructs when heated at temperatures of approximately 130° F.

The amazing Viraizer System offers this kind of controlled dry heat (hyperthermia) to penetrate the nose and throat. The temperature creates a hostile environment for the viruses and allergy related RGE antibodies — whose healthy cells remain unchanged. Additionally hyperthermia leads to increased blood flow to the nasal and throat mucosa which stimulates the body's own immune system.

The Viraizer System takes the treatment one step further by conveniently dispensing Vira-Spray I and Vira-Spray II pre-measured sprays that supply analgesic, bactericidal and decongestant medications. Scientific tests (in vitro) demonstrate that Viraizer heat will kill the Rhinoviruses, and Vira-Spray I solution will kill secondary bacterial infections.

- Gentle enough for children
- Non-prescription — over-the-counter
- Eliminates the "rebound phenomenon" — no adverse side effects
- Convicted heat and pre-measured medicated spray

\$34.95

910232

The Viraizer System is available at these fine pharmacies in Fairfield County:

Wal Drug Store, Westport  
Ide Pharmacy, Stamford  
Lewin Pharmacy, Stamford  
Finch's Drug Stores, Greenwich  
Gilbert's Pharmacy, Noroton Heights

Grannick's Pharmacy, Greenwich  
Greenwich Drug Store, Greenwich  
Hoyt St Pharmacy, Stamford  
Kerr's Pharmacy, Old Greenwich

Lakes Pharmacy, Old Greenwich  
Lang's Pharmacy, New Canaan  
North St Pharmacy, Greenwich  
Professional Pharmacy, South Norwalk  
Postiglione Pharmacy, Port Chester, NY

Richard's Pharmacy, Norwalk  
Stadi's Pharmacy, Stamford  
White's Drug Store, Cos Cob  
Windsor Drugs, Norwalk

EXHIBIT A

EXHIBIT B

# The Viralizer System

HEATED NEBULIZER SPRAYER with Vira-Spray

INVENTED  
IN THE  
USA

## THE MOST EFFECTIVE COLD RELIEF YOU WILL EVER RECEIVE OR YOUR MONEY BACK!

Patented technology...controlled heat penetrates, Vira-Spray medicates.  
Fast, effective COLD, ALLERGY and SINUS symptom relief,  
like no other treatment in the world!

INVENTED  
IN THE  
USA

"Happy. I knew something great would happen in my lifetime."  
-D.J.S. Katoor, IL

"A very big thank you. We really do feel that this system is helpful. We have 2 chronic sinus sufferers and it does seem to relieve a great deal."  
-C.W.B. Pharms, MD

"My sore throat (which is usually severe) was diminished in 1 day, almost all other symptoms in 3 days."  
-R.B. San Diego, CA

"Instant relief of nasal congestion - relieved that rebound feeling. Really like Viralizer."  
-D.N. San Juan Capistrano, CA

"Doctors have had no suggestions for me except surgery, for cyclazine or Claritane. I'm spreading the word. Do you need a sales person in Florida?"  
-M.D. Venice, FL

"I had read of the theory and was pleased to find a work for me."  
-G.G. Columbia Heights, MN

"For me, I think this is the total answer. While I don't look forward to colds, I feel I'm ready for the next one."  
-S.D.K. Alameda, CA

"It seems to really help chronic rhinitis that causes cold sores in nose. I'm grateful."  
-M.L.W. LaOroca, CA

"I am amazed at the difference after 3 days of treatment, even sores cleared up, inside my nose."  
-M.C. California, OH

"This may be the great doom to the 'Jelly cold'."  
-L.W. Studio City, CA

"It is a great invention - love it!"  
-G.V. Kenner, LA

"The only relief I have gotten other than drugs."  
-E.A.R. Gretna, LA

"So far, so good - pleased - thank you."  
-A.R. Deer Park, NY

"Rinse after 24 hours was good - feels a lot better after getting out of sinus spray."  
-A.H.C. Eganston, IL

"Complete relief in 24 hours. My cold usually last 2 weeks, and I usually feel badly about one week before my nose stops running."  
-S.J.L. Indian Head Park, IL

"We used this on two occasions with a child. In both cases, the symptoms disappeared after one treatment."  
-L.S. Memphis, TN

"My doctor suggested this, when I showed him the ad. I am happy I did get it."  
-M.H. Minneapolis, MN

"Surprised and pleased at degree of relief. Sinus stopped after day 1."  
-R.L.M. Maple, MN

"It really works. Every sinus pain should own one. Please call our flight surgeon."  
-Capt. R.H. Greenwood, CT

"I am very pleased with the Viralizer - I am recommending your device to all my friends."  
-R.R.Y. Glenview, IL

"Read about the last year - not very interested - wrote now."  
-R.L.K. McNary, IL

"What a great device! I'm telling all my friends about it. Thank you for your ingenuity."  
-E.S. Mayfield Hts., OH

"Just great! Can I buy some stock?"  
-R.C.B. Riverside, CT

"My daughter was surprised the treatment worked so quickly. She felt much better immediately."  
-M.J. Metairie Park, IL

"Our 10-year-old has since used the Viralizer and had almost complete relief at 24 hours."  
-S.L. Schaumburg, IL

"Helped to unplug head cold!"  
-J.K. Arona Pl., IL

"Quite successful!"  
-A.J.M. Chicago, IL

"Was amazed at the quick relief it gave me."  
-J.A. Palatine, IL

"Good stuff, it helps, it relieved me."  
-D.W. Chicago, IL

"Very satisfied - treatment very helpful."  
-M.S. Danver, MI

"I think it is the greatest!"  
-V.R. Kenner, LA

"I am pleased with the results."  
-C.M.C. Newton Heights, CT

"Very successful response - no cold after two days' treatment."  
-K.S. Lakewood, IL

"Seems to do exactly what it proposes - amazing!"  
-M.S. Ypsilanti, MI

"Helped allergy symptoms!"  
-E.R. Woodstock, AL

"Good! It works."  
-M.A. Edgewood, MD

"3 people in our family used Viralizer with both Vira-Spray I and II with excellent results."  
-J.B.M. Dearborn, MI


"I feel it gave us both relief after the first treatment. I feel it is very good!"  
-F.L. Palos Hills, IL

"I was skeptical - I can't believe how effective this was. I will be sure to pass on the good word! I would still be blowing my nose without using this product."  
-J.G. Greenwood, CT

"Used at the beginning of symptoms, it gives relief and stops the problem from getting worse."  
-C.A. Norwich, CT

"Good product - effective!"  
-L.A.G. Remond, CA

These comments are from consumers who have purchased and used the Viralizer System.




Scientific tests (in vitro) have shown that the common cold virus self-destructs when heated to temperatures of approximately 100° F.

The amazing Viralizer System offers the kind of controlled dry heat (hyperthermal) to penetrate the nose and throat. The temperature creates a hostile environment for the viruses, while healthy cells remain undamaged. Additionally, hyperthermia leads to increased blood flow to the nasal and throat mucosa and stimulates the body's own immune system.

The Viralizer System takes that treatment one step further by conveniently dispensing Vira-Spray I (antibiotic bacteriophage) and Vira-Spray II (antibiotic bacteriophage) and Vira-Spray III (antibiotic bacteriophage). Scientific tests in vitro demonstrate that Viralizer heat will kill the Rhinoviruses and Vira-Spray I solution will kill secondary bacterial infections.

Independent laboratory tests on human subjects have demonstrated the Viralizer System to be better than 80% effective in eliminating nasal cold symptoms in one day or less.



• Gentle enough for children • Non-prescription - over-the-counter  
 • Eliminate the "rebound phenomenon" - no adverse side effects • Doctor tested, doctor recommended

\$34.95

Vira-Spray refills available at \$3.95 for 3 bottle package.

The Viralizer System is available at these fine stores throughout the USA:
   
 Atlanta: Atlanta, GA; Birmingham: Birmingham, AL; Boston: Boston, MA; Chicago: Chicago, IL; Cincinnati: Cincinnati, OH; Dallas: Dallas, TX; Denver: Denver, CO; Detroit: Detroit, MI; Houston: Houston, TX; Indianapolis: Indianapolis, IN; Jacksonville: Jacksonville, FL; Kansas City: Kansas City, MO; Las Vegas: Las Vegas, NV; Los Angeles: Los Angeles, CA; Louisville: Louisville, KY; Miami: Miami, FL; Milwaukee: Milwaukee, WI; Minneapolis: Minneapolis, MN; Montreal: Montreal, PQ; New York: New York, NY; New Orleans: New Orleans, LA; New York: New York, NY; Phoenix: Phoenix, AZ; Pittsburgh: Pittsburgh, PA; Portland: Portland, ME; Raleigh: Raleigh, NC; Richmond: Richmond, VA; Sacramento: Sacramento, CA; St. Louis: St. Louis, MO; Tampa: Tampa, FL; Wichita: Wichita, KS; Washington: Washington, DC; York: York, PA.

The Viralizer System is available at these fine stores throughout the USA: EXHIBIT B

## EXHIBIT C

Viralizer System Point-of-Sale Commercials1. John Thompson Segment (1:00)

John Thompson: “If you and your family have been plagued by colds and allergies, here’s good news. Hi. I’m John Thompson to tell you about Viralizer, and what many scientists believe is the first really effective way to attack and stop common cold and allergy symptoms. In scientific tests at Europe’s renowned Pasteur Institute, a Nobel prize-winning virologist concluded that the rhinovirus literally self-destructs when precise heat is inhaled into the nose. And now, the safe, affordable Viralizer system brings this remarkable therapy into your home, for possibly the most effective cold symptom relief your family has ever experienced. The Viralizer system attacks the cold virus with a mix of precise heat and medicated mists designed to knock that cold right out [SUPER: USE ONLY AS DIRECTED]. At the first sign of a cold, just inhale the Viralizer’s heat and mists to penetrate infected areas of the nose and throat. That’s all there is to it. It’s safe and effective for the whole family, gentle enough for children too. In most instances, the length and severity of your family’s cold symptoms will be reduced to a shadow of what they were. Viralizer. Every home should have one.”

2. “Long” WWL, New Orleans Cold Segment (2:30)

Announcer: “WWL TV, Channel 4, New Orleans. Garland Robinette, Angela Hill, Jim Henderson, and meteorologist Dave Barnes. Louisiana’s news leader. Channel 4 Eyewitness News.”

Angela Hill: “Putting down money is not a problem for Americans fighting the sniffles. More than a billion dollars will be spent this year to combat the common cold. And though no cure yet exists, Janet Lawhon reports, a hot new device could put an end to your cold after just one day.”

Janet Lawhon: “Terri Pianovich has a very bad cold.”

[SUPER: VOICE OF TERRI PIANOVICH; same speaking]: “Well I’ve been having it for two weeks. It’s been transferred back and forth from my ten month old daughter, back to me, back to her, and it’s just been going on and on, an endless process.”

[SUPER: DR. MACK CHENEY, EYE, EAR, NOSE & THROAT HOSP.; same speaking]: “The virus actually causes a lot of sinus congestion and inflammation around the sinuses, and because of that you can then develop a secondary bacterial type of infection, which is a more severe infection.”

[PIANOVICH'S AND DOCTOR'S VOICES IN BACKGROUND] Janet Lawhon: "Today a menthol spray in a doctor's office helped relieve Terri's symptoms, but like the dozens of cold remedies on the market, it couldn't kill her cold [SUPER: SHELF DISPLAY OF DIMETANE DECONGESTANT, DIMETAPP (4 HOUR) TABLETS, DIMETAPP EXTENTABS (12 HOUR) TABLETS, DIMETANE (12 HOUR) TABLETS, ACTIFED 12 HOUR CAPSULES, ACTIFED TABLETS]. However, a new product that looks like a hair dryer may be able to. It's called the Viralizer. Just approved by the FDA, this device heats up sinus passages from a normal 92 degrees to about 115."

[SUPER: DR. MARCEL GOLDBERGER, VIRAL RESEARCHER; same speaking]: "By raising the temperature, we destroy the virus. Simply. You just kill it. If you kill it, it's not there, and symptoms of the cold will thus be eliminated."

Janet Lawhon: "Researchers say cold viruses are heat sensitive and can't live long under these conditions. Plus, a bacterial spray in the device helps kill secondary infections that make colds linger. And tests so far show good results."

[SUPER: DR. ALLEN AVEN, VIRAL RESEARCHER; same speaking]: "And it shows an unbelievable 98 percent of these people achieved improvement or complete clearing of their upper respiratory symptoms within 24 to 48 hours."

Janet Lawhon: "The Viralizer may also be helpful to those sensitive to medications, like children, pregnant women, and elderly people. But it shouldn't be used by those with chronic nasal problems."

Dr. Cheney: "And also anyone that has a history of nose bleeds or unilateral or one-sided nasal obstruction probably should come in and be seen before using it."

### 3. WWL, New Orleans Allergy segment (1:40)

Anchorman: "Remember the Viralizer, that hot air device we told you about that can kill a cold problem within two days? Well, the Viralizer is now working wonders, we're told, on another problem--allergies. Janet Lawhon has more on that."

Janet Lawhon: "Julia Schomaker has put a lot of love and sweat into her garden [SUPER: METAIRIE], so much that she refuses to be driven away by chronic allergy problems. For several months now, she's been using what looks like a mini blow dryer to get relief. It's called the Viralizer, and it heats your sinuses up to 110 degrees using one spray to kill germs and another to unstuff the problem."

[SUPER: JULIA SCHOMAKER; same speaking]: "I've used it mostly when I'm congested either in the sinuses, like when I get up in the morning, or during at night, and I'll have a headache."

Janet Lawhon: “The product was originally introduced into select pharmacies during the last cold season, and sold for about \$35. But with allergies at their peak, the device is still greatly in demand.” [SUPER: JANET LAWHON, EYEWITNESS NEWS 4] Another advantage the Viralizer has is that it can be used by pregnant women, heart and diabetes patients, without side effects. And in the general population, it doesn’t cause excitability in children or drowsiness we get from taking some of these allergy and cold preparations. In the meantime, Julia Schomaker says it not only helps her stay in the garden, it also helps keep her medicine costs down.”

Julia Schomaker: “We’re a drug society. We’re always looking for that magic pill. This is not a pill, and I’m telling you, it can help you if you use it right. I’m sold on it, I’m telling you that.”

Janet Lawhon: “Janet Lawhon, channel 4, Eyewitness News.”

#### 4. Best Talk in Town segment (3:40)

Nola Roper: “Hi and welcome back. Well, it affects 93 million of us every year. It is the common cold. We lose work over it, everything. With me this morning is Robert Krauser, he’s the president of Viral Response Systems. And he says, or you say, that this can help the common cold.”

Robert Krauser: “That’s right. I say we have fifteen medical doctors associated with the company who agree with this. And we’ve sold ten thousand units since January, and we have thousands of people around the country who agree with it.”

Nola Roper: “Well we’re going to learn more about it in just a second. But first let’s see how it works, since I caught a cold today, and it works in how many minutes?”

Robert Krauser: “Well, three minutes will give you some relief. And three minutes repeated every two to three hours for a day and you should be happy the next day.”

Nola Roper: “Let’s try it. What do we do?”

Robert Krauser: “We just heat it up.”

Nola Roper: “And you just sniff it?”

Robert Krauser: “Yeah, just breathe normally. And you’re going to feel warm air. It’s a little bit like a portable sauna.”

Nola Roper: “Yeah.”



Robert Krauser: “And it kind of dries up the mucous. The heat basically kills the viruses. And this little spray we can use, and that kills secondary bacterial infection.”

Nola Roper: “It’s drying my mascara, too.”

Robert Krauser: “That’s right.”

Nola Roper: “I tell you what. I’m going to continue using this . . . And don’t vaporize, Viralize. This does work. It is starting to work. I can feel it. It’s made a new man out of me. This is terrific. Now we’ve just committed viracide?”

Robert Krauser: “Viracide, that’s right.”

Nola Roper: “Now what about people who have allergies.”

Robert Krauser: “Apparently it works very well for allergies too. [SUPER: ROBERT KRAUSER, PRES., VIRAL RESPONSE SYSTEMS, INC.] The pollen create the IgE antibodies which are heat sensitive, and you heat your nasal passages up with the Viralizer and it kills these little antibodies and then you don’t stimulate the runny nose and the sneezing. And it’s also worked on chronic sinusitis. We have a response card from a lady in Stamford, Connecticut, and we have other people from two, three, six months, six years, who said she had a problem for twenty years in terms of congestion and sinusitis, and she bought a Viralizer and she’s breathing free.”

Nola Roper: “Oddly enough now there is some little medication in the top of this, and like I have a little sore throat, but this is helping that too.”

Robert Krauser: “Yeah, it’ll help. You see, the heat also stimulates the immune system. But the spray, the spray will kill the secondary bacterial infection that is apparent when you have a bad cold or a continued prolonged sinusitis.”

Nola Roper: “Now you told me a story a little earlier ago about a dentist that uses it with kids.”

Robert Krauser: “That’s right, Dr. Michael Sobel is an orthodontist who’s on staff at the University of Pittsburgh. [SUPER: ROBERT KRAUSER, PRES., VIRAL RESPONSE SYSTEMS, INC.] And, a lot of times when kids come in to see him, they have stuffy noses--you know, snotty kids. And uh.”

Nola Roper: “I have one of those.”

Robert Krauser: “Me too. And if the kid comes in and he’s a little, and he’s quite stuffed up it’s tough to work on him because the orthodontist is working with both

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hands, and he can't breathe. If he can't breathe through his mouth and he can't breathe through his nose."

Nola Roper: "Right."

Robert Krauser: "So what he does, he tells the child to lean back and gives him a three minute heat treatment with the Viralizer, and he cleans him up. And he says the kids are happy, in fact they often want to find out how to buy the Viralizer. In addition, his down time is cut, because kids are always being worked on, and they don't cancel appointments. And he wants to publish a paper for the Journal of American Dentistry. He thinks every dentist should have one around the office."

Nola Roper: "Terrific. Robert Krauser, thank you so much. You may have come up with a cure for the common cold. This is terrific."

Robert Krauser: "It's been my pleasure. Thank you."

Nola Roper: "Thanks so much. And thank you for being here today. I'm Nola Roper, this is Best Talk in Town, and I feel terrific. See you tomorrow."

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## EXHIBIT D

**THE BREAKTHROUGH COLD BUSTER**



Now a major scientific breakthrough prepares you for the onslaught of the cold season with this effective new method for relieving the stuffy heads, and persistent sneezes that plague cold and allergy sufferers — the **Viralizer® System**. It's the newest development of a concept pioneered at the Pasteur Institute in Paris. The **Viralizer** is based on medical fact: the cause of the common cold is the Rhinovirus family which lives and multiplies in the nose and throat, but cannot thrive in temperatures over 110° F. Now, far more compact and affordable, comes the **Viralizer** with **Vira-Spray®** medications. The **Viralizer** is designed to deliver a gentle, controlled heat which penetrates the nose and throat, creating a hostile environment for cold viruses. After a pleasant heat treatment, the **Vira-Spray** dispenses either of two mild, over-the-counter, medicated sprays, in premeasured amounts. **Vira-Spray I** is an analgesic, anti-bacterial spray. **Vira-Spray II** is a decongestant. These therapeutic sprays further discourage the stubborn cold germs so you're less likely to be re-infected or spread your cold to others. Now use the **Viralizer** to help prevent infectious re-runs and the go-round of children's colds. The **Viralizer** can produce effective relief by using it for only 3 or 4 minutes, several times a day. Proven in clinical tests 90% effective on eliminating the symptoms of upper respiratory infection in 24 hours or less, the **Viralizer** works without pills. The hottest news in cold treatment, **Viralizer** with **Vira-Spray** is safe and gentle enough for children and adults, portable, easy to use and has been tested and recommended by doctors. Designed to take you right through those cold and allergy seasons you usually dread, the complete **Viralizer® System** includes 1 electric **Viralizer** with **Vira-Spray I** and **Vira-Spray II** — plus — a 3-pak refill of medicated sprays. \$59.95 #1690.

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EXHIBIT E

**THE VIRALIZER® SYSTEM**

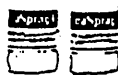
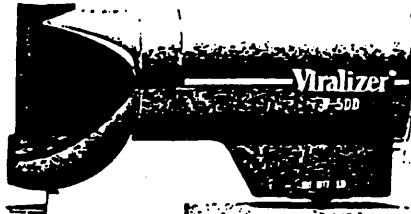
**NEW!**

Now proven relief from congestion, runny nose, sore throat & allergies

Finally there has been a significant breakthrough in treating colds, sinus infections and allergy symptoms. This system attacks both the cause and the symptoms.

The Viralizer® System has been tested extensively under medical supervision and has proven to be effective in eliminating nasal cold symptoms within one day or less.

The Viralizer® System offers controlled heat to attack the elusive cold virus... and then takes the treatment for the common cold one step further by combining it with cold medication. Thus, Viralizer's® unique system offers dry heat to penetrate and attack viruses in infected areas of the nose and throat... and Vira-Spray® pre-measured sprays to dispense the medication (Vira-Spray® I analgesic and bacteriacidal...and Vira-Spray® II decongestant).



The lightweight Viralizer® is about the size of a telephone receiver and can be held easily in the hand. Cold sufferers heat their nose and throat areas for up to five minutes and then spray a medication called Vira-Spray® every minute. This portable system is designed to penetrate both the nose and throat areas...and is gentle and safe enough even for children.

The Viralizer® System consists of 1 electric Viralizer®, 1 bottle of Vira-Spray® I and 1 bottle of Vira-Spray® II.  
 C11601 Complete System \$34.95  
 C11701 Refills (3-Pak of 2 Vira-Spray® I's and 1 Vira-Spray® II) \$4.45  
 P11703 Refills (3 Packages of 3 bottles each) \$11.85

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Viral Response Systems, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 34 East Putnam Avenue, Greenwich, Connecticut.

Respondent Robert S. Krauser is an officer of said corporation. He formulates, directs, and controls the policies, acts, and practices of said corporation. His office and place of business is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## I.

*It is ordered*, That respondent Viral Response Systems, Inc., a corporation, its successors and assigns, and its officers, and respondent Robert S. Krauser, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the Viralizer System, or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product, or any component of such product, can or will:

- A. Destroy, disable, or help destroy or disable any virus responsible for the onset or continuance of colds;
- B. Prevent or help prevent the spread or transmission of colds;
- C. Provide or help provide permanent or long term relief from any allergy symptom;
- D. Destroy, disable, or help destroy or disable any antibody that plays a part in the manifestation of any allergic reaction; or
- E. Cure or help cure colds;

unless at the time of making the representation:

1. Respondents possess and rely upon competent and reliable scientific evidence which substantiates such representation; *provided, however*, that, for purposes of this Part, for any evidence to be competent and reliable it must include at least two adequate and well-controlled, double-blind clinical studies conforming to acceptable designs and protocols and conducted by different persons, independently of each other, who are qualified by training and experience to conduct such studies; or
2. Respondents possess and rely upon (a) a tentative or final standard promulgated by the Food and Drug Administration which substantiates such representation; or (b) other evidence which demon-

strates that the making of such representation is approved by the Food and Drug Administration.

## II.

*It is further ordered,* That respondent Viral Response Systems, Inc., a corporation, its successors and assigns, and its officers, and respondent Robert S. Krauser, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the Viralizer System or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such product, or any component of such product, can or will eliminate, alleviate, relieve, or reduce temporarily cold symptoms and/or allergy symptoms unless at the time of making the representation:

1. Respondents possess and rely upon competent and reliable scientific evidence which substantiates such representation; *provided, however,* that, for purposes of this Part, for any evidence to be competent and reliable it must include at least one adequate and well-controlled, double-blind clinical study conforming to acceptable designs and protocols and conducted by a person who is qualified by training and experience to conduct such a study; or

2. Respondents possess and rely upon (a) a tentative or final standard promulgated by the Food and Drug Administration which substantiates such representation; or (b) other evidence which demonstrates that the making of such representation is approved by the Food and Drug Administration.

## III.

*It is further ordered,* That respondent Viral Response Systems, Inc., a corporation, its successors and assigns, and its officers, and respondent Robert S. Krauser, individually and as an officer of said corporation, and respondents' representatives, agents and employees,

directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of the Viralizer System, or any other health-related product or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

#### IV.

*It is further ordered*, That, for three (3) years from the date that the practices to which they pertain are last employed, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements, promotional materials, documents, or other materials relating to the offer for sale or sale of any product covered by this order that make any representation covered by this order;

B. All materials relied upon by respondents to substantiate any representation covered by this order;

C. All test reports, studies, experiments, analyses, research, surveys, demonstrations, or other materials in the possession or control of respondents that contradict, qualify, or call into question any representation covered by this order or the basis on which respondents relied for such representation; and

D. All materials that demonstrate respondents' compliance with this order.

#### V.

*It is further ordered*, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution or subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.



## VI.

*It is further ordered,* That the individual respondent shall, for a period of five (5) years after the date of service of this order upon him, promptly notify the Commission, in writing, of his discontinuance of his present business or employment and of his affiliation with a new business or employment that involves the marketing of a product designed to treat colds and/or allergies. For each such new affiliation, the notice shall include the name and address of the new business or employment, a statement of the nature of the new business or employment, and a description of respondent's duties and responsibilities in connection with the new business or employment.

## VII.

*It is further ordered,* That respondents shall, within thirty (30) days from the date of service of this order upon them, deliver by first class mail or in person a copy of this order to present distributors and retail dealers of the Viralizer System.

## VIII.

*It is further ordered,* That respondents shall, within sixty (60) days from the date of service of this order upon them, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF  
CIRCUIT CITY STORES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3389. Complaint, August 3, 1992--Decision, August 3, 1992*

This consent order requires, among other things, a Virginia-based national chain of consumer electronics and appliance stores to comply with the Magnuson-Moss Warranty Act and the Pre-Sale Availability of Written Warranty Terms Rule, which require retailers to make manufacturers' warranty information available to consumers, either (1) by displaying the text of the warranty near the warranted product, or (2) by furnishing the text of the warranty to customers upon request prior to sale, and prominently displaying signs advising customers of the availability of such warranties.

*Appearances*

For the Commission: *Jeffrey Klurfeld* and *Gerald Wright*.

For the respondent: *Howard Feller, McGuire, Woods, Battle & Booth*, Richmond, VA.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301 *et seq.*, and Rule 702, 16 CFR Part 702, promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Circuit City Stores, Inc., a corporation ("respondent"), has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it would be in the public interest, alleges:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in

Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Circuit City Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 9950 Mayland Drive, Richmond, Virginia.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of retail consumer electronic and appliance stores in approximately fourteen states and the District of Columbia. In the operation of its retail stores, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, electronic and household appliances, including but not limited to television receivers, video cassette recorders, stereo equipment, video cameras, stoves, microwave ovens, dishwashers, and clothes washers and dryers, all of which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

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

PAR. 5. In the ordinary course and conduct of its business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 6. On or after March 12, 1987, respondent, in the ordinary course of its business as a seller of consumer products actually costing more than \$15 and manufactured on or after January 1, 1977, has failed to make the texts of written warranties readily available for examination by prospective buyers prior to sale through utilization of one or both of the following methods required by 16 CFR 702.3 (a), as amended:

1. Displaying the text of the warranty in close proximity to the warranted product;
2. Furnishing the text of the warranty upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

PAR. 7. Respondent's failure to comply with the provisions of 16 CFR 702, as amended, constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110 (b) thereof, a violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a) (1).

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Circuit City Stores, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business at 9950 Mayland Drive, Richmond, Virginia.

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

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rule 702, 16 CFR 702.1, promulgated thereunder, shall apply to the terms of this order.

#### I.

*It is ordered,* That respondent Circuit City Stores, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device in connection with the sale or offering for sale of any consumer product in or affecting commerce, do forthwith cease and desist from failing to make a text of any written warranty on a consumer product actually costing more than \$15 readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in 16 CFR 702.3(a), as amended.

#### II.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, deliver to each current retail store manager and assistant manager engaged in the sale of consumer products on behalf of respondent, a copy of this order to cease and desist.

## III.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, instruct all current retail store managers and assistant managers engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

## IV.

*It is further ordered,* That respondent shall instruct all future retail store managers and assistant managers who will be engaged in the sale of consumer products on behalf of respondent, before they assume said responsibilities for respondent, as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order.

## V.

*It is further ordered,* That respondent shall, within thirty (30) days of the date of service of this order, develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

## VI.

*It is further ordered,* That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its retail store managers and assistant managers and sales personnel regarding their obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and this order; (ii) copies of signs posted by respondent in its retail store outlets designed to elicit prospective buyers' attention to the availability of the text of written warranties for review upon request; and (iii) copies of the text of written warranties made readily

available by respondent's retail store outlets for examination by prospective buyers on request.

#### VII.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

#### VIII.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order on it, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

## IN THE MATTER OF

## DEBES CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3390. Complaint, August 4, 1992--Decision, August 4, 1992*

This consent order prohibits, among other things, six Rockford, Illinois-area nursing homes and two corporations that own and operate nursing homes from entering into agreements to boycott temporary nurses registries or to fix, stabilize, or otherwise interfere or tamper with the prices charged by such registries. In addition, the order prohibits, for ten years, any agreement with any other respondent to purchase or use the services of any particular temporary nurses registry, and for five years prohibits each respondent from communicating to any other respondent any information concerning the use of temporary nurses registry services for any Rockford-area nursing home.

*Appearances*

For the Commission: *C. Steven Baker* and *Timothy T. Hughes*.

For the respondents: *Douglas R. Carlson, Wildman, Harold, Allen & Dixon*, Chicago, IL. *Patrick M. Sheller, McKenna & Cuneo*, Washington, D.C. *Andrew B. Kagan, Lawrence Y. Schwartz Ltd*, Lincolnwood, IL. *Robert J. Oliver, Connolly, Oliver, Close & Worden*, Rockford, IL. and *John P. Ryan, McBride, Baker & Coles*, Chicago, IL.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Debes Corporation, Alma Nelson Manor, Inc., Park Strathmoor Corporation, Beverly Enterprises, Inc., and its subsidiary, Beverly Enterprises - Illinois, Inc., Fairview Plaza Limited Partnership, a limited partnership, doing business as Fairview Plaza Nursing Home, The Neighbors, Inc., and Yorkdale Health Center, Inc., hereinafter sometimes collectively



referred to as "respondents," have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Debes Corporation ("Debes") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 6122 Mulford Village Drive, Rockford, Illinois. Debes owns the respondent Park Strathmoor Corporation ("Park Strathmoor") and operates and manages the nursing home facility owned by respondent Alma Nelson Manor, Inc. ("Alma Nelson"). Debes knows of, approves or controls the acts and practices of both Park Strathmoor and the nursing home facility owned by Alma Nelson.

PAR. 2. Respondent Alma Nelson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 550 S. Mulford Road, Rockford, Illinois, at which site Alma Nelson owns a nursing home facility which is operated and managed by Debes.

PAR. 3. Respondent Park Strathmoor is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 5668 Strathmoor, Rockford, Illinois, at which site Park Strathmoor owns a nursing home facility which is operated by Debes.

PAR. 4. Respondent Beverly Enterprises, Inc. ("Beverly") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at 155 Central Shopping Center, Ft. Smith, Arkansas. Beverly owns and controls Beverly Enterprises - Illinois, Inc. ("Beverly-Illinois").

PAR. 5. Respondent Beverly-Illinois is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office located at 155 Central Shopping Center, Fort Smith, Arkansas. Until December 8, 1988 Beverly-Illinois owned and operated the nursing home facility known as Roosevelt Square which is located at 3520 School Street, Rockford, Illinois.

PAR. 6. Respondent, Fairview Plaza Limited Partnership, ("Fairview") doing business as Fairview Plaza Nursing Home, is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal place of business located at 321 Arnold, Rockford, Illinois, and its principal office located at 6600 N. Lincoln Ave., Suite 300, Lincolnwood, Illinois.

PAR. 7. Respondent The Neighbors, Inc. ("Neighbors") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 811 W. Second, P.O. Box 585, Byron, Illinois, at which site it owns and operates a nursing home facility.

PAR. 8. Respondent Yorkdale Health Center, Inc. ("Yorkdale") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 2313 N. Rockton Ave., Rockford, Illinois, at which site it owns and operates a nursing home facility.

PAR. 9. Beverly, through its wholly owned subsidiary, Beverly-Illinois, and all other respondents are, or have been, engaged in the business of owning or operating nursing homes, also known as long-term health care facilities, within a thirty mile radius of the city of Rockford, Illinois ("the Rockford area"). Except to the extent that competition has been restrained as alleged herein, the respondents have been and, with the exception of Beverly and Beverly-Illinois, are now in competition among themselves and with other providers of nursing home services.

PAR. 10. Respondents' general businesses or activities, and the acts and practices described below, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 11. Nurses registries, sometimes referred to as "temporary nurses registries" or "nursing pools" supply nursing personnel such as R.N.s (Registered Nurses), L.P.N.s (Licensed Practical Nurses), and C.N.A.s (Certified Nursing Assistants) on a temporary basis to nursing homes. Absent restraints on competition, nurses registries compete among themselves to provide temporary nursing services at the price and quality nursing homes desire. Competition among

nursing homes for temporary nursing services ensures an adequate supply of quality nurses.

PAR. 12. In October 1988, one of the nurses registries serving the Rockford area, the Alpha Christian Registry ("Alpha Christian"), announced a substantial increase in its prices to nursing homes for temporary CNA services. Respondents discussed the new Alpha Christian prices and the prices of the other nurses registries in the Rockford area at meetings throughout November and December 1988. Respondents agreed to and did send letters to Alpha Christian stating that they would not use Alpha Christian temporary CNAs due to excessive prices. Respondents also did in fact cease using temporary CNAs supplied by Alpha Christian. After boycotting Alpha Christian, respondents further conspired to threaten to boycott the other registries in the Rockford area, and they communicated this threat by sending copies of the letter they had sent to Alpha Christian to the other registries.

PAR. 13. By engaging in the acts and practices described in paragraph twelve respondents have combined or conspired with each other to conduct a boycott of the Alpha Christian Registry, to threaten to boycott other registries operating in the Rockford area, and to otherwise restrain competition among themselves for temporary CNAs.

PAR. 14. Respondents' conspiracy to eliminate competition among the nursing homes for temporary CNA services has had the following effects, among others.

A. Restricting the supply of quality CNA services by depressing the price of such services.

B. Interfering in the process by which individual providers of temporary CNA services make independent decisions regarding the price of such services.

C. Limiting consumers' access to the price and quality of nursing services they desire.

PAR. 15. The conspiracy, acts and practices described herein constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. The effects of such conspiracy, acts and practices are continuing or will

continue or such conspiracy, acts, or practices will recur in the absence of the relief herein requested.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents are corporations or partnerships organized, existing, and doing business under and by virtue of the laws of the States of Illinois, Delaware or California, with their offices and principal places of business located at the addresses listed below.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

## I.

For purposes of this order, the following definitions shall apply:

(A) "*Person*" means any individual, partnership, association, company, or corporation, and includes any trustee, receiver, assignee, lessee, or personal representative of any person herein defined.

(B) "*Debes*" means the Debes Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 6122 Mulford Village Drive, Rockford, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(C) "*Park Strathmoor*" means Park Strathmoor Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 5668 Strathmoor, Rockford, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(D) "*Alma Nelson*" means Alma Nelson Manor, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 550 S. Mulford Rd., Rockford, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(E) "*Beverly*" means Beverly Enterprises, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at 155 Central Shopping Center, Fort Smith, Arkansas, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(F) "*Beverly-Illinois*" means Beverly Enterprises - Illinois, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office located at 155 Central Shopping Center, Fort Smith, Arkansas, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(G) "*Neighbors*" means The Neighbors, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 811 W. Second, P.O. Box 585, Byron, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(H) "*Fairview Plaza*" means the Fairview Plaza Limited Partnership, doing business as the Fairview Plaza Nursing Home, a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 321 Arnold, Rockford, Illinois, and its principal office located at 6600 N. Lincoln Ave., Suite 300, Lincolnwood, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(I) "*Yorkdale*" means Yorkdale Health Center, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office located at 2313 N. Rockton Ave., Rockford, Illinois, as well as its officers, directors, employees, agents, subsidiaries, divisions, successors and assigns.

(J) "*Temporary nurses registry*" means any person that supplies nursing personnel on a temporary basis.

(K) "*The Rockford area*" means the counties of Winnebago, Boone, and Ogle in the State of Illinois.

## II.

*It is ordered*, That each respondent shall forthwith, directly, indirectly, or through any corporate, or other device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, cease and desist from:

A. Entering into, attempting to enter into, organizing, adhering to or maintaining any agreement, understanding, or program with any other purchaser or user of nursing services to:

1. Refuse, or threaten to refuse, to use the services of any temporary nurses registry; or

2. Fix, stabilize, or otherwise interfere or tamper with the prices charged by any temporary nurses registry;

B. For a period of five (5) years after the date this order becomes final, communicating to any other respondent any information concerning its own or any other nursing home's intention or decision to use, refuse to use, or threaten to refuse to use the services of any temporary nurses registry for any nursing home in the Rockford area.

C. For a period of ten (10) years after the date this order becomes final, agreeing with any other respondent to purchase or use the services of a particular temporary nurses registry or of a particular group of temporary nurses registries.

### III.

*Provided, however,* That this order shall not prohibit any agreement solely between any individual respondent and any entity or entities that control or are controlled by that respondent;

*Provided further,* That Section II (A) and (B) of this order shall not be construed to prohibit respondents from entering any agreement that is reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws, except a joint venture prohibited by Section II (C) of this order; and

*Provided further,* That as to respondent Beverly Enterprises Inc., this order shall apply only to conduct or practices in or affecting the sale of temporary nurses' services to nursing home facilities in the State of Illinois.

### IV.

*It is further ordered,* That each respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order to:

1. Each of its directors and officers or, in the case of Fairview Plaza, general partners, and to each of its nursing home administra-

tors and directors of nursing employed by facilities in the Rockford area;

2. The Illinois Health Care Association, the Rockford Chapter of the Illinois Health Care Association, the Extended Care Nursing Association and every member of the Directors of Nursing Council of the Illinois Health Care Association;

3. Each temporary nurses registry from which it they purchased services for any nursing home facility located in the Rockford area since January 1988.

B. Within sixty (60) days after the period of three (3) years and annually thereafter for on the anniversary date on which this order becomes final, and at any time the Commission, by written notice, may require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respondent that may affect its compliance obligations arising out of this order.



IN THE MATTER OF

THE VONS COMPANIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3391. Complaint, Aug. 7, 1992--Decision, Aug. 7, 1992*

This consent order requires, among other things, a California-based national grocery chain to sell its Madonna Road supermarket in San Luis Obispo to an FTC-approved purchaser within twelve months or else consent to the appointment of a Commission-approved trustee to divest the property. The respondent is also required, for a period of 10 years, to obtain FTC approval before making similar acquisitions.

*Appearances*

For the Commission: *Steven A. Newborn and Paul R. Roark.*

For the respondent: *George P. Stone, Munger, Tolles & Olson,*  
Los Angeles, CA. *Terrance Wallock,* in-house counsel, Arcadia, CA.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondent, The Vons Companies, Inc., an entity subject to the jurisdiction of the Commission, entered into an agreement with Williams Bros. Markets, Inc. ("Williams Bros."), a corporation, that violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that pursuant to that agreement, Vons acquired certain business interests of Williams Bros., and that such acquisition constitutes a violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

#### I. THE RESPONDENT

1. Respondent Vons is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan with its principal place of business located at 618 Michellinda Avenue, Arcadia, California.

2. For the year ending December 31, 1990, Vons had net sales of approximately \$5.3 billion.

3. Vons is engaged in the operation of retail supermarkets in various states throughout the United States.

#### II. THE ACQUIRED ASSETS

4. Williams Bros. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal place of business located at 124 West Carmen Lane, Santa Maria, California.

5. For the year ending December 31, 1990, Williams Bros. had net sales of approximately \$218.6 million.

6. Prior to and at the time of the acquisition by Vons, Williams Bros. was primarily engaged in the operation of retail supermarkets in California.

#### III. JURISDICTION

7. At all times relevant herein, Vons has been, and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

8. At all times relevant herein, Williams Bros. has been, and is now, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

## IV. ACTS AND PRACTICES

9. On or about September 3, 1991, Vons and Williams Bros. entered into a letter of intent for the acquisition by Vons of the assets and operations of 18 Williams Bros. supermarkets in the central coastal area of California. Included in the acquisition were three supermarkets in and adjacent to the city of San Luis Obispo, California. On or about December 31, 1991, Vons and Williams Bros. entered into a purchase and sale agreement to transfer the assets and operations of the 18 Williams Bros. supermarkets to Vons. On or about January 28, 1992, the acquisition was consummated.

10. On September 6, 1991, after Vons had entered into a letter of intent to purchase the Williams Bros. stores, Vons agreed to sell its store in San Luis Obispo to a drugstore operator. On or about September 12, 1991, it entered into a formal agreement with the drugstore operator. On or about September 30, 1991, escrow closed on the transaction. This transaction and the one described in paragraph 9 were inextricably intertwined: the second would not have been made but for the first. Vons sacrificed short run profits to secure market power in the relevant market by agreeing to sell its store in the city of San Luis Obispo to a person that did not intend to operate it as a supermarket for a lower price than it was offered by a person who did intend to operate it as a supermarket.

## V. RELEVANT MARKETS

11. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisition of Williams Bros. by Vons is the retail sale and distribution of food and grocery items in supermarkets. "Supermarket" means a retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple food stuffs, which may include salt, sugar, flour, sauces, spices, coffee and tea; and other grocery products,

including non-food items, which may include soaps, detergents, paper goods, and other products, and health and beauty aids.

12. For purposes of this complaint, a relevant section of the country or geographic market within which to analyze the effects of the acquisition of Williams Bros. by Vons is the area in and around the city of San Luis Obispo, California.

#### VI. MARKET STRUCTURE

13. The relevant market set forth in paragraphs 11 and 12 is highly concentrated, whether measured by Herfindahl-Hirschmann Indices or by two-firm concentration ratios. Vons has approximately a 50% share of that market.

14. Entry into the relevant market is difficult.

15. Prior to the transactions described in paragraphs 9 and 10, Vons and Williams Bros. were actual competitors in the relevant market.

#### VII. EFFECTS

16. The effect of the acquisition by Vons of the assets of Williams Bros. may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition between Vons and Williams Bros.;

b. By eliminating Williams Bros. as a substantial independent competitive force;

c. By facilitating the reduction of capacity in the relevant markets through Vons' sale of its store in the city of San Luis Obispo to a buyer not intending to operate it as a supermarket; and

d. By significantly enhancing the likelihood of collusion, or independent coordination among retail supermarkets.

## VIII. VIOLATIONS CHARGED

17. The asset purchase agreement and acquisitions, as set forth in paragraphs 9 and 10, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Vons Companies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan with its executive offices and principal

place of business located at 618 South Michellinda Avenue, Arcadia, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

### ORDER

#### I.

As used in this order, the following definitions shall apply:

A. "*Acquisition*" means the acquisition by Vons of eighteen supermarkets from Williams Bros. Markets, Inc., in San Luis Obispo and Santa Barbara Counties in California.

B. "*Property to be divested*" means the supermarket at 1314 Madonna Road, San Luis Obispo, California, and shall include the supermarket business and all assets, title, leases, properties, interests, business, goodwill, rights and privileges, of whatever nature, tangible and intangible, except for the name "Williams Bros." and any other registered or unregistered trademarks and trade names, and, at the option of the purchaser, all fixtures, equipment and inventory (except private label inventory) generally located at and utilized in any way in conjunction with the retail sale of food and groceries at such supermarket.

C. "*Respondent*" or "*Vons*" means The Vons Companies, Inc., subsidiaries, divisions and groups, and their respective directors, officers, employees, agents, partners, and representatives, and any successors or assigns of any of the foregoing.

D. "*Supermarket*" means a retail grocery store of 10,000 or more square feet that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple food stuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items, which may

include soaps, detergents, paper goods, and other household products, and health and beauty aids.

E. "*Eligible Person*" means Albertson's Inc., Certified Grocers of California Ltd., Food 4 Less Supermarkets, Inc., Scolari of California, Inc., and Joie Scolari, and their respective successors, assigns, subsidiaries, divisions and groups.

## II.

*It is ordered, That,*

A. Within twelve (12) months of the date this order becomes final, respondent shall divest, absolutely and in good faith, the Property to be Divested.

B. The divestiture shall be made only to (1) an eligible person or to (2) an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continuation of the Property to be Divested as an ongoing viable enterprise, engaged in the supermarket business, and to remedy the lessening of competition alleged in the Commission's complaint.

## III.

*It is further ordered, That* respondent shall take such action as is necessary to maintain the viability and marketability of the Property to be Divested and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of the Property to be Divested except in the ordinary course of business and except for ordinary wear and tear.

## IV.

*It is further ordered, That:*

A. If respondent has not divested absolutely and in good faith and with the Commission's prior approval, the Property to be Divested as required by paragraph II of this order within twelve (12)

months of the date this order becomes final, respondent shall consent to the appointment of a trustee by the Commission to divest the Property to be Divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Vons to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph IV. A. of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall, subject to the prior approval of the Commission, have the exclusive power and authority to divest the Property to be Divested.

3. The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or by the Court for a court-appointed trustee.

4. The trustee shall have full and complete access to the personnel, books, records and facilities relating to the Property to be Divested, or any other relevant information, as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondent shall



take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or the court for a court-appointed trustee.

5. Subject to respondent's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II. B of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Property to be Divested. The divestiture shall be made in the manner set out in paragraph II; *provided, however*, that if the trustee receive *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the Property to be Divested.

7. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, respondent shall execute a trust

agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph IV. A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Property to be Divested.

12. The trustee shall report in writing to respondent and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

#### V.

*It is further ordered,* That, within ninety (90) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with paragraph II of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying or has complied with the order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of all substantive contacts or negotiations for the divestiture required by this order, including the identity of all parties contacted. Respondent also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

#### VI.

*It is further ordered,* That, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission:

A. Any supermarket or leasehold interest in any supermarket in San Luis Obispo County, California, or any facility that has operated as a supermarket in San Luis Obispo County within six (6) months of the date of the accepted offer of purchase, or any equity or other interest in or the stock or share capital of any entity that owns any interest in or operates any supermarket in San Luis Obispo County, or any equity or other interest in or the stock and share capital of any entity that owned any interest in or operated any supermarket in San Luis Obispo County within six (6) months of the date of the accepted offer of purchase;

B. Any supermarket or leasehold interest in any supermarket anywhere in the United States that has operated as a supermarket within six (6) months of the date of the accepted offer of purchase if Vons, directly or indirectly, has within nine (9) months of the date of the accepted offer closed or sold all of its supermarkets (which must be at least one) within seven miles of the supermarket to be acquired, to a purchaser other than an ongoing viable enterprise engaged in the supermarket business in a manner consistent with such purchaser continuing to operate such supermarket as an ongoing, viable supermarket; and

C. *Provided, however*, that paragraphs VI. A and B shall not be deemed to require prior approval by the Commission of the construction of new facilities by Vons. *Provided further*, that acquisitions resulting in an interest of not more than 1% of the outstanding voting securities of publicly traded companies, solely for the purpose of investment, or an interest of not more than 5% of the outstanding voting securities of Certified Grocers of California, Ltd. solely for the purpose of investment are not subject to paragraphs VI. A and B of this order; acquisitions of voting securities of a publicly traded company shall not be subject to paragraphs VI. A and B of this order solely by reason of the ownership, directly or indirectly, by such publicly traded company of less than 5% of the outstanding voting securities of a company that owns an interest in or operates a supermarket; and

Beginning on August 29, 1992, and annually thereafter for ten (10) years, the respondent shall file with the Commission a verified written report of respondent's compliance with sections A and B of this paragraph.

## VII.

*It is further ordered,* That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice, respondent shall permit any duly authorized representative or representatives of the Commission:

A. Access, during the office hours of respondent and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order;

B. Upon five (5) days' notice to interview officers or employees of respondent, who may have counsel present, regarding such matters.

## VIII.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, or any other change, that may affect compliance obligations arising out of this order.

## CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the complaint and order insofar as they are based on Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, but do not reach the question whether the Williams Bros. acquisition also violated Section 7 of the Clayton Act, 15 U.S.C. 18.

IN THE MATTER OF

NATIONAL CENTER FOR NUTRITION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3393. Complaint, Aug. 10, 1992--Decision, Aug. 10, 1992*

This consent order prohibits, among other things, the Virginia marketer of the Ultrafast liquid diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

*Appearances*

For the Commission: *Richard F. Kelly, Michael C. McCarey and Walter C. Gross, III.*

For the respondent: *David Smith, Pierson, Semmes & Bemis, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Center for Nutrition, Inc., a corporation, (hereinafter "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent National Center for Nutrition, Inc., is a Virginia corporation, with its offices and principal place of business at 8560 Cinderbed Road, Suite 1500, Newington, Virginia.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of the physician-supervised Ultrafast very-

low-calorie diet ("VLCD") programs and related nutritional products to the public through cooperating physicians, hospitals and clinics. VLCDs are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. The Ultrafast VLCD diet programs provide between 450 and 800 calories per day. Ultrafast also offers diet programs providing more than 800 calories per day. The Ultrafast diet programs include "foods" or "drugs" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondent has created advertisements, and provided camera-ready advertising copy to participating physicians, hospitals and clinics for placement in various periodicals that are in general circulation to the public, to promote its Ultrafast diet programs to prospective patients. Typical of respondent's advertising, but not necessarily inclusive thereof, are the advertisements entitled "Ultrafast Now. If you're tired of weighting," "Because your life isn't worth the weight," and "Weight Loss Myth 4" attached hereto as Exhibits A-1 through A-3. Respondent further advertises its Ultrafast diet programs to the public by means of brochures and pamphlets which it provides to participating physicians, hospitals and clinics to give to patients and prospective patients. Typical of respondent's brochures and pamphlets, but not necessarily inclusive thereof, is the brochure entitled "Tired of Being Overweight?" attached hereto as Exhibit B-1.

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

PAR. 5. Respondent's advertising contains the following statements:

(a) "Take control of your weight - and your life - with a weight management program that works."

"Our physician-supervised ULTRAFAST program has shown thousands the safe and effective route to long-term results." (Exhibit A-1)

(b) "Studies have shown that supplemental fasting, when medically supervised, is the quickest, safest way of losing excess body weight..."

"Medically supervised ULTRAFAST offers an effective maintenance program that enables you not only to lose the weight, but to keep it off!" (Exhibit B-1)

(c) "...with our help and your commitment to succeed, you can lose weight, keep it off, feel better about yourself and live longer."

"The ULTRAFAST program works. That's why our medical staff and thousands of physicians nationwide trust it for patients seeking long-term results." (Exhibit A-2)

(d) "Weight Loss Myth #4:"

"Once You Lose It, You'll Gain It Back"

"Fact: With most programs success is easy at first. As time goes by, old habits return and so does the weight. But with the support of the ULTRAFAST Program, you get a new attitude. The weight stays off." (Exhibit A-3)

PAR. 6. By and through the use of the statements referred to in paragraph five, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that the Ultrafast diet programs are unqualifiedly free of health risks. Respondent has failed to disclose that physician supervision is required to minimize the potential risk to patients of the development of health complications on very-low-calorie diets. In view of the representation that the Ultrafast program is free of health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondent's failure to disclose, said representation was and is misleading.

PAR. 7. By and through the use of the statements referred to in subparagraph (b) of paragraph five, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication that competent and reliable scientific tests have established that Ultrafast diet programs are safer than all non-VLCD diet programs.

PAR. 8. In truth and in fact, competent and reliable scientific tests have not established that the Ultrafast diet programs are safer than all non-VLCD diet programs. Therefore, the representations set forth in paragraph seven were and are false and misleading.

PAR. 9. By and through the use of the statements referred to in subparagraphs (a) - (d) of paragraph five, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication that:

(a) The Ultrafast diet programs are successful long-term or permanent treatments for obesity; and

(b) The typical Ultrafast patient is successful in maintaining achieved weight loss.

PAR. 10. By and through the statements and representations referred to in paragraphs five and nine, respondent represents, and has represented, directly, or by implication, that at the time respondent made those representations, respondent possessed and relied upon a reasonable basis for those representations.

PAR. 11. In truth and in fact, at the time respondent made the statements and representations referred to in paragraphs five and nine, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph ten was and is false and misleading.

PAR. 12. The dissemination of the aforesaid false and misleading representations constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.



EXHIBIT A-1

ULTRAFAST NOW  
If you're tired of weighting.



Don't shoot the scale!  
Take control of your weight — and your life — with a weight management program that works.  
Our physician supervised ULTRAFAST® program has shown thousands the safe and effective route to long term results.  
For more information, call today. And save your scale. You'll be friends again someday soon.

**ULTRAFAST**

*Weight management that makes a difference.™*

The ULTRAFAST program of FACILITY NAME  
Address: Cm. State ZIP Telephone  
Ask for FIRST NAME

ULTRAFAST NOW  
If you're tired of weighting



Don't shoot the scale!  
Take control of your weight — and your life — with a weight management program that works.  
Our physician supervised ULTRAFAST® program has shown thousands the safe and effective route to long term results.  
For more information, call today. And save your scale. You'll be friends again someday soon.

**ULTRAFAST**

*Weight management that makes a difference.™*

The ULTRAFAST program of FACILITY NAME Address: Cm. State ZIP Telephone Ask for FIRST NAME



C-3393  
912302  
B12901

Don't shoot the scale!  
Take control of your weight — and your life — with a weight management program that works.  
Our physician supervised ULTRAFAST® program has shown thousands the safe and effective route to long term results.  
For more information, call today. And save your scale. You'll be friends again someday soon.

**ULTRAFAST**

*Weight management that makes a difference.™*  
The ULTRAFAST program of FACILITY NAME  
Address: Cm. State ZIP Telephone  
Ask for FIRST NAME

ULTRAFAST NOW  
If you're tired of weighting



Don't shoot the scale!  
Take control of your weight — and your life — with a weight management program that works.  
Our physician supervised ULTRAFAST® program has shown thousands the safe and effective route to long term results.  
For more information, call today. And save your scale. You'll be friends again someday soon.

**ULTRAFAST**

*Weight management that makes a difference.™*  
The ULTRAFAST program of FACILITY NAME  
Address: Cm. State ZIP Telephone  
Ask for FIRST NAME

All the ads on this sheet are reproducible camera-ready artwork. The sizes are standard to most newspapers, but can be enlarged or reduced slightly if needed to fit a particular space.

Your own name and address must be typeset and inserted where indicated. To match the style of these ads, specify the typeface "Galliard".

Exhibit A-1

Tired of  
the weight?

**ULTRAFAST**

*Weight management that makes a difference.™*  
The ULTRAFAST program of FACILITY NAME  
Address: Cm. State ZIP Telephone  
Ask for FIRST NAME

EXHIBIT A-2

worth the weight.



Being seriously overweight is most likely shortening your life. But with our help, and your commitment to succeed, you can lose weight, keep it off, feel better about yourself, and live longer. The ULTRAFAST® program works. That's why our medical staff and thousands of physicians nationwide trust it for patients seeking long-term results. Call today for more information.

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of  
FACILITY NAME  
Address, City, State, ZIP, Telephone  
Ask for: FIRST NAME

Because your life isn't worth the weight.



Being seriously overweight is most likely shortening your life. But with our help, and your commitment to succeed, you can lose weight, keep it off, feel better about yourself, and live longer. The ULTRAFAST® program works. That's why our medical staff and thousands of physicians nationwide trust it for patients seeking long-term results. Call today for more information.

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of FACILITY NAME Address, City, State, ZIP, Telephone Ask for: FIRST NAME

All the ads on this sheet are reproducible camera-ready artwork. The sizes are standard to most newspapers, but can be enlarged or reduced slightly if needed to fit a particular space.

Your own name and address must be typeset and inserted where indicated. To match the style of these ads, specify the typeface "Galliard."

Why weight?

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of Facility name  
Address, City, State, ZIP, Telephone  
Ask for: FIRST NAME

Exhibit A-2



C-3393  
9123024  
B129014

Being seriously overweight is most likely shortening your life. But with our help, and your commitment to succeed, you can lose weight, keep it off, feel better about yourself, and live longer. The ULTRAFAST® program works. That's why our medical staff and thousands of physicians nationwide trust it for patients seeking long-term results. Call today for more information.

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of FACILITY NAME  
Address, City, State, ZIP, Telephone  
Ask for: FIRST NAME

Because your life isn't worth the weight.



Being seriously overweight is most likely shortening your life. But with our help, and your commitment to succeed, you can lose weight, keep it off, feel better about yourself, and live longer. Ask us about the ULTRAFAST® program today.

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of FACILITY NAME  
Address, City, State, ZIP, Telephone  
Ask for: FIRST NAME

Why weight?

**ULTRAFAST.**  
Weight management that makes a difference!™

The ULTRAFAST® program of Facility name  
Address, City, State, ZIP, Telephone  
Ask for: FIRST NAME

EXHIBIT A-3

Weight Loss Myth #4:

# Once You Lose It, You'll Gain It Back.

**Fact:** With most weight loss programs success is easy at first. As time goes by, old habits return and so does the weight. But with the support of the ULTRAFAST<sup>®</sup> Program, you get a new attitude. The weight *stays* off. Find out the facts about weight loss. Call today!

## ULTRAFAST.

*Weight management that makes a difference.™*

YOUR NAME HERE  
Address  
Phone Number

Weight Loss Myth #4:

# Once You Lose It, You'll Gain It Back.

**Fact:** With most weight loss programs success is easy at first. As time goes by, old habits return and so does the weight. But with the support of the ULTRAFAST<sup>®</sup> Program, you get a new attitude. The weight *stays* off. Find out the facts about weight loss. Call today!

## ULTRAFAST.

*Weight management that makes a difference.™*

YOUR NAME HERE Address Phone Number

# Once You Lose It, You'll Gain It Back.

C-3393  
9123024  
B129014

**Fact:** With most weight loss programs success is easy at first. As time goes by, old habits return and so does the weight. But with the support of the ULTRAFAST<sup>®</sup> Program, you get a new attitude. The weight *stays* off. Find out the facts about weight loss. Call today!

## ULTRAFAST.

*Weight management that makes a difference.™*

YOUR NAME HERE  
Address  
Phone Number

Weight Loss Myth #4

# Once You Lose It, You'll Gain It Back.

**Fact:** Dieting is easy at first. Over time, old habits return and so does the weight. But with ULTRAFAST<sup>®</sup>, you get a new attitude. The weight *stays* off. Call today!

## ULTRAFAST.

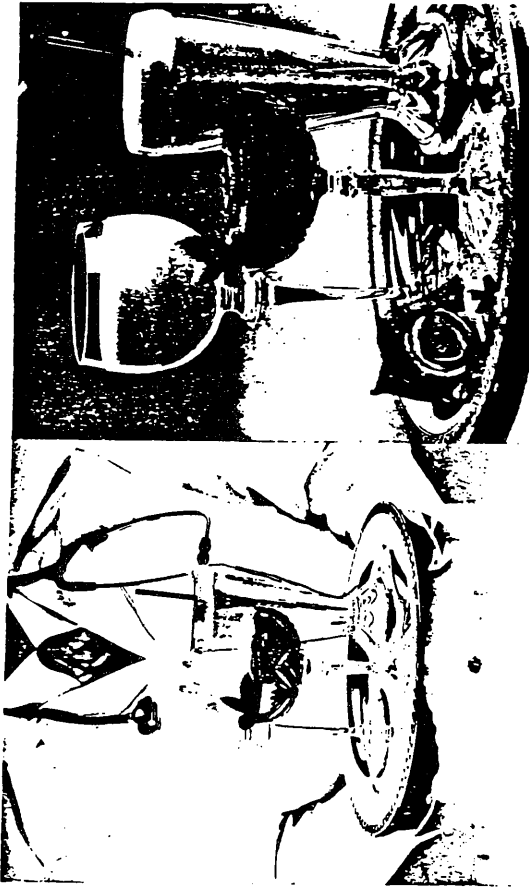
*Weight management that makes a difference.™*

YOUR NAME HERE  
Address  
Phone number

All the ads on this sheet are reproducible camera-ready artwork. The sizes are standard to most newspapers, but can be enlarged or reduced slightly, if needed to fit a particular space.

Your own name and address must be typeset and inserted where indicated. To match the style of these ads, specify the typeface "Galliard."

EXHIBIT B-1



ULTRAFAST™ is a dietary supplement applied only to physicians and hospitals for the use of treating overweight patients. ULTRAFAST™ is nutritionally complete and contains:  
 The highest biological quality protein available  
 More than 100% of the Recommended Daily Allowance of essential vitamins, minerals and trace elements  
 Adequate amounts of fiber  
 The ULTRAFAST™ program consists of a medical-behavioral treatment regimen for achieving immediate and lasting results

ULTRAFAST™ is different from other diet loss programs you may have seen in the past. Medically supervised, ULTRAFAST™ offers an effective maintenance program, which enables you to not only lose the weight, but keep it off! You will be provided nutritional counseling, exercise advice, behavior modification instruction, and most importantly, supervision and support you may not receive from a physician and associated staff.

# Tired of Being Overweight?

A Physician Supervised  
Weight Loss Program

**ULTRAFAST**



National Center of Nutrition, Inc.  
 1-800-678-5940 1-703-334-0700  
 8540 Comberford Rd. Suite 1500  
 Newport News, Virginia 23122  
 ©National Center of Nutrition 1994



<p>Studies have shown that supplemental fasting, when medically supervised, is the quickest, safest way of losing excess body weight. During the program you will experience the following:</p> <ul style="list-style-type: none"> <li>■ High energy level throughout the program</li> <li>■ Virtually NO HUNGER</li> <li>■ A significant reversal in conditions such as: diabetes, hypertension, high blood cholesterol, and other related conditions</li> <li>■ Women: 2-5 lb. weight loss per week</li> <li>■ Men: 3-7 lb. weight loss per week</li> </ul>	<p><b>PHASE I:</b></p> <ul style="list-style-type: none"> <li>■ Supplemental Fasting or Modified Fasting, 12 week period or until goal weight is reached</li> <li>■ Weekly visits</li> <li>■ No whole foods and virtually no hunger</li> <li>■ Weight loss: Women 2-5 lbs. per week Men 3-7 lbs. per week</li> <li>■ On-going support, guidance and counseling</li> </ul> <p><b>PHASE II:</b></p> <ul style="list-style-type: none"> <li>■ Re-introduction of food, 6 week period (Stabilization of weight)</li> <li>■ Weekly visits</li> <li>■ On-going support, guidance and counseling</li> </ul> <p><b>PHASE III:</b></p> <ul style="list-style-type: none"> <li>■ Maintenance Phase, 6-18 month period (introduces new life style changes)</li> <li>■ Monthly visits</li> <li>■ On-going support, guidance and counseling</li> </ul> <p>The Consultation and all three phases are extremely important to obtain your goals and to insure future success in maintaining your weight loss. Patients show a dramatic improvement in overall health while achieving an average weight loss of 70 pounds.</p>	<p>The cost of the program depends upon the amount of weight to be lost, the time needed to re-introduce food and other factors. The cost of the program is minimal when compared to the medical, physical and mental benefits you will experience during and after the program.</p>	<p>Depending on the insurance company, many of them cover a portion of the costs for office visits, lab work and medical examinations. The Internal Revenue Service has approved a full medical deduction for participation in a weight reduction program undertaken primarily for the treatment or cure of hypertension or other health problems directly related to excessive weight.</p>	<p>Take charge of your life and take the first step to begin your new life.</p> <p>If you are interested in this program, we urge you to attend one of our orientation sessions. At the orientation, the program will be outlined in detail and any questions you may have will be answered. The orientation is free of charge and there are no obligations. Schedule a visit, and if you are committed to losing weight, we are committed to helping you.</p>
<p><b>ORIENTATION:</b> Individual or group question and answer session designed to acquaint prospective patients with the program.</p>	<p><b>CONSULTATION:</b></p> <ul style="list-style-type: none"> <li>Physical Exam</li> <li>Blood Tests</li> <li>EKG</li> <li>Urinalysis</li> <li>Medical History</li> <li>Other Tests as Indicated</li> </ul>			

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent National Center for Nutrition, Inc., is a Virginia corporation, with its offices and principal place of business at 8560 Cinderbed Road, Suite 1500, Newington, Virginia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## DEFINITION

For purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, surveys or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results.

## I.

*It is ordered*, That respondent National Center for Nutrition, a Virginia corporation, its successors and assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control product, program or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of any very-low-calorie diet ("VLCD") program (providing 800 calories or less per day), unless respondent clearly and prominently discloses in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of the program.

B. Misrepresenting the likelihood that patients of respondent's diet program(s) will regain all or any portion of lost weight.

C. Making any representation, directly or by implication, about the success of patients on any diet program to achieve or maintain weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; *provided, however*, that for any representation that:

(1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of patients using the program, said evidence shall, at a minimum, be based on a representative sample of: (a) all patients who have entered the program, where the representation relates to such persons; or (b) all patients who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent or (b) demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

D. Representing, directly or by implication, that any patients of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation:

(1) The following information:

(a) The average percentage of weight loss maintained by those patients,

(b) The duration, over which the weight loss was maintained, measured from the date that patients ended the active weight loss phase of the program, *provided, however*, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed, and

(c) If the patient population referred to is not representative of the general patient population for that program, the proportion of the



total patient population in respondent's programs that those patients represent, expressed in terms of a percentage or actual numbers of patients, or the statement: "Ultrafast makes no claim that this [these] result[s] is [are] representative of all patients in the Ultrafast program;" and

(2) The statement: "For many dieters, weight loss is temporary." *Provided, however,* that, respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's diet programs.

E. Making comparisons between the safety of respondent's diet program or programs and the safety of any other diet program or programs, unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for making such representation. Such reasonable basis shall consist of a competent and reliable scientific study or studies substantiating the representation in terms of both the safety of respondent's diet program or programs and the safety of the diet program or programs with which the comparison is made.

F. Misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

## II.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, the filing of a bankruptcy petition, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

## III.

*It is further ordered,* That respondent shall maintain for a period of three (3) years after the date the representation was last made, and make available to the Federal Trade Commission staff upon request

for inspection and copying, all materials possessed and relied upon to substantiate any claim or representation covered by this order, and all test reports, studies, surveys or information in its possession or control or of which it has knowledge that contradict, qualify or call into question any such claim or representation.

#### IV.

*It is further ordered,* That respondent and its successors or assigns, shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors and employees, that are engaged in the preparation and placement of advertisements or promotional materials, who communicate with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all of respondent's future officers, agents, representatives, independent contractors and employees having said responsibilities. *Provided, however,* that nothing in this order shall obligate respondent with respect to advertising or promotional materials of participating physicians, hospitals and clinics that are neither owned, operated or controlled by respondent when said advertising is not prepared, approved or placed by respondent.

#### V.

*It is further ordered,* That respondent and its successors or assigns shall, within thirty (30) days after service of this order, advise physicians, hospitals and clinics using the Ultrafast diet program that advertising previously furnished by respondent for their use, and brochures, pamphlets and booklets previously provided by respondent to physicians, hospitals, and clinics for dissemination to patients and prospective patients, shall not be further used by those physicians, hospitals and clinics where that advertising or other materials would violate this order. If, after providing the notification required by the first sentence in this paragraph V, respondent becomes aware that any physician, hospital or clinic using the Ultrafast diet program, uses advertising or other materials previously

furnished by respondent that would violate this order, respondent shall again communicate with that physician, hospital or clinic in an attempt to ensure that such advertising or other materials shall not be further used by said physician, hospital or clinic.

## VI.

*It is further ordered,* That respondent and its successors or assigns shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Owen dissenting with respect to the numerical disclosure requirements for television and radio advertisements.

### CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted to accept the consent agreements in these matters. In addition to the injunctive provisions, the advertising disclosures that the orders require are appropriate given the allegations in the complaints that the firms failed to have a basis for previous advertising claims about weight loss maintenance. This does not mean that similar disclosures are necessarily required for other firms in the diet industry. Indeed, if their advertising claims have a valid basis, such a requirement might be unduly burdensome, for firms who routinely use broadcast advertising, and without clear, countervailing benefits for consumers.

### STATEMENT OF COMMISSIONER DEBORAH K. OWEN CONCURRING IN PART AND DISSENTING IN PART

The consent orders with these three marketers of very low calorie diet programs go a long way toward protecting consumers against misrepresentations about the safety and efficacy of these programs. However, legitimate concerns have been raised as to whether the mandated, company-specific maintenance disclosures in television and radio ads are effective in communicating useful information to consumers, unduly cumbersome, and consistent with the Commission's position in other situations. Based on comments received and

other information, I believe that consumers would be better served by a different approach to company-specific disclosures when weight-loss maintenance claims are made in certain television and radio advertisements. Accordingly, I have voted in favor of issuing the consent agreements in final form, except as to those provisions, with respect to which I dissent.

I support requiring in all maintenance advertising by these respondents general disclaimers which alert consumers to the fact that weight loss is temporary for many dieters. This counterbalances any unrealistically rosy scenario that a diet program might try to present in this regard. However, the orders compel additional disclosures, including a string of statistics, which may well be among the more informationally complex disclosures that have been required in Commission orders. While these numerically intricate disclosures may ultimately prove helpful to consumers in the context of print ads, which afford the opportunity for absorption, reflection, and comparison, I am concerned that the orders may fail to appreciate that consumers' ability to assimilate such complicated messages is likely to be much poorer for TV and radio ads of 30 seconds or less. One study of FTC orders with disclosure requirements noted that, generally, broadcast media would not appear especially effective in providing detailed or complex disclosures.<sup>1</sup> A more recent study suggests that consumers are less likely to become well informed when certain disclosures are displayed in a video, as compared to a print, format.<sup>2</sup>

In the past, the Commission itself has recognized that less detailed disclosure requirements are sometimes appropriate for broadcast claims, and has entered orders which tailored the disclosure requirements to particular media. For instance, in *Sorga, Inc.*, 97 FTC 205 (1981), the Commission charged an advertising agency with having made deceptive and unsubstantiated representations about the efficacy and safety of a contraceptive, where the potential adverse

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<sup>1</sup> W. Wilkie, *Affirmative Disclosure at the FTC: Communication Decisions*, 6 J. Pub. Pol'y & Marketing 33, 35 (1987).

<sup>2</sup> See A. Best, *The Talismanic Use of Incomprehensible Writings: An Empirical and Legal Study of Words Displayed in TV Advertisements*, 33 St. Louis U. L. J. 285 (1989).

impact of the misrepresentations was highly serious. Lengthy disclosures were required in print ads, whereas the television and radio ad disclosures were greatly abbreviated. Similarly, in *Southwest Sunsites, Inc.*, 105 FTC 7 (1985), a brief, simple disclosure concerning the riskiness of land purchases was required for radio, television, and short print advertisements, with a lengthy, more complex disclosure mandated for larger print ads, promotional materials, and oral sales presentations. In addition, a detailed disclosure about cancellation rights was required in each land sale contract.

More recently, the Commission has recognized the differences between disclosures in print on labels, and in broadcast media. In Congressional testimony presented in November of last year, the Commission noted that:

we feel it is important that the Commission have the ability to take account of the practicalities of regulating advertising. For example, regulations enacted pursuant to the [Nutrition Labeling and Education Act] might require more extensive explanations of a health claim in food labeling than would be necessary for a television or radio advertisement.<sup>3</sup>

Finally, the length and detailed nature of the disclosures mandated by the Commission for radio and television ads in these orders appear to resemble proposed Food and Drug Administration labeling disclosure requirements that Commission staff from the Bureau of Consumer Protection and Economics have recently criticized, in the print context of labels. With respect to the length of the numerical disclosures required in connection with relative nutrient content claims, the staff argued:

The length of the required disclosure is a concern primarily because it could reduce the information available to consumers by reducing producers' incentives to make valid relative claims.... Lengthy disclosures contribute to label clutter, which may discourage consumers from reading the information on the label.

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<sup>3</sup> Prepared Statement of the Federal Trade Commission before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, U.S. House of Representatives (Nov. 21, 1991) at 12.

The staff proposed, instead, a more concise disclosure similar in length to the general maintenance disclaimer that would be required under these consent orders.<sup>4</sup>

I strongly suspect that many consumers will have great difficulty in absorbing or recalling the relatively complex disclosures of these orders if made during broadcast ads. Although these particular respondents have to date not made great use of broadcast media in marketing their programs, some such undesirable effects from the present orders will still obtain in the broadcast advertising that they do. Moreover, I am very concerned that the approach in these orders may be viewed as precedent in any future matter that involves firms whose use of broadcast media is much more extensive.

In my view, the orders would have been more effective had they required for broadcast ads only the general disclaimer on weight-loss maintenance. But I am also convinced that the other disclosures on percent of weight loss maintained, duration of that maintenance, and the representativeness of the triggering claim would be important in helping consumers decide whether they will get their money's worth when they sign up for a particular program. Consequently, based on available information, I would have supplemented the more concise general disclosure for broadcast ads with requirements that respondents provide at point-of-sale, and prior to the execution of any contract, a clearly written statement of all the disclosures otherwise required,<sup>5</sup> and that the broadcast ads alert consumers to the

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<sup>4</sup> The staff cited as an example of a problematic mandated disclosure: "Less fat -- 38 percent less fat than our regular popcorn. This popcorn has 5 grams of fat compared to 8 grams in our regular popcorn." They proposed as an alternative: "Less fat -- 3 grams less than our regular popcorn." Federal Trade Commission Staff Comments Before the Dept. of Health and Human Services, Food and Drug Administration, In the Matters of Nutrition Labeling; Nutrient Content Claims; Health Claims; Ingredient Labeling, Prop. Rules, Dkt. Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992) at 39-40.

<sup>5</sup> See, e.g., *Arthur Murray, Inc.*, 95 FTC 347 (1980) (disclosures required of firm and its franchisees in contracts with consumers); see also, Letter from the Honorable Janet D. Steiger (by direction of the Commission) to Senator Slade Gorton (Sept. 25, 1991) at 7 n.11 ("The principle that detailed information of the kind usually found on labels is most useful when available at the point when comparisons can be made or decisions can be affected has been supported by many

availability of that additional information. This approach, in my view, would provide the relevant information to consumers at a time when they most need it, and in a format more likely to be useful in evaluating and comparing diet programs.

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consumer information processing studies.").

## IN THE MATTER OF

## SANDOZ NUTRITION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3394. Complaint, Aug. 10, 1992--Decision, Aug. 10, 1992*

This consent order prohibits, among other things, the Minnesota-based marketer of the Optifast diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients or any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

*Appearances*

For the Commission: *Richard F. Kelly, Michael C. McCarey and Walter C. Gross, III.*

For the respondent: *Daniel Shulman, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, MN.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Sandoz Nutrition Corporation, a corporation, (hereinafter "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Sandoz Nutrition Corporation is a Delaware corporation, with its offices and principal place of business at 5320 W. 23rd Street, Minneapolis, Minnesota.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of the physician-supervised Optifast 70, and other very-low-calorie diet ("VLCD") programs and related



nutritional products to the public through cooperating hospitals and clinics. VLCDS are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. The Optifast diet programs provide between 420 and 800 calories per day. The Optifast diet programs include "foods" or "drugs" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondent has created and placed advertisements, and provided camera-ready advertising copy and 30 and 60 second scripts for radio spots to its participating hospitals and clinics for placement in various periodicals that are in general circulation to the public and broadcast on radio stations, to promote its Optifast diet programs to prospective patients. Typical of respondent's advertising, but not necessarily inclusive thereof, are the advertisements entitled "How expensive is cheap weight loss?" "To some weight loss programs, it's just before and after...", "The One," and the 30 second radio script attached hereto as Exhibits A-1 through A-4. Respondent further advertises its Optifast diet programs to the public by means of brochures and pamphlets which it provides to participating hospitals and clinics to give to patients and prospective patients. Typical of respondent's brochures and pamphlets, but not necessarily inclusive thereof, are the brochures and pamphlets entitled "Introducing a successful approach to weight management for people 50 pounds or more overweight," and "Getting Serious... About Lightening Up" attached hereto as Exhibits B-1 and B-2.

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

PAR. 5. Respondent's advertising contains the following statements:

(a) "While our typical patients also lose more weight. . . they also lose safely. . . ."

"So safe, it's chosen by more hospitals than any other weight management program." (Exhibit A-1)

(b) "The Optifast Program provides a unique combination of safe, rapid weight loss. . . ." (Exhibit B-1)

(c) "The One That's Clinically Proven Safe and Effective" (Exhibit A-4)

PAR. 6. By and through the use of the statements referred to in paragraph five, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that the Optifast diet programs are unqualifiedly free of health risks. Respondent has failed to disclose that physician supervision is required to minimize the potential risk to patients of the development of health complications on very-low-calorie diets. In view of the representation that the Optifast program is free of health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondent's failure to disclose, said representation was and is misleading.

PAR. 7. Respondent's advertising contains the following statements:

(a) "To some weight loss programs, it's just before and after... The OPTIFAST program works after the after." (Exhibit A-1)

(b) "The most discouraging part of losing weight is knowing that you'll probably gain it all back. Unless you're on the OPTIFAST Program." (Exhibit A-1)

(c) "[Y]ou can call the OPTIFAST program today, and have all you need to control your weight the rest of your life." (Exhibit A-2)

(d) "[T]he focus is on long term, sustained weight loss. In other words, what you lose stays lost." (Exhibit B-1)

(e) "How Serious Are You About Finding A Sensible Way To Lose Weight - and Keep It Off? . . . Designed by the same professionals and research experts who created the OPTIFAST Program . . . the OPTITRIM Program is designed to offer you safe and effective weight loss and maintenance. Because the point of losing weight is to adjust your life style so that you'll keep it off." (Exhibit B-2)

PAR. 8. By and through the use of the statements referred to in paragraph seven, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that:

(a) The Optifast diet programs are successful long-term or permanent treatments for obesity; and

(b) The typical Optifast patient is successful in maintaining achieved weight loss.

PAR. 9. By and through the statements and representations referred to in paragraphs seven and eight, respondent represents, and has

represented, directly, or by implication, that at the time respondent made those representations, respondent possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at the time respondent made the statements and representations referred to in paragraphs seven and eight, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph nine was and is false and misleading.

PAR. 11. Respondent's advertising contains the following statement:

"... OPTIFAST patients maintain more weight loss, on average, than on any other program. And they have large, published clinical studies that prove it." (Exhibit A-3)

PAR. 12. By and through the use of the statement referred to in paragraph eleven, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that competent and reliable scientific studies have established that Optifast diet programs are more successful at maintaining weight loss than any other weight loss program.

PAR. 13. In truth and in fact, respondent possesses no scientific studies for diet programs other than the Optifast program, and therefore no competent and reliable scientific studies have established that the Optifast diet programs are more successful at maintaining weight loss than any other weight loss program. Therefore, the representation set forth in paragraph twelve was and is false and misleading.

PAR. 14. The acts and practices of respondent alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and "false advertisements" in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.

EXHIBIT A-1

~~EXHIBIT A-1~~

C-3394 B129026

**To some weight loss programs, it's just before and after...**

**The OPTIFAST® Program works after the after.**

The most discouraging part of losing weight is knowing you'll probably gain it all back. Unless you're on The OPTIFAST Program.

While our typical patients lose more weight...faster than on any other weight loss program (48 pounds in 13 weeks\*), they also lose safely. Our patients also maintain more weight loss, on average, than on any other program.\*

And it's all due to the comprehensive support of a team of physicians, behaviorists and registered dietitians specially trained in weight management. They'll constantly monitor your progress as they teach you skills you need to lose weight and keep the pounds off. Then our professionally supervised maintenance program will reinforce all you've learned.

What's more, The OPTIFAST Program can actually cost no more than the so-called "one fee" programs, when you add up their weekly prepackaged food costs and other extra expenses. So call The OPTIFAST Program today. You'll live thinner and healthier ever after. And after.

**The OPTIFAST Program**

**So safe, it's chosen by more hospitals than any other weight management program.**

\*Large, published weight reduction clinical studies. © 1990 Sandoz Nutrition Corporation

For more moderate weight problems, ask about The OPTITRIM® Program.

For more moderate weight problems, ask about The OPTITRIM® Program.

These additional tags are for use within the body of this ad only by those centers offering The OPTITRIM<sup>SM</sup> Program.

## EXHIBIT A-2

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## How expensive is cheap weight loss? \_\_\_\_\_

Some weight loss programs entice you with low initial fees and big promises.

They give you weekly "nutrition" counseling and optional group meetings.

But you also give—as much as \$84 a week—for a mandatory part of the program: the prepackaged foods.

So achieving a 50-pound weight loss can cost as much, or even more, than losing 50 pounds on The OPTIFAST® Program.

What's more, the average OPTIFAST patient loses 48 pounds in 13 weeks!

And The OPTIFAST Program gives you so much more—a comprehensive program, run by a team of physicians, behaviorists and registered dietitians, who will teach you the skills you need to

lose weight and keep the pounds off. Then our professionally supervised maintenance program will reinforce all you've learned.

In fact, on average, OPTIFAST patients maintain more weight loss than on any other weight loss program! Instead of just emphasizing the "before and after," The OPTIFAST Program keeps working "after the after."

So you can pay for meal after meal. You can pay for meeting after meeting. Or you can call The OPTIFAST Program today, and have all you need to control your weight the rest of your life.



Chosen by more hospitals than any other weight management program.

## EXHIBIT A-3

## The OPTIFAST PROGRAM

## 30 SECOND RADIO SPOT

L.L.A. : With some diets, it's just before and after. But The OPTIFAST Program works after the after. Because while the average OPTIFAST patient loses weight quickly -- 48 pounds in 13 weeks -- they also lose safely. And they maintain more weight loss, on average, than on any other program. Published clinical studies prove it. So call The OPTIFAST Program today. You'll live thinner, and healthier, even after. Call The OPTIFAST Program at (hospital name), (phone number), (repeat number).

Complaint

115 F.T.C.

EXHIBIT A-4

Exhibit A-4

C-3394  
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◆  
The One You've Been Hearing About

◆  
The One You've Been Reading About

◆  
The One That's Medically Supervised

◆  
The One With Behavioral And Nutritional Therapy

◆  
The One That's Clinically Proven Safe And Effective

◆  
The One Everyone Tries To Imitate

◆  
The One Medical Weight Management Program You Should Call



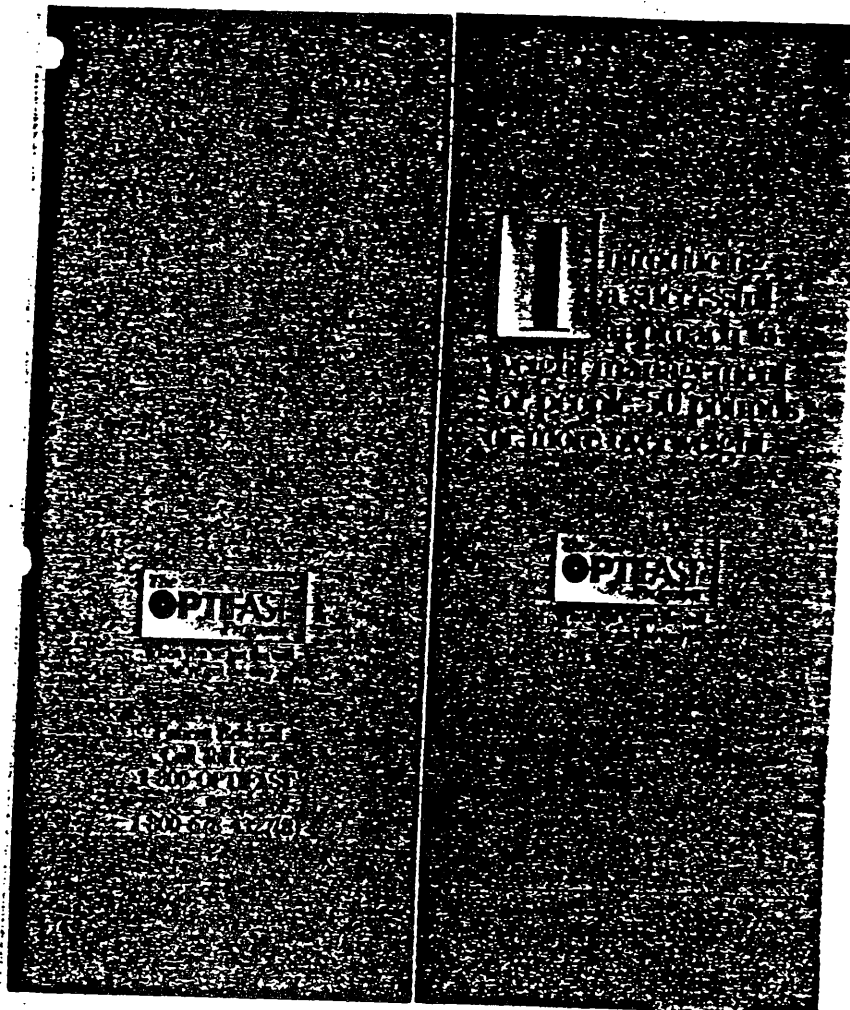
The Proven Medical Treatment For Obesity



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To Attend A Free Orientation Call:

EXHIBIT B-1



C-3394  
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**O**besity. It's not a weakness in character. It's a disease.

Obesity is one of the most critical health problems we face today. It's a chronic medical condition that affects millions of Americans. And the problem is growing worse every year.

Obesity causes or contributes to the development of an array of life-threatening diseases, including hypertension, heart disease and Type II diabetes. It also creates untold physical pain and emotional anguish for those afflicted.

If you are 50 pounds or more overweight, The Optifast® Program offers new hope for you.

Developed by Sandoz Nutrition, The Optifast Program is based on the belief that a problem as complex as obesity requires a complex solution. One that deals not only with your weight, but also with the physical, social and emotional aspects of being severely overweight.



**M**ore than a diet, Optifast is a program for losing weight.

Taking weight off and keeping it off are two different matters.

For the first, you need a program that offers safe, rapid weight loss. For the second, you need a program that focuses on long-term behavior modification.

The Optifast Program offers both. Medically supervised and hospital/clinic

affiliated, The Optifast Program provides a unique combination of safe, rapid weight loss; behavior modification and psychological support; nutrition education; exercise; and frequent medical monitoring.

Initial weight loss is rapid. And very encouraging. But the focus is on long-term, sustained weight loss. In other words, what you lose stays lost.

It's not easy, of course, but if you have the commitment, The Optifast Program has the know-how. Plus an impressive 12-year record with over a quarter of a million people to back us up.



**M**ore than a way of losing, it's a new way of living.

The Optifast Program is a highly structured, 26-week program of supplemented fasting, refeeding, and stabilization.

There are four stages to the Optifast Program:

In the evaluation, we help you determine if you qualify for the program by conducting a series of medical tests and an interview.

You have an equally important role to play.

You must decide if you are willing to make the commitment in time, money and lifestyle change it will take to achieve our mutual goals if you elect to participate in The Optifast Program.

The supplemented fasting phase lasts for 12 weeks. During this phase you will be put on a very low calorie diet consisting solely of the Optifast formulation. The



formulation comes in a variety of flavors, is nutritionally balanced, and contains 100% of the daily recommended requirements of protein, vitamins and minerals.

You will have weekly consultations with program physicians, nurses and nutritionists to monitor your safety and progress.

In addition, you will participate in behavior modification sessions led by a professional behaviorist. It is participation in these sessions, and the group support you encounter there, which enables you to successfully reshape your thinking about food and the role you will allow it to play in your future life.

**The refeeding and stabilization phases** of the program last a total of 13 weeks.

During refeeding you will be gradually reintroduced to regular food and withdrawn from the Optifast formulation. Weekly medical consultations and group behavior modification sessions will continue. Most patients continue to lose weight during this period.

Once solid foods have been completely reintroduced into your diet, you will move into stabilization, the final stage of the core Optifast Program. Behavioral counselling and relapse prevention techniques are stressed during this period as you gain the skills and confidence necessary to maintain your weight loss.

**Maintenance: an additional support.** Following stabilization, many participants elect the additional support provided by Optifast weight maintenance sessions. Experience has shown that people who continue with the program for this optional phase experience increased success at keeping their weight down.

**I**f you've failed at one diet after another, come taste success.

The Optifast Program is an unprecedented medical success. Over the past 12 years, more than a quarter of a million obese people have participated in the program. The results have been impressive, both in terms of long-term sustained weight loss, and in the lessening of medically related problems such as diabetes and hypertension.

If you're fifty or more pounds overweight, The Optifast Program offers new hope for you.

**B**egin by attending one of our free Optifast orientation sessions.

Hear for yourself how The Optifast Program approaches weight loss and the health risks of obesity. Our team of medical specialists will explain the program in depth and answer any questions you may have.

To register, or for more information, please call us at the number listed on the back of this brochure. And remember, when it comes to long-term weight management: If you have the will, The Optifast Program has the way.



**SANDOZ NUTRITION**  
YOUR SOURCE FOR NUTRITION™

5320 West Twenty Third Street, Minneapolis, Minnesota 55416

Complaint

115 F.T.C.

EXHIBIT B-2

EXHIBIT B-2

C-3394  
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B129026

*Introducing*

*The OPTITRIM<sup>®</sup>*

*Program.*

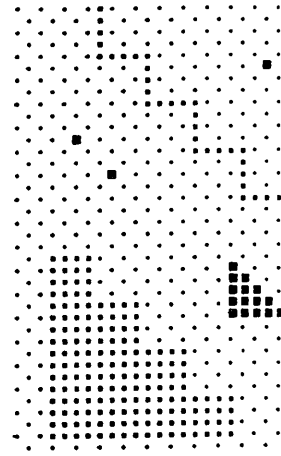
*More Than A Diet...*

*An Opportunity*

*For Healthier*

*Living.*

Get Serious...  
About Lightning Up.



*The*  
**OptiTrim<sup>®</sup>**  
*Program*

© 1992 Swanson Nutrition Corporation. All rights reserved. Program OptiTrim<sup>®</sup> may not be reproduced or used here without the prior permission of Swanson Nutrition Corporation.  
08-001-190

EXHIBIT B-2 Cont.

**How Serious Are You About Finding A Sensible Way To Lose Weight - and Keep It Off?**

There are many reasons to lose weight. And there are just as many ways to lose weight. Choosing to offer a "quick and easy" way to take the weight off.

No doubt you've even used a lot of those "fast" solutions - a sleeping pill, diuretic, a stomach pump or even a supermarket purchase - with no success. And now you're frustrated because you're still carrying around the 20 to 40 pounds of weight you thought you'd lost for good.

You're probably concerned that those extra pounds will have already started to affect your health.

Disappointed by the many professional and research experts who recommend The OPTITUM Program (formulated specifically for women obese people). The OPTITUM Program is designed to offer you safe and effective weight loss and maintenance.

Because the goal of losing weight is to adjust your life style so that you'll keep it off!

So if you're ready to spend your time in a weight management program that is as sensible and effective as it is suitable for your overall health, why not make a sensible choice in The OPTITUM Program?

Let's meet with your doctor. How much should you weigh for your good health?

**Can You Imagine How Life Would Change If You Finally Lost Those Pounds For Good?**

Think about it when you run up a flight of stairs. Or climb a ladder across the yard, turn a procedure on your to do list, lounge down all those sleepless nights and start-conscious.

Aside from the fact that you can't see that you look as good as you could, you know that your body could benefit from the loss of those extra pounds too. But your doctor told you that your cholesterol level, your blood pressure, and diabetes risk are climbing right along with your weight.

Good health and good nutrition go together. That's why your weight loss program with The OPTITUM Program will be guided by a team of health care professionals under a doctor's supervision. The supervising physician will ensure your current health status and advise you on reasonable weight loss goals.

A supervised supplement as well as prepackaged portion-controlled meals take the guesswork out of calorie counting and meal preparation.

But there's more to long-term weight loss than what you eat - and what you can't eat. With the weekly guidance of your group leader, you'll learn to change your eating habits and create a regular exercise routine.

By the time you're ready for the maintenance phase, your group and your group leader will be an excellent source of support, encouragement and advice.

Planned. Sensible. Guided by medical professionals who have weight loss goals and can benefit the rest of us. The OPTITUM Program difference.

Check your calendar. It needs from today.

**Is The OPTITUM Program The One For You?**

If you're an adult with 20 to 50 pounds to lose, you can be an excellent candidate for The OPTITUM Program.

And you're fortunate. Because this hospital has teamed up with leading physicians and the nutrition and clinical expertise of Sandoz Nutrition to provide you with a program designed for safe, effective weight loss.

You're fortunate for another reason too. Sandoz has been a leader for responding to the needs of people like you, people who want the best for their health. As a result of clinical research and extensive experience in weight management, Sandoz Nutrition products and programs have an unmatched reputation for excellence in the health care industry.

But, necessary as a lifetime life style change, The OPTITUM Program is a serious decision. The more you consider yourself, the more you can benefit from:

- A sensible weight loss program
- Healthier eating habits
- A lower cholesterol level
- Increased physical activity
- Reduced stress

No matter how you look at it, The OPTITUM Program is a good choice today. And it will help you change your life style so that you can look forward to the good years ahead.

Take a look in the mirror. Don't that person who deserves to feel as good - but great?

Yes  Absolutely  No question

Just as a good health is The OPTITUM Program, information means. Just call the toll-free number listed on the back cover to learn when a convenient session will begin.

Optitum®

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sandoz Nutrition Corporation is a Delaware corporation, with its offices and principal place of business at 5320 W. 23rd Street, Minneapolis, Minnesota.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## DEFINITION

For purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, surveys or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results.

## I.

*It is ordered*, That respondent Sandoz Nutrition Corporation, a Delaware corporation, its successors and assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control product, program or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of any very-low-calorie diet ("VLCD") program (providing 800 calories or less per day), unless respondent clearly and prominently discloses in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of the program.

B. Misrepresenting the likelihood that patients of respondent's diet program(s) will regain all or any portion of lost weight.

C. Making any representation, directly or by implication, about the success of patients on any diet program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; *provided, however*, that for any representation that:

(1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of patients using the program, said evidence shall, at a minimum, be based on a representative sample of: (a) all patients who have entered the program, where the representation relates to such persons; or (b) all patients who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent or (b) demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

D. Representing, directly or by implication, that any patients of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation:

(1) The following information:

(a) The average percentage of weight loss maintained by those patients,

(b) The duration, over which the weight loss was maintained, measured from the date that patients ended the active weight loss phase of the program, *provided, however*, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed, and

(c) If the patient population referred to is not representative of the general patient population for that program, the proportion of the

total patient population in respondent's programs that those patients represent, expressed in terms of a percentage or actual numbers of patients, or the statement: "Optifast makes no claim that this [these] result[s] is [are] representative of all patients in the Optifast program;" and

(2) The statement: "For many dieters, weight loss is temporary." *Provided, however,* that, respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's diet programs.

E. Making comparisons between the efficacy of respondent's diet program or programs and the efficacy of any other diet program or programs, unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for making such representation. Such reasonable basis shall consist of a competent and reliable scientific study or studies substantiating the representation in terms of both the efficacy of respondent's diet program or programs and the efficacy of the diet program or programs with which the comparison is made.

F. Misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

## II.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, the filing of a bankruptcy petition, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

## III.

*It is further ordered,* That respondent shall maintain for a period of three (3) years after the date the representation was last made, and make available to the Federal Trade Commission staff upon request



for inspection and copying, all materials possessed and relied upon to substantiate any claim or representation covered by this order, and all test reports, studies, surveys or information in its possession or control or of which it has knowledge that contradict, qualify or call into question any such claim or representation.

#### IV.

*It is further ordered,* That respondent and its successors or assigns, shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors and employees, including participating hospitals or clinics, that are engaged in the preparation and placement of advertisements or promotional materials, who communicate with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all of respondent's future officers, agents, representatives, independent contractors and employees having said responsibilities.

#### V.

*It is further ordered,* That respondent and its successors or assigns shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Owen dissenting with respect to the numerical disclosure requirements for television and radio advertisements.

#### CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted to accept the consent agreements in these matters. In addition to the injunctive provisions, the advertising disclosures that the orders require are appropriate given the allegations in the complaints that the firms failed to have a basis for previous advertising claims about weight loss maintenance. This does not mean that similar disclosures are necessarily required for other firms in the diet industry. Indeed, if their advertising claims have a valid

basis, such a requirement might be unduly burdensome, for firms who routinely use broadcast advertising, and without clear, countervailing benefits for consumers.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN  
CONCURRING IN PART AND DISSENTING IN PART

The consent orders with these three marketers of very low calorie diet programs go a long way toward protecting consumers against misrepresentations about the safety and efficacy of these programs. However, legitimate concerns have been raised as to whether the mandated, company-specific maintenance disclosures in television and radio ads are effective in communicating useful information to consumers, unduly cumbersome, and consistent with the Commission's position in other situations. Based on comments received and other information, I believe that consumers would be better served by a different approach to company-specific disclosures when weight-loss maintenance claims are made in certain television and radio advertisements. Accordingly, I have voted in favor of issuing the consent agreements in final form, except as to those provisions, with respect to which I dissent.

I support requiring in all maintenance advertising by these respondents general disclaimers which alert consumers to the fact that weight loss is temporary for many dieters. This counterbalances any unrealistically rosy scenario that a diet program might try to present in this regard. However, the orders compel additional disclosures, including a string of statistics, which may well be among the more informationally complex disclosures that have been required in Commission orders. While these numerically intricate disclosures may ultimately prove helpful to consumers in the context of print ads, which afford the opportunity for absorption, reflection, and comparison, I am concerned that the orders may fail to appreciate that consumers' ability to assimilate such complicated messages is likely to be much poorer for TV and radio ads of 30 seconds or less. One study of FTC orders with disclosure requirements noted that, generally, broadcast media would not appear especially effective in

providing detailed or complex disclosures.<sup>1</sup> A more recent study suggests that consumers are less likely to become well informed when certain disclosures are displayed in a video, as compared to a print, format.<sup>2</sup>

In the past, the Commission itself has recognized that less detailed disclosure requirements are sometimes appropriate for broadcast claims, and has entered orders which tailored the disclosure requirements to particular media. For instance, in *Sorga, Inc.*, 97 FTC 205 (1981), the Commission charged an advertising agency with having made deceptive and unsubstantiated representations about the efficacy and safety of a contraceptive, where the potential adverse impact of the misrepresentations was highly serious. Lengthy disclosures were required in print ads, whereas the television and radio ad disclosures were greatly abbreviated. Similarly, in *Southwest Sunsites, Inc.*, 105 FTC 7 (1985), a brief, simple disclosure concerning the riskiness of land purchases was required for radio, television, and short print advertisements, with a lengthy, more complex disclosure mandated for larger print ads, promotional materials, and oral sales presentations. In addition, a detailed disclosure about cancellation rights was required in each land sale contract.

More recently, the Commission has recognized the differences between disclosures in print on labels, and in broadcast media. In Congressional testimony presented in November of last year, the Commission noted that:

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<sup>1</sup> W. Wilkie, *Affirmative Disclosure at the FTC: Communication Decisions*, 6 J. Pub. Pol'y & Marketing 33, 35 (1987).

<sup>2</sup> See A. Best, *The Talismanic Use of Incomprehensible Writings: An Empirical and Legal Study of Words Displayed in TV Advertisements*, 33 St. Louis U. L. J. 285 (1989).

we feel it is important that the Commission have the ability to take account of the practicalities of regulating advertising. For example, regulations enacted pursuant to the [Nutrition Labeling and Education Act] might require more extensive explanations of a health claim in food labeling than would be necessary for a television or radio advertisement.<sup>3</sup>

Finally, the length and detailed nature of the disclosures mandated by the Commission for radio and television ads in these orders appear to resemble proposed Food and Drug Administration labeling disclosure requirements that Commission staff from the Bureaus of Consumer Protection and Economics have recently criticized, in the print context of labels. With respect to the length of the numerical disclosures required in connection with relative nutrient content claims, the staff argued:

The length of the required disclosure is a concern primarily because it could reduce the information available to consumers by reducing producers' incentives to make valid relative claims.... Lengthy disclosures contribute to label clutter, which may discourage consumers from reading the information on the label.

The staff proposed, instead, a more concise disclosure similar in length to the general maintenance disclaimer that would be required under these consent orders.<sup>4</sup>

I strongly suspect that many consumers will have great difficulty in absorbing or recalling the relatively complex disclosures of these orders if made during broadcast ads. Although these particular respondents have to date not made great use of broadcast media in marketing their programs, some such undesirable effects from the

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<sup>3</sup> Prepared Statement of the Federal Trade Commission, before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, U.S. House of Representatives (Nov. 21, 1991) at 12.

<sup>4</sup> The staff cited as an example of a problematic mandated disclosure: "Less fat -- 38 percent less fat than our regular popcorn. This popcorn has 5 grams of fat compared to 8 grams in our regular popcorn." They proposed as an alternative: "Less fat -- 3 grams less than our regular popcorn." Federal Trade Commission Staff Comments Before the Dept. of Health and Human Services, Food and Drug Administration, In the Matters of Nutrition Labeling; Nutrient Content Claims; Health Claims; Ingredient Labeling, Prop. Rules, Dkt. Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992) at 39-40.

present orders will still obtain in the broadcast advertising that they do. Moreover, I am very concerned that the approach in these orders may be viewed as precedent in any future matter that involves firms whose use of broadcast media is much more extensive.

In my view, the orders would have been more effective had they required for broadcast ads only the general disclaimer on weight-loss maintenance. But I am also convinced that the other disclosures on percent of weight loss maintained, duration of that maintenance, and the representativeness of the triggering claim would be important in helping consumers decide whether they will get their money's worth when they sign up for a particular program. Consequently, based on available information, I would have supplemented the more concise general disclosure for broadcast ads with requirements that respondents provide at point-of-sale, and prior to the execution of any contract, a clearly written statement of all the disclosures otherwise required,<sup>5</sup> and that the broadcast ads alert consumers to the availability of that additional information. This approach, in my view, would provide the relevant information to consumers at a time when they most need it, and in a format more likely to be useful in evaluating and comparing diet programs.

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<sup>5</sup> See, e.g., *Arthur Murray, Inc.*, 95 FTC 347 (1980) (disclosures required of firm and its franchisees in contracts with consumers); see also, Letter from the Honorable Janet D. Steiger (by direction of the Commission) to Senator Slade Gorton (Sept. 25, 1991) at 7 n.11 ("The principle that detailed information of the kind usually found on labels is most useful when available at the point when comparisons can be made or decisions can be affected has been supported by many consumer information processing studies.").

IN THE MATTER OF  
PACIFIC RICE PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3395. Complaint, Aug. 17, 1992--Decision, Aug. 17, 1992*

This consent order prohibits, among other things, a California company from misrepresenting the contents, validity, results, conclusions or interpretations of any test or study; and from representing that any food produces any health benefit, unless the respondent possesses and relies upon competent and reliable scientific evidence to substantiate the representation.

*Appearances*

For the Commission: *Philip L. Broyles, Michael Milgrom and Mark D. Kindt.*

For the respondent: *Peter Goodman, Brobeck, Phleger & Harrison, San Francisco, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pacific Rice Products, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its office or principal place of business located at 1275 Santa Anita Court, Post Office Box 2060, Woodland, California.

PAR. 2. Respondent has advertised, offered for sale, sold or distributed food products, including Vita Fiber Rice Bran.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent disseminated or caused to be disseminated an advertisement and point-of-purchase materials for Vita Fiber Rice Bran, a "food" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52. This advertisement and point-of-purchase materials were disseminated by various means in or affecting commerce, including newspapers distributed across state lines, for the purpose of inducing the purchase of such foods by members of the public.

PAR. 5. Typical of respondent's advertisements, but not necessarily all-inclusive thereof, are the advertisements attached hereto as Exhibits A, B, C and D. The aforesaid advertisements and others contain the following statements:

- (A) REDUCE CHOLESTEROL (Exhibit A.)
- (B) THE KEY TO A HEALTHY HEART™ (Exhibit A.)
- (C) Can help reduce cholesterol as a dietary supplement. (Exhibit B.)
- (D) Lowers LDL. (bad cholesterol) (Exhibit B.)
- (E) Improves HDL/LDL ratio which is the best measure of heart attack risk. (Exhibit B.)
- (F) CAN HELP REDUCE CHOLESTEROL AND LESSEN THE RISK OF HEART DISEASE (Exhibit B.)
- (G) FIGHTS CHOLESTEROL (Exhibit B.)
- (H) Clinical studies show that VITA FIBER Rice Bran Special Fiber Formulation can help reduce blood cholesterol levels. (Exhibit C.)
- (I) U.S.D.A. tests show medium grain rice bran is best for binding bile acids which has a strong correlation with the ability to reduce cholesterol. (Exhibit C.)
- (J) Ounce for ounce, Vita Fiber Rice Bran has nearly twice the total dietary fiber as oat bran. (Exhibit D.)
- (K) Helps reduce the risk of heart disease. (Exhibit B.)

PAR. 6. Through the use of the statements referred to in paragraph five (H) and (I), above, and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that tests and clinical studies have proven that Vita Fiber Rice Bran will help reduce the serum cholesterol levels of consumers who add it to their diets.

PAR. 7. In truth and in fact, tests and clinical studies have not proven that Vita Fiber Rice Bran will help reduce the serum cholesterol levels of consumers who add it to their diets. Therefore,

the representation set forth in paragraph six was and is false and misleading.

PAR. 8. Through the use of the statements referred to in paragraph five, above, and others in advertisements and promotional materials not specifically set forth herein, respondent has represented, directly or by implication, that:

(A) Consumption of Vita Fiber Rice Bran lowers cholesterol;  
(B) Consumption of Vita Fiber Rice Bran will help reduce the consumer's risk of heart disease; and

(C) Consumers who add Vita Fiber Rice Bran to their diets will improve the ratio of HDL-to-LDL cholesterol in their blood.

PAR. 9. Through the use of the statements set forth in paragraph five and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph eight, respondent possessed and relied upon a reasonable basis for such representations.

PAR. 10. In truth and in fact, at the time respondent made the representations set forth in paragraph eight, it did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representation as set forth in paragraph nine was and is false and misleading.

PAR. 11. Respondent's dissemination of the aforesaid false and misleading representations as alleged in this complaint constitutes unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

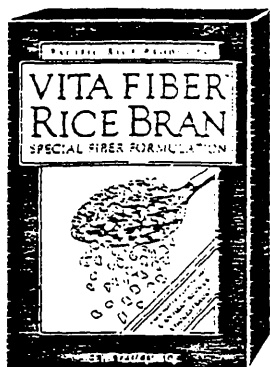


EXHIBIT A

Enlarged version

EXHIBIT A

IN HOT  
CEREAL SECTION



# REDUCE CHOLESTEROL

## VITA FIBER™ RICE BRAN

THE KEY TO A  
HEALTHY HEART™

RECOMMENDED. ROBERT E. KOWALSKI, THE 8-WEEK CHOLESTEROL CURE

- Can help reduce cholesterol when part of a low fat, low cholesterol diet.
- Nearly twice the total dietary fiber as oat bran.
- Tastes great by itself, in muffin and bread recipes, or on your favorite cereal.

50¢

MANUFACTURERS COUPON | EXPIRES 12/31/88

50¢

SAVE  
**50¢**

Good toward purchase of  
one 12 oz. box of  
VITA FIBER RICE BRAN™



LIMIT: One coupon per purchase.  
RETAILER: You will be reimbursed  
for the face value of this coupon plus  
\$.08 if submitted in compliance with  
Pacific Rice Products' redemption  
policy, available on request. Cash  
value is 1/20 of a cent. Void where  
prohibited or taxed by law.  
Mail coupons to:  
Pacific Rice Products, Inc.,  
P.O. Box 700159, El Paso, TX  
88570-0159

EXHIBIT B



THE KEY TO A HEALTHY HEART™



Case Size

**KD DISPLAY:**  
 Outside Carton: 1.5"D x 21.5"W x 42.75"H  
**SET UP SIZE:**  
 Base: 18"W x 13.25"D  
 Overall Height: 65.5"

**VITA FIBER CASE SIZE:**  
 Case Pack: 12/12 oz.  
 Dim.: 10.5"D x 10.0"W x 9.0"  
 Wt.: 10.5 Lbs.  
 Pallet: 12 x 7 High  
 Case: 0.46

Complaint

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EXHIBIT B

## VITA FIBER RICE BRAN

Page 2 of 2

## FACT SHEET

PRODUCT DESCRIPTION

Vita Fiber Rice Bran is a high fiber supplement made by Pacific Rice Products. Using a patent pending, all natural method that stabilizes the enzymes found in the oil of the rice bran, Pacific Rice produces a flaked product that preserves all of the many nutrients found in rice bran.

ATTRIBUTES

Can help reduce cholesterol as a dietary supplement.

Contains 27% dietary fiber, nearly twice that of oat bran.

Lowers LDL. (bad cholesterol)

Provides many vitamins and minerals.

Sweetened with apple juice.

Versatile in use.

Package Details:

UPC 51376-00515  
7.5 oz. Jar  
12 jars/case  
Dim:  
11.25 x 8.5 x 6.75  
Case wt. 9.0 lbs.  
Case cube: .37 ft.  
Cases/pallet: 114  
Pallet wt. 1071 lbs.

UPC 51376-60520  
12 oz. Box  
12 boxes/case  
Dim:  
10.5 x 10 x 8  
Case wt. 10.5 lbs.  
Case cube: .46 ft.  
Cases/pallet: 84  
Pallet wt. 927 lbs.

BENEFITS

Helps reduce the risk of heart disease.

Helps reduce the risk of colon cancer.

Improves the HDL/LDL ratio which is the best measure of heart attack risk.

100% RDA of Niacin  
100% RDA of Magnesium  
100% RDA of Thiamin  
90% RDA of Phosphorus  
30% RDA of Vitamin E  
30% RDA of Iron  
20% RDA of Zinc  
20% RDA of Copper

Can be eaten directly from the package or used as an ingredient.

-Topping on yogurt, cereals, salads, etc.  
-High fiber supplement to muffins, breads, pancakes, any baked foods.  
-Turns any main dish into high fiber meals: soups, chili, spaghetti sauce...

22 Pallets per standard 45ft. truck load.

## EXHIBIT C



Pacific Rice Products, Inc.

## VITA FIBER RICE BRAN SPECIAL FIBER FORMULATION

Clinical studies show that VITA FIBER Rice Bran Special Fiber Formulation can help reduce blood cholesterol levels.

VITA FIBER is a product made from rice bran, rice germ, fruit fiber and juice. The rice bran in VITA FIBER is made from medium grain versus long grain rice. The reason for using medium grain rice is that U.S.D.A. tests show medium grain rice bran is best for binding bile acids which has a strong correlation with the ability to reduce cholesterol. Medium grain rice is primarily grown in Northern California.

The following are benefits of VITA FIBER over other rice bran products:

1. Dietary Fiber - approximately 27% to 34%.
2. Contains monounsaturated fat with natural cholesterol reducing capabilities.
3. Flavor - sweet/nutty.
4. Texture - uniform grind.
5. Odor - neutral.
6. All medium grain rice.
7. Lowest Free Fatty Acids - longest stability.
8. U.S.D.A. tests show medium grain bran best for binding bile acids which has a strong correlation with ability to reduce cholesterol.
9. Cleaner - free of hulls, seeds, rice chits.
10. Sanitarily produced and sterilized.
11. Free from infestation.

000012

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EXHIBIT D

**REDUCE CHOLESTEROL**      **VITA FIBER RICE BRAN**      **INCREASE PROFITS**

SPECIAL FIBER FORMULATION

PACIFIC RICE PRODUCTS

**VITA FIBER RICE BRAN**  
SPECIAL FIBER FORMULATION

Wheat Bran  
Wheat Bran  
Wheat Bran  
Wheat Bran  
Wheat Bran  
Wheat Bran

- VITA FIBER is a specially formulated high-fiber supplement made with rice bran
- Studies show that the ingredients in VITA FIBER RICE BRAN can help reduce the cholesterol content of a diet low in fat and cholesterol.
- VITA FIBER RICE BRAN is also high in insoluble dietary fiber which reduces the risk of heart disease, cancer and intestinal disorders.
- For every ounce, VITA FIBER RICE BRAN has nearly twice the total dietary fiber as wheat bran.
- Unlike wheat bran, VITA FIBER RICE BRAN is naturally high in vitamins B and B<sub>6</sub>.
- Because VITA FIBER RICE BRAN is naturally sweetened with apple juice, it is a great topping for cereals, puddings, and other high-fiber products. It is also a great topping for breads, muffins, and other baked goods. It can also be used in casseroles, etc. and in other healthful recipes.

Exhibit D

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1275 Santa Anita Court, Post Office Box 2060, Woodland, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

## I.

*It is ordered,* That respondent Pacific Rice Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, do forthwith cease and desist from misrepresenting, directly or by implication, the contents, validity, results, conclusions or interpretations of any test or study.

## II.

*It is further ordered,* That respondent Pacific Rice Products, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any food product, do forthwith cease and desist from representing, directly or by implication, that any health benefit may or will be derived from consumption of such product unless, at the time such representation is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. For purposes of this provision, to the extent evidence consists of scientific or professional tests, analyses, research, studies, or any other evidence based on the expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

## III.

*It is further ordered,* That for three (3) years from the date that the representations are last disseminated, respondent shall maintain

and upon request make available to the Commission for inspection and copying:

(A) All materials relied upon to substantiate any representation covered by this order; and

(B) All tests, reports, studies, surveys or other materials in its possession or control that contradict, qualify or call into question such representation or the basis relied upon for such representation.

#### IV.

*It is further ordered,* That respondent shall distribute a copy of this order to each of its operating divisions and to each officer and other person responsible for the preparation or review of advertising material, and shall secure from each such person a signed statement acknowledging receipt of a copy of this order.

#### V.

*It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

#### VI.

*It is further ordered,* That respondent shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner in which it has complied with this order.