

IN THE MATTER OF

ROBERT FRANCIS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3327. Complaint, Mar. 4, 1991—Decision Mar. 4, 1991*

This consent order prohibits, among other things, the advertiser and distributor of the Diet Patch from making unsubstantiated efficacy claims for any product or service and from misrepresenting that a paid advertisement is an independent program. In addition, the order prohibits the respondent from disseminating or broadcasting "The Michael Reagan Show".

Appearances

For the Commission: *Tracy S. Thorleifson.*

For the respondent: *Pro se.*

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 Robert Francis, an individual, hereinafter sometimes referred to as respondent, has 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 Robert Francis is an individual residing at 4975 Viceroy Street, Apartment #204, Cape Coral, Florida. Individually or in concert with others, he advertised, marketed and sold a weight-loss product, the "EuroTrym Diet Patch," primarily by means of a 30-minute television advertisement made to simulate a regular television talk show.

PAR. 2. Respondent, individually or in concert with others, engaged in the advertising, offering for sale, sale and distribution of a food, drug, device, or cosmetic, the EuroTrym Diet Patch, a product found in commerce. The EuroTrym Diet Patch comes within the classifica-

tion of "drug," as that term is defined in Section 15(c) of the FTC Act, 15 U.S.C. 55(c).

PAR. 3. The acts and practices of respondent alleged in this complaint have been or are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

PAR. 4. Since at least 1988, individually or in concert with others, respondent promoted the sale of and sold numerous packages of the EuroTrym Diet Patch to consumers in various areas of the United States. A one-month supply of the EuroTrym Diet Patch sold for \$49.95, plus shipping and handling costs of \$4.00. Sales of the EuroTrym Diet Patch totalled approximately \$4,833,000. The EuroTrym Diet Patch was advertised on a 30-minute television commercial identified as "The Michael Reagan Show," which was broadcast on network, independent and cable television stations throughout the United States.

PAR. 5. By and through the "Michael Reagan Show" and other statements and depictions, respondent, individually or in concert with others, represented, directly or by implication, that:

- (a) Use of the EuroTrym Diet Patch prevents feelings of hunger.
- (b) Use of the EuroTrym Diet Patch enables users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch enables users to lose weight in a large majority of cases.
- (d) Competent and reliable tests or studies establish that the EuroTrym Diet Patch promotes weight loss.

PAR. 6. In truth and in fact:

- (a) Use of the EuroTrym Diet Patch does not prevent feelings of hunger.
- (b) Use of the EuroTrym Diet Patch does not enable users to lose substantial amounts of weight.
- (c) Use of the EuroTrym Diet Patch does not enable users to lose weight in a large majority of cases.
- (d) No competent and reliable test or study establishes that the EuroTrym Diet Patch promotes weight loss.

Therefore, each of the representations set forth in paragraph 5 was and is false, misleading or deceptive.

PAR. 7. Through the use of the statements and representations set forth in paragraph 5 and others not specifically set forth herein, respondent, individually or in concert with others, represented,

directly or by implication, that he possessed and relied upon a reasonable basis for each of the representations set forth in paragraph 5 at the time such representations were made.

PAR. 8. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making each of the representations set forth in paragraph 5 at the time such representations were made. Therefore, the representation set forth in paragraph 7 was and is false, misleading or deceptive.

PAR. 9. By and through "The Michael Reagan Show," respondent, individually or in concert with others, represented, directly or by implication, that "The Michael Reagan Show" was an independent consumer program that discusses a variety of topics, including products like the EuroTrym Diet Patch.

PAR. 10. In truth and in fact, "The Michael Reagan Show" was not an independent consumer program or anything other than paid commercial advertising. Therefore, the representation set forth in paragraph 9 was and is false, misleading or deceptive.

PAR. 11. By and through "The Michael Reagan Show" and other statements and depictions, respondent, individually or in concert with others, in numerous instances represented, directly or by implication, that endorsements appearing in advertisements for the EuroTrym Diet Patch:

(a) Reflect the honest opinions, findings, beliefs, or experience of the endorser;

(b) Reflect the typical or ordinary experience of members of the public who have used these products; and

(c) Were obtained from individuals or other entities who at the time of providing their endorsements, were independent from all of the individuals and entities marketing the product.

PAR. 12. In truth and in fact, in numerous instances, the endorsements appearing in advertisements for the EuroTrym Diet Patch:

(a) Do not reflect the honest opinions, findings, beliefs, or experience of the endorser;

(b) Do not reflect the typical or ordinary experience of members of the public who have used these products; and

(c) Were obtained from individuals or other entities who, at the time of providing their endorsements, were not independent from all of the individuals and entities marketing the product.

Therefore, each of the representations set forth in paragraph 11 was and is false, misleading and deceptive.

PAR. 13. Respondent's dissemination of the false and misleading representations as alleged in this complaint constitutes unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the FTC Act.

PAR. 14. Respondent's unfair or deceptive acts or practices as alleged in this complaint have caused substantial injury to consumers. Commissioner Starek not participating.

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 Seattle 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 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. Robert Francis resides at 4975 Viceroy Street, Apartment #204, Cape Coral, Florida.
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, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole the 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

II.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product or service prevents feelings of hunger;
- (2) Use of such product or service enables users to lose substantial amounts of weight;
- (3) Use of such product or service enables users to lose weight in a large majority of cases; or
- (4) Any competent and reliable test or study establishes that such product or service promotes weight loss.

For purposes of this Part II a "substantially similar weight control

or weight reduction product” shall be defined as any product that is advertised to cause or aid weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient *calcareo carbonica*.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that:

(1) Use of the product or service prevents or reduces feelings of hunger;

(2) Use of the product or service enables users to lose substantial amounts of weight;

(3) Use of the product or service enables users to lose weight in a substantial number of cases; or

(4) Any competent and reliable test or study establishes that use of the product or service promotes weight loss,

unless the representation is true and, at the time of making the representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation. Competent and reliable scientific evidence shall mean for purposes of this order any test, analysis, research, study, survey or other evidence that has been 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.

C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product or service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; *provided, however*, that this disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product or service in question is effective without dieting and/or exercise.

III.

It is further ordered, That respondent, an individual, and respondent’s agents, representatives and employees, directly or through any

partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product 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 performance, benefits, efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, unless at the time of making the representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

B. Making any representation, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a product or service covered under Subpart III.A), unless at the time of making the representation respondent possesses and relies upon a reasonable basis for each such representation.

IV.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Using, publishing, or referring to any endorsement (as "endorsement" is defined in 16 CFR 255(b)), unless respondent has good reason to believe that at the time of such use, publication or reference, the endorsement reflects the honest opinions, findings, beliefs or experience of the endorser and contains no representation that would be false or unsubstantiated if made directly by respondent.

B. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and respondent. For purposes of this Part IV, a "*material connection*" shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the

endorsement and which relationship would not reasonably be expected by consumers.

C. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless the representation is true.

V.

It is further ordered, That respondent, an individual, and respondent's agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale, or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any commercial or other advertisement for any such product or service that misrepresents, directly or by implication, that it is an independent program and not a paid advertisement;

B. Any commercial or other advertisement for any such product or service fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner, within the first thirty (30) seconds of the commercial and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

VI.

It is further ordered, That, within fifteen (15) days after the date this order becomes final, respondent shall submit a truthful sworn statement, in the form shown in Exhibit A to this order that shall reaffirm and attest to the truth, accuracy, and completeness of respondent's financial statements and the related documents ("Financial Statement") that were dated June 26, 1990, and previously submitted to the Commission.

VII.

It is further ordered, That this order is expressly premised upon respondent's financial condition as represented in the sworn Financial Statement referenced above, which contains material information upon which the Commission relied in negotiating and agreeing to the lack of a redress payment in this order. If the Commission determines that respondent failed to file the truthful sworn statement required by Part VI of this order, or failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission in his Financial Statement, the Commission may reopen the proceeding and take such action as the Commission deems appropriate. Proceedings instituted under this paragraph are in addition to and not in lieu of any other remedies as may be provided by law, including any proceedings the Commission may initiate to enforce this order.

VIII.

It is further ordered, That respondent shall, for a period of five (5) years from the date of entry of this order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities. The expiration of the notice provision of this Part VIII shall not affect any other obligation arising under this order.

IX.

It is further ordered, That for three (3) years from the date that the practices to which they pertain are last employed, respondent shall maintain and upon reasonable request make available to the Federal Trade Commission, at a place designated by Commission staff for inspection and copying:

A. All advertisements and promotional materials subject to this order;

B. All materials relied on as substantiation for any representation covered by this order;

C. All test reports, studies or other materials in respondent's possession or control at any time that contradict, qualify or call into question any representation of respondent covered by this order or the basis on which respondent relied for such claim or representation; and

D. All other materials and records that relate to respondent's compliance with this order.

This Part IX shall expire five (5) years after the date of entry of this order.

X.

It is further ordered, That respondent shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

Commissioner Starek not participating.

EXHIBIT A

Declaration of Robert Francis

I, Robert Francis, do hereby affirm and attest that the financial statements and related documents dated June 26, 1990, that I submitted to the Federal Trade Commission, copies of which are attached hereto, were truthful, accurate and complete. I understand that should the Commission determine that I failed to disclose any asset, materially misrepresented the value of any asset, or made any other material misrepresentations, the Commission may reopen this proceeding, initiate an enforcement proceeding against me, or take other appropriate action.

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____

Robert Francis

Modifying Order

114 F.T.C.

IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SECS. 3 AND 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, March 15, 1991*

This order reopens the proceeding and modifies Paragraph I.A of the 1977 consent order [90 FTC 257] by allowing the respondent to enter into multi-year requirements contracts with several new industrial gas distribution companies ("NEWCOs").

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 28, 1977

On November 2, 1990, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission's Procedures and Rules of Practice, 16 CFR 2.51. The request asks the Commission to reopen and modify the consent order in Docket No. C-2902 ("order"). Carbide seeks to have paragraph I.A. of the order modified to permit Carbide to enter into requirements contracts for terms longer than one year with several gas distribution companies, which are to be formed from packaged gas distribution businesses in which UCIG had, as of November 1, 1990, more than a 50% interest ("NEWCOs") and are to be owned jointly by the Union Carbide Industrial Gas division ("UCIG") and its employees. The employees and management together will own more than 50% interest in each NEWCO. The order presently requires that any requirements contracts with distributors in which Carbide does not own a "majority interest" have initial terms not longer than one year and be terminable annually on not more than 90-days notice.

The Commission has carefully considered Carbide's request and has concluded that the public interest warrants reopening and modifying paragraph I.A to allow Carbide to enter into requirements contracts with the NEWCOs for terms greater than one year. Carbide did not request, and the Commission has not considered, that the order be