

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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In the Matter of )  
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 VITAL BASICS, INC., )  
 a corporation, )  
 )  
 ROBERT B. GRAHAM, )  
 individually and as an officer of )  
 Vital Basics, Inc., and )  
 )  
 MICHAEL B. SHANE, )  
 individually and as an officer )  
 of Vital Basics, Inc. )  
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DOCKET NO. C-4107

COMPLAINT

The Federal Trade Commission, having reason to believe that Vital Basics, Inc., a corporation, Robert B. Graham, individually and as an officer of Vital Basics, Inc., and Michael B. Shane, individually and as an officer of Vital Basics, Inc. (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Vital Basics, Inc. (“Vital Basics”) is a Maine corporation with its principal office or place of business at 100 Commercial Street, Portland, Maine 04101.
2. Respondent Robert B. Graham (“Graham”) is an officer and director of respondent Vital Basics. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Vital Basics.
3. Respondent Michael B. Shane is an officer and director of respondent Vital Basics. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Vital Basics, including the acts or practices alleged in this complaint. His principal office or place of business is that of Vital Basics’ wholly-owned subsidiary, Vital Basics Media, Inc., 330 Madison Avenue, New York, NY 10017.

4. Respondents have advertised, labeled, offered for sale, sold, and distributed the dietary supplement Focus Factor since at least 2000. According to the package label, Focus Factor contains more than forty (40) ingredients, including vitamins, minerals, dimethylaminoethanol, Bacopa monnieri extract, huperzine, and phosphatidyl serine. Respondents Vital Basics, Graham, and Shane sell adult and children's versions of Focus Factor. A bottle of adult Focus Factor costs \$74.95. A bottle of children's Focus Factor costs \$49.95.
5. Respondents have also advertised, labeled, offered for sale, sold, and distributed the dietary supplement V-Factor Natural Pack (hereinafter "V-Factor") since at least 2000. According to the package label, V-Factor contains L-arginine, yohimbine, and ginkgo biloba.
6. Focus Factor and V-Factor are "foods" or "drugs" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
7. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

#### **ADVERTISING AND PROMOTION OF FOCUS FACTOR AND V-FACTOR**

8. Respondents have disseminated or have caused to be disseminated advertisements for Focus Factor, including but not limited to the attached Exhibits A through I. These advertisements contain the following statements:

##### Radio Advertising

- a. "Smith: I'm Dr. Kyl Smith. A poor memory can be embarrassing. In business it can cost you money.  
  
I've spent my career studying brain function, and I've created an amazingly effective supplement called Focus Factor. It's a unique supplement that enhances your natural brain chemistry to improve memory, focus and concentration.  
  
In just a few days, you'll actually *feel* it working. You'll absorb the information in books like a sponge. You'll be able to recall facts, figures and names more easily. You'll feel more alert, more focused, and 'on task.'" [Exhibit A: "Kyl 2" (emphasis in original)]
- b. "Smith: This is Dr. Kyl Smith. . . . My dietary supplement, called Focus Factor, is helping thousands of families improve their focus, memory, mood, concentration, and energy.  
  
(Electronic voice mail 'beep')

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

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

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

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

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

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

- d. "I'm Rob Graham, president of Vital Basics. Our revolutionary Focus Factor all-natural supplement was developed to expand *your* powers of focus. Have you ever noticed how effortless things seem when you're 'on?' You're 'on' when your brain function is high. You're 'off' when your brain function is low. Focus Factor contains over 50 nutrients sharpen your brain function." [Exhibit D: "Rob 3" (emphasis in original)]
- e. "Host: Well hello again . . . welcome to the Vitalbasics radio program. We bring you vital health information on over 300 great radio stations covering all 50 states . . . and y'know what? I can count on two fingers – literally – the number of times I've actually invited a guest back on this program. Today is one of those times.

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

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So these are just a few of the phone messages we received, um . . . Here's a 65-year old woman . . . She's been using it for 4 days. She says she cannot believe the change. She said she was slow and lethargic . . . she thought she was getting dimwitted . . . and she says Focus Factor started working almost immediately.

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

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

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Host: [T]his is the supplement that is designed to literally supercharge your brain." [Exhibit E: "4600" ]

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

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

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

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

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

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

Anita: Definitely.

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

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Host: All right, we’ll continue our discussion in a moment. But right now I want us to listen to some doctors and what they are saying about Focus Factor. Folks, these are people we spoke with earlier this week. First we’ll hear from Dr. Shawn Sieracki and then from Dr. Jim Van Meter. These are doctors who recommend Focus Factor to their patients – adults, children, seniors – some very interesting comments here. And Jon, if we could, let’s roll the tape.

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

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

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

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

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

Rep. Green: Well, you basically listed the reasons I was looking for something like Focus Factor. I was elected 2 years ago, and in our Texas legislature we meet for 140 days and we cover 6,000 bills in that short time frame, and trying to juggle that and practice law and run a business and spend time with my boys is not an easy thing to do, and I'm used to managing all of those different things but just being stressed out all the time, and not really enjoying the times that you do get with the family . . . started taking [Focus Factor] about a year ago and found that was exactly the results. I felt a major difference in being able to manage different tasks, and focus on that task instead of y'know, how . . . you'd be at lunch with one person meeting on one thing, your mind's wandering off on all these other things you're supposed to be doing. Taking this product made a significant difference to where those things wouldn't happen.

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

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

Kyl: Exactly.

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

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

Smith: It all started really when I just graduated out of my internship and I was creating my own practice. You see, every day it seemed patients were coming in with a similar question. They'd say, *Doctor, I am tired and fatigued all the time.*

*I feel mentally foggy. Is there anything that's natural and that's good for me that's gonna boost my energy levels? . . . And I felt guilty because I didn't have a good answer. So what did I do? I went to other physicians and I asked them, Hey, what do you do when your patients ask this question? Did I miss something?*

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

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

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

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

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

feels the same way. We all love Focus Factor.” [Exhibit G: “Leisa #4500” (emphasis in original)]

### Television Advertising

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

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Host: And you have made an impact in my life as well and I want to talk about that a little bit. Because in our last program folks, if you saw it, I told a story about this great big thick book that I picked up and read because I was taking Focus Factor and it was about the American revolution and I was able to remember all kinds of things. So I’ll you what, let’s roll the clip . . . .

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

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

### Internet Advertising

- i. **“Finally! A safe, easy and natural way to improve focus, memory, mood, concentration and energy.** Focus Factor is a superior natural supplement that enhances brain function.



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This revolutionary dietary supplement is perfect for the whole family

- Men and women feel more focused and alert throughout the day.
- Women report relief from irritability and mood swings.
- Seniors say they feel an improvement in memory, mental clarity, and energy.
- Children and teens love the effect on focus and concentration.”

[Exhibit I (emphasis in original)]

9. Respondents have disseminated or have caused to be disseminated advertisements for V-Factor, including but not limited to the attached Exhibits J through M. These advertisements contain the following statements:

#### Radio Advertising

- a. “Denise: Hi, I’m Denise Diamond. Welcome to the *Vital Basics Health Show*. If your sex life isn’t as satisfying as it used to be, our guest today says he has some groundbreaking new information that may give you and your partner what you need to re-ignite the spark in your relationship.

We’ll talk about some of the prevailing myths about sex that often prevent couples from enjoying the intimacy that they deserve. And he’ll tell us about a new solution that is safe and easy . . . and is something you can use right now to improve your sex life.

Carlton Colker, M.D. is Medical Director and CEO of Peak Wellness in Greenwich, Connecticut. He’s been practicing in the health care field for over 20 years. In fact, he pioneered the first wellness clinic on the East Coast. He is an attending physician at Beth Israel Medical Center in New York City, Greenwich Hospital in Greenwich, Connecticut and Stamford Hospital and St. Joseph’s Hospital in Stamford, Connecticut. He is one of the most sought-after consultants in the country and has written extensively about sexual health. We’re very fortunate to have him on the program today. Dr. Colker, thank you for joining me.

Colker: Thanks so much for having me.

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Diamond: We’re back with Dr. Carlton Colker. We’re talking about sexual response in men and ways in which you can make every day feel like you’re on your honeymoon. And Doctor, I understand you have some exciting news regarding a recent clinical trial on the V-Factor Natural Pack. Could you tell us about that. These results are just fascinating.

Colker: Yeah, the news *is* exciting. The V-Factor Natural Pack is a product that I’ve specifically formulated and I’ve clinically tested to support and improve

sexual function and response. As I like to say, it's just like dialing the right combination on a lock. The V-Factor Natural Pack has a precise formula and the exact levels of ingredients to unlock sexual potential. Just like the lock example, the right combination of ingredients in the proper proportions is really the key for improving sexual satisfaction.

Diamond: So this was a well-designed clinical trial. And the #1 response was: 'increased sexual satisfaction.' That was the feedback that you got from the men that were in the trial. And isn't that *exactly* the kind of solution men are looking for?

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Diamond: Knowing that there's a positive clinical trial behind this . . . and everybody wants to be safe, this should give men out there who are listening a peace of mind that they can trust the product, that they can believe in that. Can you tell us a bit more about that?

Colker: Oh yeah, well, this is the idea that we have a clinical trial behind this supporting the effectiveness of the product in terms of increasing sexual satisfaction. And that's so important. And, of course, the ingredients in the V-Factor Natural Pack have been well-investigated and the ingredients have been carefully selected, and there's quite an amount of research behind these substances . . . in particular the one that we spoke about, the idea of increasing nitric oxide, and that's something that one of the ingredients in the V-Factor Natural Pack can really do, and that's what's amazing. [Exhibit J: "Natural Pack #7000" (emphasis in original)]

- b. "Announcer: Welcome to the VitalBasics radio program with Dr. Shari Lieberman and Carlon Colker, M.D. Today, Drs. Lieberman and Colker talk about a revolutionary new approach to solving some of today's most talked about health issues, including sexual performance, poor memory, concerns about prostate health, and emotional well-being. And now, let's join Dr. Shari Lieberman and Dr. Carlon Colker.

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Lieberman: Y'know what I love, Carlon? I love when the downside is . . . *nothing* . . . . Once again, it's safe, it's natural . . . there's no downside. And I love that as a clinician.

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Lieberman: I . . . and, once again, who can benefit from this? If you are feeling not the same pep and drive as you have had in the past when it comes to sex . . . [I]f your sexual desire, sexual performance, sexual energy, just isn't what it's been in the past . . . And I have to tell you something: This is a product that, once again, you have nothing to lose. If you are experiencing low sex drive, low sexual desire . . . if you've *never* experienced your sexual performance or desire to where it should be . . . whether you're a man or a woman or you want to perhaps enhance your sexual performance or desire, this is a product, once again .

. . . why not give it a try? There's no downside . . . it's completely safe and natural, and I just love that about the product." [Exhibit K: "Natural Pack #5000" (emphasis in original)]

- c. "No stimulants. No drugs. Just safe, clinically-proven ingredients chosen for one thing and one thing only . . ." [Exhibit L: "Sexy"]

#### Television Advertising

- d. "Diamond: If your sex life isn't as satisfying as it used to be, my guest has some groundbreaking new scientific information that may give you exactly what you need to improve your sex life. He'll tell us about a new supplement that's easy, safe, clinically tested . . . and is something you can use immediately to improve your level of sexual satisfaction. . . . Dr. Colker, thank you for joining us.

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Diamond: [W]hat can men expect from this, specifically? They're out there, they're wondering, they want to know.

Colker: Well as our clinical trial showed, when an individual takes the V-Factor Natural Pack they are going to experience increased sexual satisfaction and a better sexual response. . . .

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Diamond: We're back with Carlon Colker, M.D. We're talking about a revolutionary breakthrough that improves sexual function and satisfaction . . . some very dramatic results. Doctor, we've been talking a little bit today about the clinical trial that went into this, the due diligence that went into the V-Factor Natural Pack. So much good verbatims [sic] that came back from the people that were part of the study. What were they telling you?

Colker: Well it's so important to recognize that having a clinical study behind the product is so important because it tells you that this product really works and that's the whole idea. There are too many products out there that don't have a clinical study to support their use. If the man's taking V-Factor Natural Pack, they can expect to have improved satisfaction, have a greater satisfaction . . .

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Colker: And then the V-Factor Natural Pack itself – the actual final formula – has also been tested and shown to be safe and effective.

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Diamond: I think that patients, and you've told me your patients, are very savvy, though in terms of the products that they purchase. And sometimes they're a little bit suspicious . . . as well they should be. That's the good thing about the V-Factor is the clinical study that went behind it, your personal effort and the effort of other people, the safety, the data, the documentation, the verification . . . it's all there.

Colker: Yeah, it's so important because there are so many products out there, and lord knows I wrote the book on it. So I can tell firsthand you [sic] there are many, many products out there and most of them don't work and they don't have clinical studies to support their safety and efficacy. The nice thing about the V-Factor Natural Pack is you do have a product that has been clinically tested. It is safe and effective." [Exhibit M: "Natural Pack DK"]

### **FOCUS FACTOR**

10. Through the means described in Paragraph 8, respondents have represented, expressly or by implication, that:

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

11. Through the means described in Paragraph 8, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 10, at the time the representations were made.

12. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 10, at the time the representations were made. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

### **V-FACTOR**

13. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that V-Factor is safe for virtually all men.

14. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that, they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made.

15. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 13, at the time the representations were made. Therefore, the representation set forth in Paragraph 14 was, and is, false or misleading.

16. Through the means described in Paragraph 9, respondents have represented, expressly or by implication, that the clinical study of the V-Factor Natural Pack conducted by Dr. Carlton Colker proves that V-Factor is safe and is effective at improving sexual response and function.

17. In truth and in fact, the clinical study of the V-Factor Natural Pack conducted by Dr. Carlton Colker does not prove that V-Factor is safe and is effective at improving sexual response and function. The clinical study referred to by respondents does not provide competent or reliable scientific evidence of the safety or efficacy of the V-Factor Natural Pack. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

#### **CONSUMER AND EXPERT ENDORSERS**

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

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

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

19. In their advertising and sale of Focus Factor, respondents have represented, directly or by implication, that consumers' endorsements were made voluntarily and without compensation. Respondents have failed to disclose adequately that Vital Basics solicited consumer endorsements by promising a free 6-month supply of Focus Factor to those individuals whose

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

### **DECEPTIVE FORMAT**

20. Through the dissemination of advertisements referred to in Paragraphs 8 and 9, including but not limited to "Bill #4400" and "Natural Pack #7000," transcriptions of which are attached hereto as Exhibits F and J, respondents have represented, directly or by implication, that these advertisements are independent radio programs and are not paid commercial advertising.

21. In truth and in fact, these advertisements are not independent radio programs and are paid commercial advertising. Therefore, the representation set forth in Paragraph 20 was, and is, false or misleading.

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

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

By the Commission.

Donald S. Clark  
Secretary

SEAL