

IN THE MATTER OF
NUTRITONE, INC., ET AL.

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

Docket C-3264. Complaint, July 24, 1989—Decision, July 24, 1989

This consent order prohibits, among other things, a Massachusetts corporation from making any representations concerning the efficacy of electric muscle stimulation ("EMS") treatment programs and products, unless respondents possess reliable scientific evidence to substantiate the representations. Respondents are required to retain, for at least five years, records supporting any future advertising and also required to post a copy of the order on the premises.

Appearances

For the Commission: *Sara V. Greenberg, William P. McDonough*
and *Phoebe Morse*.

For the respondents: *Alan J. Cushner*, Boston, Ma.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutritone, Inc., a corporation, also trading and doing business as Body By Design, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of said corporation ("respondents"), have violated Sections 5(a) and 12 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 that:

PARAGRAPH 1. (a) Respondent Nutritone, Inc., is a Massachusetts corporation. Its principal office or place of business is at 1172 Beacon Street, Newton, Massachusetts.

(b) Dinah H. Simonini and Donald L. Simonini are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including all the acts and practices alleged in this complaint below. Their principal office or place of business is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed to the public an electric muscle stimulation program.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including, but not limited to, the advertising and promotional materials attached hereto as Exhibits A through D to promote the sale of their electric muscle stimulation treatment program.

PAR. 4. The acts or practices of respondents alleged in this complaint have been 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 electric muscle stimulation, by various means in or affecting commerce and including *inter alia*, placing advertisements for broadcast by radio, in magazines and in newspapers distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' electrical muscle stimulation program.

PAR. 6. Typical statements in such 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, these advertisements and promotional materials contain the following statements:

1. Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
2. Men develop the "V" shape.
3. Women tone stomachs, thighs and buttocks.
4. EMS can be the best workout of your life with significant strength gains.
5. Save time—in just 35 min. you can do the equivalent of 2 hours in the gym.
6. EMS is the new high technology way to tone or strengthen muscles for Men and Women.
7. No agonizing exercise—no pain.

PAR. 7. Through the use, *inter alia*, of the statements referred to in paragraph six and other statements contained in advertisements or promotional materials not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that their electric muscle stimulation treatments:

1. Cause muscle contractions of comparable intensity to those

produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Change the girth of various parts of the body such as the stomach, buttocks, and thighs;

3. Provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Provide greater health benefits and increases in strength for normal healthy people in a specified period of time than a program of rigorous physical exercise for the same time period;

5. Are the result of recent scientific and technological learning and experimentation; and

PAR. 8. In truth and in fact, respondents' electric muscle stimulation treatments consisting of low-frequency, low-current muscle stimulation:

1. Do not cause muscle contractions of comparable intensity to those produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Do not change the girth of various parts of the body such as the stomach, buttocks, and thigh;

3. Do not provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Do not provide greater health benefits and increases in strength for normal healthy people in a specific period of time than programs of regular gym exercises for the same time period;

5. Are not the result of recent scientific and technological learning and experimentation. Therefore, the representations set forth in paragraph seven are false and misleading.

PAR. 9. Through the use, *inter alia*, of the statements referred to in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented and now represent, directly or by implication, that at the time of making the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for these representations.

PAR. 10. In truth and in fact, at the time of those representations respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and

instrumentalities by and through which others may have used said acts and practices, constitute 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

Have Any BODY You Want



FREE SESSIONS

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
964-TRIM
288 Newbury St., Boston
236-TRIM

EMS — electrical muscle stimulation is the new high technology way to tone or strengthen muscles for Men or Women

- EMS can be the best workout of your life with significant strength gains.
- Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
- Lie back and relax in private rooms with trained personnel.
- Save time — in just 35 min. you can do the equivalent of 2 hours in the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks
- Used for years by doctors for therapy

Call 964-TRIM for your introductory session. And bring in this ad for "ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program."

Offer expires May 30, 1987
Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm
Saturday 9 am-5 pm
Copyright 1987 BDD

30. Use VISA, Mastercard, or American Express. 1

Learning Adventure Magazine April/May 1987

Exhibit A

Complaint

112 F.T.C.

EXHIBIT B

Have Any BODY You Want



FREE* SESSIONS

EMS — electrical muscle stimulation is the new high technology way to tone or build muscles for Men or Women

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy.

Call 964-TRIM for your introductory session. And bring in this ad for *ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program.

Offer expires June 21, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-5 pm • Saturday 9 am-5 pm

Boston Globe
June 10, 1986

Complaint

EXHIBIT C

3/5/86
 All, This is a copy of the coupon I received in
 yesterday's mail
 Carde

Have Any BODY You Want Absolutely Free *

EMS
 advanced muscle stimulation
 is the NEW high tech way to
 tone muscles

- Work 8000 reps and do the equivalent of 1000 situps, 1000 leg lifts and 1000 pushups in 35 minutes.
- Save time—1 month on EMS is worth 4-6 months at the gym.
- Lie back and relax in private rooms with Kensed personnel.
- Men develop the "V" shape. Women tone stomach, thighs and buttocks.

WEIGHT NORMALIZATION PROGRAM

- Body fat analysis with weight recommendations
- Computerized food analysis, meal plans and nutritional counseling
- Diet without hunger or loss of energy
- Free USAR requirements

BRING THIS COUPON
 *For One Week
 Use at any of our
 1200+ locations
 Expires 4/5/86

BRING THIS COUPON
 For 25% Off
 Our Weight
 Normalization
 Program
 Expires 4/5/86

Call 964-TRIM
 TO SCHEDULE YOUR INTRODUCTORY SESSION

BODY BY DESIGN
 1172 Beacon St., Newton Four Corners
 Staffed by Licensed Medical Professionals
 Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm • Saturday 9 am-5 pm

ADVERTISE WITH SUPER COUPS (617) 871-1810 (T.C. 01) B-12/86 014.15

Exhibit C

FEDERAL TRADE COMMISSION DECISIONS

Complaint

112 F.T.C.

EXHIBIT D

Have Any BODY You Want



FREE SESSIONS

EMS — electrical muscle stimulation is the new high technology way to tone or build muscles for Men or Women

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy.

Call 964-TRIM for your introductory session. And bring in this ad for **"ONE WEEK OF FREE VISITS (valued at \$84) when you sign up for a Body by Design program."**

Offer expires May 3, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-8 pm • Saturday 9 am-5 pm

Boston Globe

April 22, 1986

Exhibit D

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 Boston 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 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. Respondent, Nutritone, Inc., is a corporation, d/b/a/ Body By Design, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 65 Main Street, Watertown, Massachusetts.

2. Respondents Dinah H. Simonini and Donald L. Simonini are officers of the corporation.

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 Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, selling or distribution of any electric muscle stimulation treatment program or 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, contrary to fact, that any low-frequency (1000 Hz and below) electric muscle stimulation treatment or product:

- A. Can cause muscle contractions of similar intensity to those produced by conventional exercise.
- B. Will visibly change the girth of any part of the body without a reduction in caloric intake or participation in a weight loss program.
- C. Provides similar or superior health benefits to those produced by rigorous conventional exercise for normal healthy people.
- D. Provides, in the same or shorter time period, health benefits similar or superior to those produced by conventional exercise.
- E. Are a result of any new or recent scientific and technological research and experimentation.

II.

It is further ordered, That respondents Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents' 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 diet, strength development, or fitness program or product 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 such program's or product's efficacy, or the comparability or superiority over other programs or products, or the results typically achieved by

consumers of the program or product unless, at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that for purposes of this order for any test, analysis, research, study, or other evidence to be "competent and reliable" it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents shall for at least five years after the date of the last dissemination of the representation, maintain and upon reasonable request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondents in disseminating any representation covered by this order.
2. All test reports, studies, surveys, or demonstrations in their possession or control that contradict any representation of respondents that is covered by this order.

IV.

It is further ordered, That respondents shall conspicuously post a copy of this order on their premises.

V.

It is further ordered, That the corporate respondent and the individual 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 of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order, or of any change in the position or responsibilities of Dinah H. Simonini or Donald L. Simonini in regard to any corporation or subsidiary of which either is an officer and which corporation or subsidiary is, directly or indirectly, involved in the sale or distribution of any electric muscle stimulation treatment program or product.

VI.

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.

IN THE MATTER OF

ADOLPH COORS COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 8845. Order, Feb. 4, 1975*—Modifying Order, Aug. 1, 1989*

This order reopens the proceeding and modifies the Commission's order issued on Feb. 4, 1975 (85 FTC 187), by deleting provisions that prohibited respondent from imposing certain territorial and customer restrictions on its distributors.

ORDER GRANTING IN PART AND DENYING IN PART PETITION TO
REOPEN AND MODIFY ORDER

Adolph Coors Company ("Coors"), has filed, on April 3, 1989, a "Petition to Modify Order" ("Petition"), pursuant to Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The petition asks the Commission to reopen the proceeding and set aside the modified cease and desist order entered by the Commission on February 4, 1975, in Docket No. 8845, 85 FTC 187, "except insofar as the order prohibits price fixing or resale price maintenance." Petition at 2. Specifically, Coors requests that the Commission set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order, which prohibit Coors from, among other things, imposing non-price vertical restraints on distributors of Coors' beer products.¹ In support of its request, Coors argues that the order modification is warranted by changed conditions of law. Petition at 2-3. The petition was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and one comment was received. For the reasons discussed below, the Commission has determined that Coors has not shown a changed condition of law requiring reopening the order but that Coors has shown that granting the request, with one exception, would be in the public interest. The Commission has therefore reopened and modified the order.

*Decision issued July 24, 1973 (83 FTC 32).

¹ In addition to prohibiting Coors from refusing to deliver beer to distributors selling outside their designated territory, paragraph 7 of the order also prohibits Coors from refusing to deliver beer to distributors who sell beer at prices, markups or profits lower than those approved by Coors. 85 FTC at 189.