

## IN THE MATTER OF

## NU-DAY ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3380. Complaint, Apr. 22, 1992--Decision, Apr. 22, 1992*

This consent order prohibits, among other things, a Washington corporation, its owner, and an officer from making false and unsubstantiated claims concerning their diet program, and from misrepresenting that any program length television commercial ("infomercial") they produce is an independent program and not a paid advertisement; and requires a disclosure message, within the first 30 seconds of any infomercial that is 15 minutes long or longer, and in addition, every time ordering information is presented, a disclosure that the infomercial is a paid advertisement.

*Appearances*

For the Commission: *Timothy T. Hughes* and *John C. Hallerud*.

For the respondents: *Robert E. Armstrong, Gronek & Armstrong*,  
Chicago, IL.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Nu-Day Enterprises, Inc., HealthComm, Inc., corporations and Jeffrey S. Bland, individually and as an officer of Nu-Day Enterprises, Inc., and HealthComm, Inc., hereinafter sometimes referred to as respondents, have violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. a. Respondent Nu-Day Enterprises, Inc., is a Washington corporation with its office and principal place of business located at 5800 Soundview Dr., N.W., Gig Harbor, Washington.

b. Respondent HealthComm, Inc. is a Washington corporation with its office and principal place of business located at 5800 Soundview Dr., N. W., Gig Harbor, Washington. HealthComm, Inc., owns and controls Nu-Day Enterprises, Inc.

c. Respondent Jeffrey S. Bland is an officer and director of Nu-Day Enterprises, Inc., and of HealthComm, Inc. He formulates, directs and controls the acts and practices of these corporations. At all times material herein, respondent Jeffrey S. Bland has formulated, directed and controlled the acts and practices of Nu-Day Enterprises, Inc., and HealthComm, Inc., including the acts and practices herein after set forth. Respondent Jeffrey S. Bland's address is the same as that of the corporate respondents Nu-Day Enterprises, Inc., and HealthComm, Inc.

PAR. 2. Respondents have been engaged in the business of offering for sale, selling, advertising, or distributing dietary programs and food products, as "food" is defined in Section 15 of the Federal Trade Commission Act, such as the "Nu-Day Diet Program," the "Nu-Day Meal Replacement Formula" and "Nu-Day Herbulk" food products; and have participated in, and assisted others in the creation and dissemination to the public of 30 minute, program-length television advertisements for such food products.

PAR. 3. Respondents' acts and practices, including those alleged in this complaint, have been, and are, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative of the statements made in respondents' advertisements, but not including all such statements or advertisements, are the following statements from the television commercial entitled "The Perfect Diet":

(a) "Amazing true stories of people like yourself losing 20, 30, 50 pounds or more, safely, quickly and naturally."

(b) "What the Nu-Day program allows us to do is to tune up that heat-producing machinery so that the fat is not stored for a rainy day that never comes. Rather, it's lost as body heat -- and that is what we call efficient metabolism. So really, we're inducing efficient metabolism."

(c) "A revolutionary new concept in weight loss. A diet that actually raises your metabolism, causing your body to burn off excess fat, quickly, safely and naturally. . . Now this diet's available to you at home without a doctor's prescription -- just call

1/800/225-6400, toll free -- that's 1/800/225-6400. A 14-day supply of Nu-Day is only \$59.95 and comes with a 100 % money back guarantee."

(d) "So we said, you know, we need to really examine what is going on physiologically. What about their metabolism? Can we roll back their metabolism to that younger age when they could eat more and gain less weight? And that led us ultimately on a search which finally arrived at this Nu-Day product and program that we are going to be talking about -- that I believe has, uh, really heralded a major breakthrough in metabolic management -- getting a person so that their body will in fact work the way it should to maintain proper body weight."

(e) "In the cell we have different little organelles, these are these little things like the nucleus of the cell in the center, which is like the brain of the cell. These little pink units are called mitochondria -- and they're like the lungs or spark plugs of the cell -- they burn up the energy -- and you know, as a person tends to age, what happens is these mitochondria take a siesta, they go to sleep and they don't effectively convert food to energy anymore. We tend to store that energy as fat for a rainy day that never comes. So really what the Nu-Day program -- is to try to help activate those mitochondria. Get them to work right. Get them back to the point where they will convert efficiently food and energy and burn off that fat."

(f) "and well in excess of 100,000 clinical trials have been evaluated with people that have been on this diet and the responses that we are getting here are remarkable . . ."

(g) Standing in front of three canisters, a small box, an audio tape and a booklet, the announcer describes the product: "Developed by Dr. Jeffrey Bland, one of the nation's leading nutritional biochemists, the Nu-Day metabolic weight management system is an easy to use, two-part program. First, the Meal Replacement Formula provides your body with all its basic nutritional needs, using the highest quality ingredients available. Second, Nu-Day Herbulk, the natural appetite suppressant, provides fiber and cleanses the digestive system. Nu-Day contains no narcotic appetite suppressants. It's composed of 100 percent natural ingredients and doesn't contain any drugs, stimulants or preservatives. The Nu-Day metabolic weight management system is fully explained in this complete, easy to follow booklet which also gives you meal suggestions so you can enjoy a delicious variety of real foods. Also this audio cassette, which features Dr. Bland as he answers the most commonly asked questions of people using the Nu-Day program."

PAR. 5. Through the use of the statements referred to in paragraph four, and other statements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" alter human metabolism so that the body will burn more calories than the body was burning prior to following the program or eating the food products.

(b) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" alter human metabolism so that weight lost while following the program or eating the food products will not return when caloric intake increases.

(c) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" alter the mitochondria in the body's cells so that the cells convert more food into energy.

(d) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" prevent the body's metabolism from slowing down to the level that it would reach on any other diet involving similar caloric intake.

PAR. 6. In truth and in fact:

(a) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" do not alter human metabolism so that the body will burn more calories than the body was burning prior to following the program or eating the food products.

(b) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" do not alter human metabolism so that weight lost while following the program or eating the food products will not return when caloric intake increases.

(c) The "Nu-Day Diet Program," "Nu-Day Meal Replacement Formula," and/or "Nu-Day Herbulk" do not alter the mitochondria in the body's cells so that those cells convert more food into energy.

Therefore, the representations set forth in paragraph five (a) through five (c) were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in paragraph four, and others not specifically set forth herein, respondents have represented, directly or by implication, that, at the time of making the representations set forth in paragraph five (a) through five (d), respondents possessed and relied upon a reasonable basis for making those representations.

PAR. 8. In truth and in fact, at the time of making the representations set forth in paragraph five (a) through five (d) respondents did not possess and rely upon a reasonable basis for making those

representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of the statements set forth in paragraph four, and others not specifically set forth herein, respondents have represented, directly or by implication, that the representations referred to in paragraph five (a) through five (d) are substantiated by 100,000 clinical trials conducted, in a scientifically or medically acceptable manner, on patients specifically following the Nu-Day diet program and/or taking the Nu-Day product or a substantially similar product.

PAR. 10. In truth and in fact, the representations referred to in paragraph five (a) through five (d) are not substantiated by 100,000 clinical trials conducted, in a scientifically or medically acceptable manner, on patients specifically following the Nu-Day diet program and/or taking the Nu-Day product or a substantially similar product. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. By and through "The Perfect Diet" television show, respondents have represented, directly or by implication, that "The Perfect Diet" television show is an independent consumer news program that uses interviews to report on its discovery of the Nu-Day Diet.

PAR. 12. In truth and in fact, "The Perfect Diet" television show is not an independent consumer news program. "The Perfect Diet" television show is a paid commercial advertisement. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. The dissemination of the aforesaid false and misleading representations by respondents, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce and the making of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Commissioner Yao not participating.

## DECISION AND ORDER

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

The respondents, their attorneys, 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 Nu-Day Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 5800 Soundview Dr., N.W., in the City of Gig Harbor, State of Washington.

Respondent HealthComm, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 5800 Soundview Dr., N.W. in the City of Gig Harbor, State of Washington.

Respondent Jeffrey S. Bland, Ph.D., is an officer and director of Nu-Day Enterprises, Inc., and HealthComm, Inc. His address is the same as that of the corporate respondents.

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

### ORDER

#### I.

*It is ordered*, That respondents Nu-Day Enterprises, Inc., a corporation, its successors and assigns, and its officers, HealthComm, Inc., a corporation, its successors and assigns, and its officers, and Jeffrey S. Bland, individually and as an officer of Nu-Day Enterprises, Inc., and HealthComm, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, labeling, packaging, offering for sale, selling, or distributing of the dietary program or food product (also known as the "Nu-Day Program," "Nu-Day Meal Replacement Formula," "Nu-Day Herbulk," or any other substantially similar dietary program or food 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:

A. That any such program and/or product alters human metabolism so that the body will burn more calories than the body was burning prior to following the program or eating the product;

B. That any such program and/or product alters human metabolism so that weight lost while following the program or eating the product will not return when caloric intake increases; or

C. That any such program and/or product alters the mitochondria in the body's cells so that those cells convert more food into energy.

For purposes of this Part I a "*substantially similar dietary program or food product*" shall mean any program or product that involves reduction of caloric intake to between eight hundred and one

thousand two hundred (1,200) calories and the consumption of food supplements consisting of powdered protein and bulking agents or containing chromium or any chromium-niacin complex.

## II.

*It is further ordered*, That respondents Nu-Day Enterprises, Inc., a corporation, its successors and assigns, and its officers, Health-Comm, Inc., a corporation, its successors and assigns, and its officers, and Jeffrey S. Bland, individually and as an officer of Nu-Day Enterprises, Inc., and Health Comm, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with manufacturing, advertising, labeling, packaging, offering for sale, selling, or distributing of any dietary program or food product in or affecting commerce, as "commerce" and "food" are defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any such program or product:

A. Can or will alter human metabolism so that the body will burn more calories than the body was burning prior to following the program or eating the product;

B. Can or will alter human metabolism so that weight lost during a period of caloric restriction will not return when caloric intake increases; or

C. Can or will alter the mitochondria in the body's cells so that the cells convert more food into energy;

D. Can or will prevent the body's metabolism from slowing down to the level that it would reach on any other diet involving similar caloric intake;

*unless*, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean for purposes of this order such test, analysis, research, study, survey or other evidence conducted and evaluated in an objective manner by persons qualified to do so using procedures

generally accepted by others in that profession or science to yield accurate and reliable results.

### III.

*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 manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising any food or weight control service 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, that any such product or service can or will help any consumers lose weight or maintain weight loss unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean for purposes of this order such test, analysis, research, study, survey or other evidence conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in that 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 manufacturing, labeling, packaging, offering for sale any food, drug or device as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, selling, distributing or advertising any such 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, regarding the performance, benefits, efficacy or safety of such food, drug or device *unless*, at the time of making such representation, respondents possess and rely 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 such test, analysis, research, study, survey or other evidence conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in that profession or science to yield accurate and reliable results.

V.

*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 manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising any dietary program or food product, 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 article, survey or any other scientific opinion or data.

VI.

*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 manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising any service or product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling, broadcasting, or disseminating, or assisting or encouraging others to create, produce, sell, broadcast, or disseminate:

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 that is 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]."

*Provided that*, for purposes of this provision, the oral or visual presentations of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

## VII.

*It is further ordered*, That, on the date this order becomes final, respondents shall pay thirty thousand dollars (\$30,000) to the Federal Trade Commission. Respondents shall make this payment by cashier's check or certified check made payable to the Federal Trade Commission. If the Commission determines that redress is wholly or partially impracticable or is otherwise unwarranted, any such funds shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are disbursed, but shall have no right to counter the manner of distribution chosen by the Commission.

## VIII.

*It is further ordered*, That respondents Nu-Day Enterprises, Inc., and HealthComm, Inc., shall for five (5) years following service of this order, notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 corporation that may affect compliance obligations arising out of the order, or of any change in the positions or responsibilities of

Dr. Jeffrey S. Bland in regard to any corporation or subsidiary of which he is an officer.

IX.

*It is further ordered,* That respondent Dr. Jeffrey S. Bland shall promptly notify the Commission of his discontinuance of his present business or employment and of his affiliation with a new business or employment engaged in the manufacturing, labeling, packaging, offering for sale, selling, distributing or advertising of any foods, dietary programs, or publications relating thereto, or the offering for sale, selling, distributing or advertising of any services relating to any foods or dietary programs, and, for a period of five (5) years from the date of service of this order, shall promptly notify the Commission of each affiliation with such new business or employment. Each such notice shall include his new business address and a statement of the nature of the business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

X.

*It is further ordered,* That, for at least four (4) years after the date of service of this order, respondents, their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying at a place designated by the Commission,

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

B. All materials relied upon as substantiation for any representation subject to this order;

C. All test reports, studies, surveys, or other materials in respondents' possession or control at any time that contradict, qualify, or call into question any representation subject to this order or that contradict, qualify, or call into question the basis upon which respondents relied for any such representation; and

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

XI.

*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.

Commissioner Yao not participating.

## IN THE MATTER OF

PETERSON DRUG COMPANY OF  
NORTH CHILI, NEW YORK, INC.FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION  
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9227. Complaint, Apr. 19, 1989 -- Final Order, Apr. 22, 1992*

This final order grants the respondent's motion to withdraw notice of appeal and adopts the initial decision of the administrative law judge, and the order therein, which prohibits boycotts, or threats of boycotts, of pharmacy participation plans.

*Appearances*

For the Commission: *Karen G. Bokat, John R. Hoagland, Micheal McNeely, Kevin J. Arquit and Daniel P. Ducore.*

For the respondent: *Paul Kelly and Thomas Fink, Davidson, Fink, Cook & Gates, Rochester, N.Y.*

## 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 the Chain Pharmacy Association of New York State, Inc.; Melville Corporation; Fay's Drug Company, Inc.; Kinney Drugs, Inc.; Peterson Drug Company of North Chili, New York, Inc.; Rite Aid Corporation; and James E. Krahulec 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 as follows:

PARAGRAPH 1. Respondent Chain Pharmacy Association of New York State, Inc. ("Chain Association") is a corporation organized, existing and doing business under and by virtue of the