

IN THE MATTER OF

P. LEINER NUTRITIONAL PRODUCTS CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SECS. 5
AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9173. Complaint, Jan. 27, 1984—Decision, May 3, 1985*

This consent order requires two California firms engaged in the advertising, labelling, packaging, sale and distribution of nutritional supplements, among other things, to cease representing falsely or without proper substantiation, that Octacol 4 or any similar product can improve human vigor, endurance or other aspects of physical performance or fitness; or that the Octacosano, Triacantanol, Hexacosanol or tetracosanol contained in their products are related to athletic endurance or physical fitness. The firms are also barred from making claims regarding physical benefits to be derived from using such products unless they are properly substantiated; and from misrepresenting the purpose, reliability, results or conclusions of any test, research, article or scientific opinion. Additionally, the companies are required to maintain for a period of three years all materials that substantiate or contradict representations covered by the order.

Appearances

For the Commission: *Cheryl B. Anderson, Teresa A. Hennessy and Brinley H. Williams.*

For respondents: *Henry P. Sailer and Jonathan L. Wiener, Covington & Burling, Washington, D.C.*

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 PLNP Holdings, Inc., a corporation, and P. Leiner Nutritional Products, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent PLNP Holdings, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Respondent P. Leiner Nutritional Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Respondent PLNP

Holdings, Inc. dominates or controls, knew of and approved, or benefits from the acts and practices of its only and wholly-owned subsidiary, P. Leiner Nutritional Products, Inc., including the acts and practices hereinafter set forth. Both corporate respondents have their offices and principal places of business at 1805 West 205th Street, Torrance, California.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture, offering for sale, and sale of nutritional supplements, including Octacol 4, and other products for personal or household use by members of the general public (hereinafter "consumer products").

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional material, including, but not limited to, the advertising and labeling referred to herein, to promote the sale of Octacol 4. As advertised, Octacol 4 is a "food" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. PLNP Holdings, Inc., and P. Leiner Nutritional Products, Inc., operate in various States of the United States and in the District of Columbia. Respondents' manufacture, offering for sale, sale, and distribution of nutritional supplements, including Octacol 4, mentioned herein constitutes 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 businesses, respondents have disseminated and caused the dissemination of advertisements for nutritional supplements, including Octacol 4, by various means in or affecting commerce, including national magazines, product labels, point of sale brochures, distributed by the mail and across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products.

PAR. 6. Typical statements in said advertisements, and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, the aforesaid advertisements contain the following statements:

- (a) Octacol 4 Helps Increase Endurance, Stamina and Vigor .
- (b) . . . Octacol 4 contains all *four* sports stamina factors reported in U.S. Patent No. 3,031,376—including high content octacosanol (Emphasis in Original).
- (c) To help you play stronger, play longer .
- (d) Octacol 4 contains all *four* sports stamina factors reported in U.S. Patent No. 3,031,376. Triacantanol. Tetracosanol. Hexacosanol. And high-content octacosanol. Result? Octacol 4 can help you get the most from your favorite sport—jogging, swimming, ~~and~~ ~~weight training~~ ~~tennis~~ ~~or skiing~~

(e) . . . [I]n long-term university studies and related research, published results indicate that the four performance factors now available in Octacol 4—including high content Octacosanol—have shown significant effects on several types of human endurance. Result? Athletes participating in these research studies were able to play and perform stronger, longer .

(f) In particular, Octacol 4 may benefit athletes and active people participating in these extra effort sports:

Aerobics	Racquet Sports
Basketball	Running
Dance	Soccer
Football	Swimming
Hockey	Skiing
Jogging	Weight Training

PAR. 7. Through the use, *inter alia*, of the statements referred to in Paragraphs Six (a) through Six (f), and other representations contained in advertisements or promotional materials not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that the use of Octacol 4 will improve consumers' endurance, stamina, vigor, overall athletic performance, or overall physical fitness.

PAR. 8. Through the use, *inter alia*, of the statements referred to in Paragraph Six (b) and Six (d), respondents have represented, and now represent, directly or by implication, that Octacol 4 contains four sports stamina and performance factors—octacosanol, triacontanol, tetracosanol, and hexacosanol—that render Octacol 4 effective in improving consumers' athletic endurance or performance or physical fitness.

PAR. 9. Through the use, *inter alia*, of the statements referred to in Paragraph Six (a) through Six (f) respondents have represented, and now represent, directly or by implication, that they possessed and relied upon a reasonable basis consisting of competent and reliable evidence that substantiated the representations referred to in Paragraphs Seven through Eight, at the time they first disseminated those representations and at each subsequent dissemination. Through the use, *inter alia*, of the statements referred to in Paragraph Six (e), respondents further represented:

(a) that, at the time they made the representations referred to in Paragraphs Seven and Eight, they possessed and relied upon scientific studies, 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; and

(b) that the scientific studies referred to in Paragraph Nine (a) provided a reasonable basis consisting of competent and reliable

scientific evidence that substantiated the representations in Paragraphs Seven and Eight.

PAR. 10. The representation contained in Paragraph Seven is false, for the reason that the use of Octacol 4 will not improve consumers' athletic endurance, stamina, vigor, overall athletic performance or overall physical fitness.

PAR. 11. The representation contained in Paragraph Eight is false, for the reason that none of the four factors referred to in Paragraph Eight renders Octacol 4 effective in improving consumers' athletic endurance or performance or physical fitness.

PAR. 12. The representations contained in Paragraph Nine are false, for the reasons that respondents did not possess and rely upon a reasonable basis that substantiated the representations referred to in Paragraphs Seven and Eight at the time they made those representations. The representations referred to in Paragraph Nine (a) and (b) are false, for the reasons that the studies referred to:

(a) were not 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; and

(b) did not provide a reasonable basis consisting of competent and reliable scientific evidence that substantiated the representations referred to in Paragraphs Seven and Eight.

PAR. 13. The use by respondent of the aforesaid acts and practices, directly or by implication, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had and now have the capacity and tendency to mislead consumers and to induce such persons to purchase Octacol 4.

PAR. 14. The aforesaid acts and 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 and false advertisements in violation of Sections 5 and 12 of the Federal Trade Commission Act.

EXHIBIT A

**IMPORTANT NEWS.
NEW OCTACOL 4 HELPS INCREASE ENDURANCE,
STAMINA AND VIGOR.**



OCTACOL 4
1000 mg
OCTACOSANOL
COLD PROCESSED
WHEAT GERM OIL
60 CAPSULES

**OCTACOL 4 HELPS
INCREASE ENDURANCE,
STAMINA AND VIGOR.**

Octacol 4 is important news for athletes. And active people.
Because Octacol 4 is a natural daily supplement with cold processed wheat germ oil that can help increase your personal sports stamina and endurance.
To help you play stronger, play longer.
In fact, Octacol 4 contains all four sports stamina factors reported in U.S. Patent No. 3,031,376—Including high-content Octacosanol.
Result? Octacol 4 can help you get the most from your favorite sport—jogging, swimming, tennis, dancing or weight training.
New Octacol 4 from Your Life®

SAVE \$1

WHEN YOU BUY ANY-
SIZE BOTTLE OF
OCTACOL 4, PRESENT
THIS COUPON AND \$1
WILL BE TAKEN OFF THE
MARKED RETAIL PRICE!

74590 100188

STORE COUPON

MORE GOOD NEWS!
SAVE \$1 ON OCTACOL 4 AT THESE QUALITY STORES.

**BI-MART
FRED MEYER
K MART
PAY 'N SAVE**

And other fine stores.

Complaint

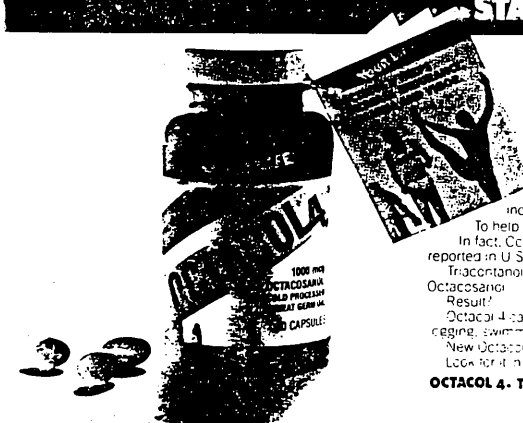
105 F.T.C.

EXHIBIT B

YOUR LIFE OCTACOL 4.

AS SEEN IN:
SPORTS ILLUSTRATED
PEOPLE
RUNNER'S WORLD

IMPORTANT NEWS...
NEW OCTACOL 4 HELPS INCREASE ENDURANCE,
STAMINA AND VIGOR.



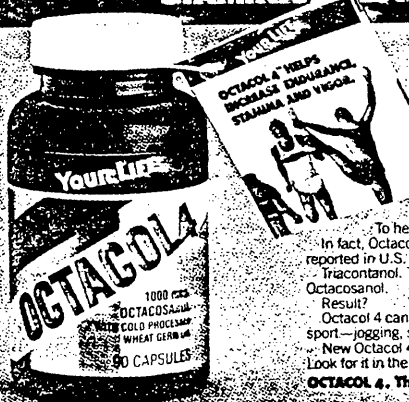
Octacol 4™ is important news for athletes
And active people.
Because Octacol 4 is a natural, daily
nutritional supplement that can help
increase your personal sports stamina and endurance.
To help you play stronger, play longer.
In fact, Octacol 4 contains all four sports stamina factors
reported in U.S. Patent No. 3,631,376:
Tricosanol, Tetracosanol, Hexacosanol, And nonyl menthyl
Octacosanol.
Result?
Octacol 4 can help you get the most from your body, no matter
whether you're running, swimming, climbing, weight training, tennis or fishing.
New Octacol 4 from 1974-1975.
Look for it in the stamina section of leading sports magazines.

OCTACOL 4. The edge in sports. The edge in life.

YOUR LIFE OCTACOL 4.

AS SEEN IN:
SPORTS ILLUSTRATED
PEOPLE
RUNNER'S WORLD

**IMPORTANT NEWS.
NEW OCTACOL 4 HELPS INCREASE ENDURANCE,
STAMINA AND VIGOR.**



OCTACOL 4™ is important news for athletes. And active people. Because Octacol 4 is a natural daily supplement with cold processed wheat germ oil that can help increase your personal sports stamina and endurance.

To help you play stronger, play longer. In fact, Octacol 4 contains all four sports stamina factors reported in U.S. Patent No. 3,031,376. Triacantanol. Tetracosanol. Hexacosanol. And high-content Octacosanol.

Result? Octacol 4 can help you get the most from your favorite sport—jogging, swimming, dancing, weight training or tennis. New Octacol 4 from Your Life. Look for it in the vitamin section of leading stores everywhere.

OCTACOL 4. The edge in sports. The edge in life.

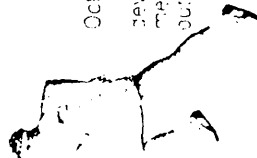
Complaint

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EXHIBIT D

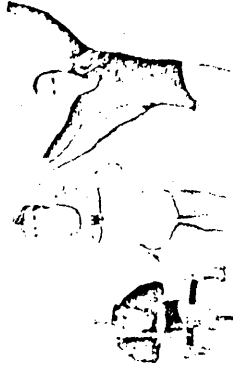
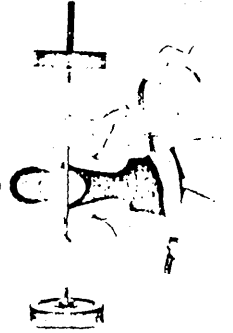
OCTACOL 4. THE EDGE IN SPORTS. THE EDGE IN LIFE.

OCTACOL 4 is an
 octacosanol product
 containing octacosanol
 and other natural
 ingredients. It is
 designed to help
 athletes and others
 who are active in
 sports and life to
 achieve their goals
 and to live longer.



Tricosanol
 Tetraolanol
 Hexacosanol
 And high content

OCTACOSANOL
 A product specially
 developed to help athletes
 and others achieve
 their goals and to live
 longer.

**OCTACOL 4. HELPS
 INCREASE ENDURANCE,
 STAMINA AND VIGOR.****OCTACOL 4.
 The edge in sports.
 The edge in life.****OCTACOSANOL.
 THE ATHLETE'S EDGE.****OCTACOL 4. A NATURAL
 FOOD PRODUCT.**

Who should consider Octacol 4?

SEPARATE STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK* ON
COMPLAINT IN P. LEINER NUTRITIONAL PRODUCTS, INC.

I fully support the Commission's decision to issue a complaint in this matter. At the same time, I am disturbed that the Commission has scrapped its traditional practice of pleading a failure to have a reasonable basis for an advertising claim as both an *unfair* as well as a deceptive practice. The complaint issued today charges only that the respondent's claims (both express and implied) that it had substantiation for its advertising claims were false.

One concern is that this unwarranted change in the Commission's standard pleading will cause confusion and uncertainty. Among others, the administrative law judges will naturally wonder whether the Commission intended in some way to change the standard traditionally used to judge unsubstantiated ads.

Further, while the staff have stated that the changes only reflect what staff in fact intend to prove in this particular case, given Chairman Miller's repeated concerns about the advertising substantiation doctrine, this change may also be a step toward abandonment of unfairness as a basis for the advertising substantiation doctrine. If that is the case, it marks a radical departure for the Commission, which has recently plainly stated in its unfairness policy statement sent to Congress that unfairness is a cornerstone of the advertising substantiation doctrine.

No adequate justification has been given for such a change in our legal theory for requiring advertising substantiation. No analysis has been presented on whether such a change will make it more difficult for the Commission to win its cases. And certainly no rationale has been given for making this decision now, rather than waiting for the Commission's review of the comprehensive comments recently filed concerning the Commission's advertising substantiation program.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations 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, 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 complaint, a statement that the signing of said agreement is for

* Michael Pertschuk, Commissioner 1977-1984.

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, 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 P. Leiner Nutritional Products Corp., 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 1805 West 205th Street, Torrance, California.

2. Respondent P. Leiner Nutritional Products, Inc., of Delaware, is a corporation existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1805 West 205th Street, Torrance, California.

3. 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

It is ordered, That respondents P. Leiner Nutritional Products Corp., a corporation, and P. Leiner Nutritional Products, Inc., of Delaware, a corporation, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale or distribution of Octacol 4, or any other product of substantially similar composition, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that the product can help consumers improve vigor, stamina, endurance, any aspect of athletic performance, or any aspect of physical fitness.

B. Representing, directly or by implication, that the following in-

gredients contained in the product are related in any way to athletic endurance or performance or physical fitness—octacosanol, triacontanol, hexacosanol, tetracosanol.

II

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclusions of any scientific test, research, or article, or any other scientific opinion or data.

III

A. *It is further ordered,* That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture, advertising, labeling, packaging, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning any benefit to be derived from using any such product with respect to athletic performance or endurance or any improvement in physical capability to be derived from using such product or from comparing any such products to any product or products of one or more competitors concerning the benefits from using any such products with respect to athletic performance or endurance or any improvement in physical capability to be derived from using such product unless, at the time of such representation, respondents possess and rely upon reliable and competent evidence that substantiates each such representation of the type and quantum appropriate for the representation.

B. For the purposes of Part III (A) to the extent evidence consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" 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.

IV

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, labeling, offering for sale, sale, or distribution of any product for personal or household use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain accurate records:

1. Of all materials that were relied upon by respondents in disseminating any representation covered by this order.

2. Of all test reports, studies, surveys, or demonstrations in their possession or control or of which they have knowledge that contradict any representation made by respondents that is covered by this order.

Such records shall be retained by respondents for three years from the date that the representations to which they pertain are last disseminated. It is further ordered that any such records shall be retained by respondents and that respondents shall make such documents available to the Commission for inspection and copying upon request.

V

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed changes in respondents 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 corporations which may affect compliance obligations arising out of the Order.

VI

It is further ordered, That respondents shall forthwith distribute a copy of this Order to each of their operating divisions and to all distributors of Octacol 4 or any other product of substantially similar composition.

VII

It is further ordered, That respondents 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.

VIII

It is further ordered, That no provision of this Order shall be interpreted as precluding respondents from making statements or disclosures on their labels or labeling where those statements or disclosures are required by regulations promulgated by the Food and Drug Administration (FDA) or by statutes the FDA enforces.

Complaint

105 F.T.C.

IN THE MATTER OF
THE CITY OF MINNEAPOLIS

ORDER WITHDRAWING COMPLAINT IN REGARD TO ALLEGED VIOLATION
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9180. Complaint, May 10, 1984—Order Withdrawing Complaint, May 7, 1985

This order withdraws the complaint alleging that the City of Minneapolis had combined, contracted or agreed with taxicab companies to pursue certain anticompetitive policies in violation of Section 5 of the Federal Trade Commission Act. The Commission held that changes now made in the City's municipal Code, which includes raising the number of taxicab licenses to be made available to operators, "significantly relieves the injury to competition alleged in the complaint and . . . may eliminate the need for further Commission action." Thus, continuing the matter would not be in the public interest. In withdrawing its complaint, the Commission expressed no opinion as to whether the "liability of the City of Minneapolis could have been established at trial."

Appearances

For the Commission: *Jerry A. Philpott.*

For the respondent: *John French, French, Faegre & Benson, Minneapolis, Minn. and Robert J. Alfton and Scott Reeves, City of Minneapolis, Minn.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the City of Minneapolis, a municipal corporation subject to the jurisdiction of the Commission, hereinafter sometimes referred to as Respondent or the City, has violated the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

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

(A) *Taxicab* means any motor vehicle, except a limousine, regularly engaged in the business of carrying passengers for hire, having a seating capacity of less than ten (10) persons and not operated on a fixed route or schedule.

(B) *License* means the annual taxicab vehicle license issued by the