

IN THE MATTER OF

SANDOZ NUTRITION CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3394. Complaint, Aug. 10, 1992--Decision, Aug. 10, 1992*

This consent order prohibits, among other things, the Minnesota-based marketer of the Optifast diet program from misrepresenting the efficacy of any very-low-calorie diet program, and requires the respondent to possess competent and reliable scientific evidence to substantiate any claims about the success of patients or any diet program in achieving or maintaining weight loss. It also requires that claims about the safety of the program be accompanied by a clear disclosure that physician monitoring is needed to minimize the potential for health risks.

Appearances

For the Commission: *Richard F. Kelly, Michael C. McCarey and Walter C. Gross, III.*

For the respondent: *Daniel Shulman, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, MN.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sandoz Nutrition Corporation, a corporation, (hereinafter "respondent"), has violated the 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. Respondent Sandoz Nutrition Corporation is a Delaware corporation, with its offices and principal place of business at 5320 W. 23rd Street, Minneapolis, Minnesota.

PAR. 2. Respondent is engaged, and has been engaged, in the sale and offering for sale of the physician-supervised Optifast 70, and other very-low-calorie diet ("VLCD") programs and related

nutritional products to the public through cooperating hospitals and clinics. VLCDs are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. The Optifast diet programs provide between 420 and 800 calories per day. The Optifast diet programs include "foods" or "drugs" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondent has created and placed advertisements, and provided camera-ready advertising copy and 30 and 60 second scripts for radio spots to its participating hospitals and clinics for placement in various periodicals that are in general circulation to the public and broadcast on radio stations, to promote its Optifast diet programs to prospective patients. Typical of respondent's advertising, but not necessarily inclusive thereof, are the advertisements entitled "How expensive is cheap weight loss?" "To some weight loss programs, it's just before and after...", "The One," and the 30 second radio script attached hereto as Exhibits A-1 through A-4. Respondent further advertises its Optifast diet programs to the public by means of brochures and pamphlets which it provides to participating hospitals and clinics to give to patients and prospective patients. Typical of respondent's brochures and pamphlets, but not necessarily inclusive thereof, are the brochures and pamphlets entitled "Introducing a successful approach to weight management for people 50 pounds or more overweight," and "Getting Serious... About Lightening Up" attached hereto as Exhibits B-1 and B-2.

PAR. 4. The acts and practices of respondent alleged in this complaint are, and have been, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent's advertising contains the following statements:

(a) "While our typical patients also lose more weight. . . they also lose safely. . . ."

"So safe, it's chosen by more hospitals than any other weight management program." (Exhibit A-1)

(b) "The Optifast Program provides a unique combination of safe, rapid weight loss. . . ." (Exhibit B-1)

(c) "The One That's Clinically Proven Safe and Effective" (Exhibit A-4)

PAR. 6. By and through the use of the statements referred to in paragraph five, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that the Optifast diet programs are unqualifiedly free of health risks. Respondent has failed to disclose that physician supervision is required to minimize the potential risk to patients of the development of health complications on very-low-calorie diets. In view of the representation that the Optifast program is free of health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondent's failure to disclose, said representation was and is misleading.

PAR. 7. Respondent's advertising contains the following statements:

(a) "To some weight loss programs, it's just before and after... The OPTIFAST program works after the after." (Exhibit A-1)

(b) "The most discouraging part of losing weight is knowing that you'll probably gain it all back. Unless you're on the OPTIFAST Program." (Exhibit A-1)

(c) "[Y]ou can call the OPTIFAST program today, and have all you need to control your weight the rest of your life." (Exhibit A-2)

(d) "[T]he focus is on long term, sustained weight loss. In other words, what you lose stays lost." (Exhibit B-1)

(e) "How Serious Are You About Finding A Sensible Way To Lose Weight - and Keep It Off? . . . Designed by the same professionals and research experts who created the OPTIFAST Program . . . the OPTITRIM Program is designed to offer you safe and effective weight loss and maintenance. Because the point of losing weight is to adjust your life style so that you'll keep it off." (Exhibit B-2)

PAR. 8. By and through the use of the statements referred to in paragraph seven, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that:

(a) The Optifast diet programs are successful long-term or permanent treatments for obesity; and

(b) The typical Optifast patient is successful in maintaining achieved weight loss.

PAR. 9. By and through the statements and representations referred to in paragraphs seven and eight, respondent represents, and has

represented, directly, or by implication, that at the time respondent made those representations, respondent possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at the time respondent made the statements and representations referred to in paragraphs seven and eight, respondent did not possess and rely upon a reasonable basis for those representations. Therefore, the representation set forth in paragraph nine was and is false and misleading.

PAR. 11. Respondent's advertising contains the following statement:

"... OPTIFAST patients maintain more weight loss, on average, than on any other program. And they have large, published clinical studies that prove it." (Exhibit A-3)

PAR. 12. By and through the use of the statement referred to in paragraph eleven, and others not specifically set forth herein of similar import and meaning, respondent represents, and has represented, directly, or by implication, that competent and reliable scientific studies have established that Optifast diet programs are more successful at maintaining weight loss than any other weight loss program.

PAR. 13. In truth and in fact, respondent possesses no scientific studies for diet programs other than the Optifast program, and therefore no competent and reliable scientific studies have established that the Optifast diet programs are more successful at maintaining weight loss than any other weight loss program. Therefore, the representation set forth in paragraph twelve was and is false and misleading.

PAR. 14. The acts and practices of respondent alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce and "false advertisements" in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. 45(a) and 52.

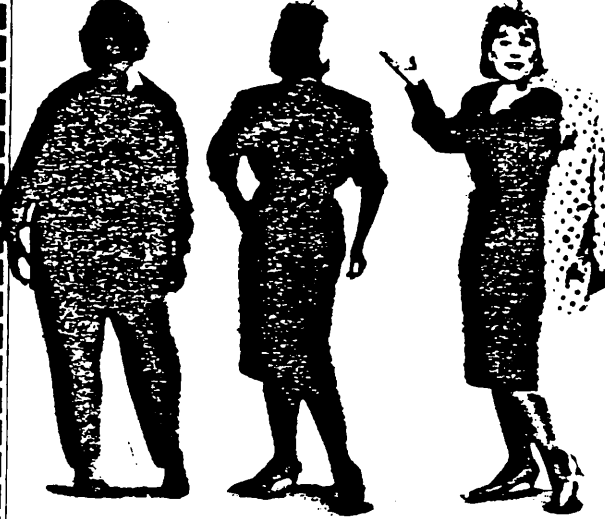
EXHIBIT A-1

SANDOZ NUTRITION CORPORATION

C-3394 B129026

To some weight loss programs, it's just before and after...

The OPTIFAST® Program works after the after.



The most discouraging part of losing weight is knowing you'll probably gain it all back. Unless you're on The OPTIFAST Program.

While our typical patients lose more weight...faster than on any other weight loss program (48 pounds in 13 weeks*), they also lose safely. Our patients also maintain more weight loss, on average, than on any other program.*

And it's all due to the comprehensive support of a team of physicians, behaviorists and registered dietitians specially trained in weight management. They'll constantly monitor your progress as they teach you skills you need to lose weight and keep the pounds off. Then our professionally supervised maintenance program will reinforce all you've learned.

What's more, The OPTIFAST Program can actually cost no more than the so-called "one fee" programs, when you add up their weekly prepackaged food costs and other extra expenses.

So call The OPTIFAST Program today. You'll live thinner and healthier ever after. And after.

The OPTIFAST Program

So safe, it's chosen by more hospitals than any other weight management program.

*Large, published weight reduction clinical studies. © 1990 Sandoz Nutrition Corporation

For more moderate weight problems, ask about The OPTITRIM® Program.

For more moderate weight problems, ask about The OPTITRIM® Program.

These additional tags are for use within the body of this ad only by those centers offering The OPTITRIMSM Program.

EXHIBIT A-2

9123023
B129026

How expensive is cheap weight loss? _____

Some weight loss programs entice you with low initial fees and big promises.

They give you weekly "nutrition" counseling and optional group meetings.

But you also give—as much as \$84 a week—for a mandatory part of the program: the prepackaged foods.

So achieving a 50-pound weight loss can cost as much, or even more, than losing 50 pounds on The OPTIFAST® Program.

What's more, the average OPTIFAST patient loses 48 pounds in 13 weeks*.

And The OPTIFAST Program gives you so much more—a comprehensive program, run by a team of physicians, behaviorists and registered dietitians, who will teach you the skills you need to

lose weight and keep the pounds off. Then our professionally supervised maintenance program will reinforce all you've learned.

In fact, on average, OPTIFAST patients maintain more weight loss than on any other weight loss program*. Instead of just emphasizing the "before and after," The OPTIFAST Program keeps working "after the after."

So you can pay for meal after meal. You can pay for meeting after meeting. Or you can call The OPTIFAST Program today, and have all you need to control your weight the rest of your life.



Chosen by more hospitals than any other weight management program.

* Large, published multi-center clinical studies.

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EXHIBIT A-3

The OPTIFAST PROGRAM

30 SECOND RADIO SPOT

L.L.A. : With some diets, it's just before and after. But The OPTIFAST Program works after the after. Because while the average OPTIFAST patient loses weight quickly -- 48 pounds in 13 weeks -- they also lose safely. And they maintain more weight loss, on average, than on any other program. Published clinical studies prove it. So call The OPTIFAST Program today. You'll live thinner, and healthier, even after. Call The OPTIFAST Program at (hospital name), (phone number), (repeat number).

Complaint

115 F.T.C.

EXHIBIT A-4

Exhibit A-4

C-3394
9123023
B129026♦
The One You've Been Hearing About♦
The One You've Been Reading About♦
The One That's Medically Supervised♦
The One With Behavioral And Nutritional Therapy♦
The One That's Clinically Proven Safe And Effective♦
The One Everyone Tries To Imitate♦
The One Medical Weight Management Program You Should Call

The Proven Medical Treatment For Obesity

To Attend A Free Orientation Call:

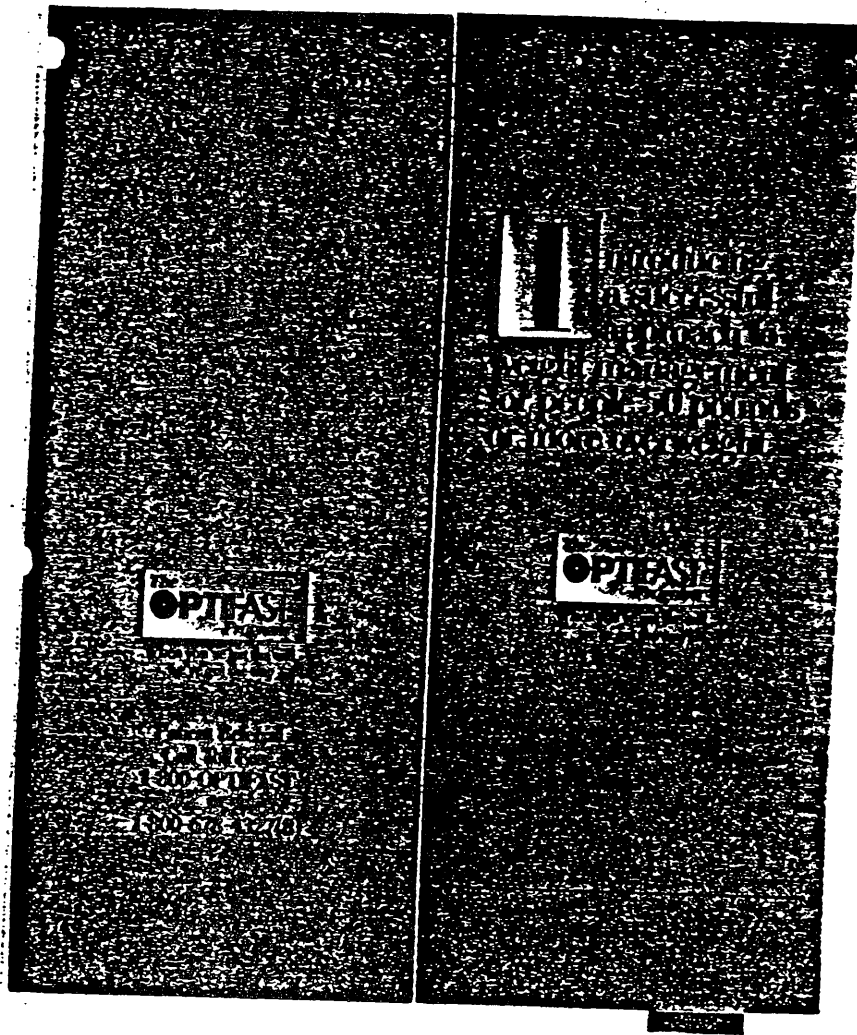
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Complaint

EXHIBIT B-1



C-3394
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Obesity. It's not a weakness in character. It's a disease.

Obesity is one of the most critical health problems we face today. It's a chronic medical condition that affects millions of Americans. And the problem is growing worse every year.

Obesity causes or contributes to the development of an array of life-threatening diseases, including hypertension, heart disease and Type II diabetes. It also creates untold physical pain and emotional anguish for those afflicted.

If you are 50 pounds or more overweight, The Optifast® Program offers new hope for you.

Developed by Sandoz Nutrition, The Optifast Program is based on the belief that a problem as complex as obesity requires a complex solution. One that deals not only with your weight, but also with the physical, social and emotional aspects of being severely overweight.



More than a diet, Optifast is a program for losing weight.

Taking weight off and keeping it off are two different matters.

For the first, you need a program that offers safe, rapid weight loss. For the second, you need a program that focuses on long-term behavior modification.

The Optifast Program offers both. Medically supervised and hospital/clinic

affiliated, The Optifast Program provides a unique combination of safe, rapid weight loss; behavior modification and psychological support; nutrition education; exercise; and frequent medical monitoring.

Initial weight loss is rapid. And very encouraging. But the focus is on long-term, sustained weight loss. In other words, what you lose stays lost.

It's not easy, of course, but if you have the commitment, The Optifast Program has the know-how. Plus an impressive 12-year record with over a quarter of a million people to back us up.



More than a way of losing, it's a new way of living.

The Optifast Program is a highly structured, 26-week program of supplemented fasting, refeeding, and stabilization.

There are four stages to the Optifast Program:

In the evaluation, we help you determine if you qualify for the program by conducting a series of medical tests and an interview. You have an equally important role to play.

You must decide if you are willing to make the commitment in time, money and lifestyle change it will take to achieve our mutual goals if you elect to participate in The Optifast Program.

The supplemented fasting phase lasts for 12 weeks. During this phase you will be put on a very low calorie diet consisting solely of the Optifast formulation. The

formulation comes in a variety of flavors, is nutritionally balanced, and contains 100% of the daily recommended requirements of protein, vitamins and minerals.

You will have weekly consultations with program physicians, nurses and nutritionists to monitor your safety and progress.

In addition, you will participate in behavior modification sessions led by a professional behaviorist. It is participation in these sessions, and the group support you encounter there, which enables you to successfully reshape your thinking about food and the role you will allow it to play in your future life.

The refeeding and stabilization phases of the program last a total of 13 weeks.

During refeeding you will be gradually reintroduced to regular food and withdrawn from the Optifast formulation. Weekly medical consultations and group behavior modification sessions will continue. Most patients continue to lose weight during this period.

Once solid foods have been completely reintroduced into your diet, you will move into stabilization, the final stage of the core Optifast Program. Behavioral counselling and relapse prevention techniques are stressed during this period as you gain the skills and confidence necessary to maintain your weight loss.

Maintenance: an additional support. Following stabilization, many participants elect the additional support provided by Optifast weight maintenance sessions. Experience has shown that people who continue with the program for this optional phase experience increased success at keeping their weight down.

If you've failed at one diet after another, come taste success.

The Optifast Program is an unprecedented medical success. Over the past 12 years, more than a quarter of a million obese people have participated in the program. The results have been impressive, both in terms of long-term sustained weight loss, and in the lessening of medically related problems such as diabetes and hypertension.

If you're fifty or more pounds overweight, The Optifast Program offers new hope for you.

Begin by attending one of our free Optifast orientation sessions.

Hear for yourself how The Optifast Program approaches weight loss and the health risks of obesity. Our team of medical specialists will explain the program in depth and answer any questions you may have.

To register, or for more information, please call us at the number listed on the back of this brochure. And remember, when it comes to long-term weight management: If you have the will, The Optifast Program has the way.



SANDOZ NUTRITION
YOUR SOURCE FOR NUTRITION™

5320 West Twenty Third Street Minneapolis, Minnesota 55416

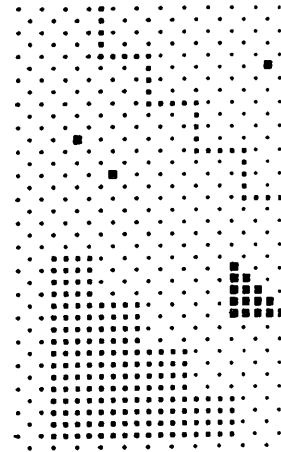
Complaint

115 F.T.C.

EXHIBIT B-2

EXHIBIT B-2C-3394
9123023
B129026*Introducing**The OPTITRIM™**Program.**More Than A Diet...**An Opportunity**For Healthier**Living.*

Get Serious...
About Lightening Up.



The
OptiTrim™
Program

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be reproduced in any form without the prior permission of Sander Hamilton Corporation.
48-601-190

EXHIBIT B-2 Cont.**How Serious Are You About Finding A Sensible Way To Lose Weight - and Keep It Off?**

There are many reasons to lose weight, and there are just as many ways to accomplish this goal. It's not a "quick and easy" way to take the weight off.

No doubt you've even tried a lot of those "fast" solutions - a sleeping pill, a crash diet or even a supermarket powder-spoon response. And now you're frustrated because you're still carrying around the 20 to 40 pounds of weight you thought would last for good.

You're probably concerned that those extra pounds will have already started to affect your health.

Disputed by the many professionals and research experts who regard The OPTITRIM Program (formulated specifically for overweight people), The OPTITRIM Program is designed to offer you safe and effective weight loss and maintenance.

Because the goal of losing weight is to adjust your life style so that you'll keep it off!

So if you're ready to spend your time in a weight management program that is sensible and effective, as it is suitable for your overall health, why not make a sensible look at The OPTITRIM Program?

Let's start with your doctor. How much should you weigh for your good health?

Can You Imagine How Life Would Change If You Finally Lost Those Pounds For Good?

Think about it when you run up a flight of stairs. Or climb a ladder across the roof, turn in procedure, or rise to the bus. Imagine doing all these things effortlessly and smart-easiness!

Aside from the fact that you can see that you look as good as you could, you learn that your body could benefit from the loss of those extra pounds too. But your doctor told you that your cholesterol level, your blood pressure, and your blood sugar are climbing right along with your weight.

Good health and good nutrition go together. That's why your weight loss program with The OPTITRIM Program will be guided by a team of health care professionals under a doctor's supervision. The supervising physician will ensure your current health status and advise you on reasonable weight loss goals.

A supervised, supervised, as well as prepackaged portion-controlled meals take the guesswork out of calorie counting and meal preparation.

But there's more to long-term weight loss than what you eat - and what you can't eat. With the week's guidance of your group leaders you'll learn to change your eating habits and create a regular exercise too.

By the time you're ready for the maintenance phase your group and your group leader will be an excellent source of support, encouragement and advice.

Planned. Sensible. Guided by medical professionals who know weight loss inside and out. Benefits that add up to The OPTITRIM Program difference.

Check your calendar. 18 weeks from today is

Is The OPTITRIM Program The One For You?

If you're an adult with 20 to 50 pounds to lose, you can be an excellent candidate for The OPTITRIM Program.

And you're fortunate. Because this hospital has teamed up with leading physicians and the nutrition and clinical expertise of Sandoz Nutrition to provide you with a program designed for safe, effective weight loss.

You're fortunate for another reason too. Sandoz has been a leader for responding to the needs of people like you, people who want the best for their health. As a result of clinical research and extensive experience in weight management, Sandoz Nutrition products and programs have an unmatched reputation for excellence in the health care industry.

But necessary is a lifetime life style change. The OPTITRIM Program is a serious decision. The more you consider yourself, the more you can benefit from

- A sensible weight loss program
- Healthier eating habits
- A lower cholesterol level
- Increased physical activity
- Reduced stress

No matter how you look at it, The OPTITRIM Program is a good choice today. And it will help you change your life style so that you can look forward to the good years ahead.

Take a look in the mirror. Don't that person who deserves to feel not just good-but great?

Just as a good health as The OPTITRIM Program. Informational reasons. Just call the telephone number listed on the back cover to learn when a convenient session will begin.

Remember!

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 Bureau of Consumer Protection 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, its attorney, 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Sandoz Nutrition Corporation is a Delaware corporation, with its offices and principal place of business at 5320 W. 23rd Street, Minneapolis, Minnesota.
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

DEFINITION

For purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, surveys or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results.

I.

It is ordered, That respondent Sandoz Nutrition Corporation, a Delaware corporation, its successors and assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control product, program 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 safety of any very-low-calorie diet ("VLCD") program (providing 800 calories or less per day), unless respondent clearly and prominently discloses in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of the program.

B. Misrepresenting the likelihood that patients of respondent's diet program(s) will regain all or any portion of lost weight.

C. Making any representation, directly or by implication, about the success of patients on any diet program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; *provided, however*, that for any representation that:

(1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of patients using the program, said evidence shall, at a minimum, be based on a representative sample of: (a) all patients who have entered the program, where the representation relates to such persons; or (b) all patients who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of patients who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent or (b) demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

D. Representing, directly or by implication, that any patients of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation:

(1) The following information:

(a) The average percentage of weight loss maintained by those patients,

(b) The duration, over which the weight loss was maintained, measured from the date that patients ended the active weight loss phase of the program, *provided, however*, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed, and

(c) If the patient population referred to is not representative of the general patient population for that program, the proportion of the

total patient population in respondent's programs that those patients represent, expressed in terms of a percentage or actual numbers of patients, or the statement: "Optifast makes no claim that this [these] result[s] is [are] representative of all patients in the Optifast program;" and

(2) The statement: "For many dieters, weight loss is temporary." *Provided, however,* that, respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's diet programs.

E. Making comparisons between the efficacy of respondent's diet program or programs and the efficacy of any other diet program or programs, unless at the time of making such representation, respondent possesses and relies upon a reasonable basis for making such representation. Such reasonable basis shall consist of a competent and reliable scientific study or studies substantiating the representation in terms of both the efficacy of respondent's diet program or programs and the efficacy of the diet program or programs with which the comparison is made.

F. Misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, the filing of a bankruptcy petition, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

It is further ordered, That respondent shall maintain for a period of three (3) years after the date the representation was last made, and make available to the Federal Trade Commission staff upon request

for inspection and copying, all materials possessed and relied upon to substantiate any claim or representation covered by this order, and all test reports, studies, surveys or information in its possession or control or of which it has knowledge that contradict, qualify or call into question any such claim or representation.

IV.

It is further ordered, That respondent and its successors or assigns, shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors and employees, including participating hospitals or clinics, that are engaged in the preparation and placement of advertisements or promotional materials, who communicate with patients or prospective patients, or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all of respondent's future officers, agents, representatives, independent contractors and employees having said responsibilities.

V.

It is further ordered, That respondent and its successors or assigns 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 Owen dissenting with respect to the numerical disclosure requirements for television and radio advertisements.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted to accept the consent agreements in these matters. In addition to the injunctive provisions, the advertising disclosures that the orders require are appropriate given the allegations in the complaints that the firms failed to have a basis for previous advertising claims about weight loss maintenance. This does not mean that similar disclosures are necessarily required for other firms in the diet industry. Indeed, if their advertising claims have a valid

basis, such a requirement might be unduly burdensome, for firms who routinely use broadcast advertising, and without clear, countervailing benefits for consumers.

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

The consent orders with these three marketers of very low calorie diet programs go a long way toward protecting consumers against misrepresentations about the safety and efficacy of these programs. However, legitimate concerns have been raised as to whether the mandated, company-specific maintenance disclosures in television and radio ads are effective in communicating useful information to consumers, unduly cumbersome, and consistent with the Commission's position in other situations. Based on comments received and other information, I believe that consumers would be better served by a different approach to company-specific disclosures when weight-loss maintenance claims are made in certain television and radio advertisements. Accordingly, I have voted in favor of issuing the consent agreements in final form, except as to those provisions, with respect to which I dissent.

I support requiring in all maintenance advertising by these respondents general disclaimers which alert consumers to the fact that weight loss is temporary for many dieters. This counterbalances any unrealistically rosy scenario that a diet program might try to present in this regard. However, the orders compel additional disclosures, including a string of statistics, which may well be among the more informationally complex disclosures that have been required in Commission orders. While these numerically intricate disclosures may ultimately prove helpful to consumers in the context of print ads, which afford the opportunity for absorption, reflection, and comparison, I am concerned that the orders may fail to appreciate that consumers' ability to assimilate such complicated messages is likely to be much poorer for TV and radio ads of 30 seconds or less. One study of FTC orders with disclosure requirements noted that, generally, broadcast media would not appear especially effective in

providing detailed or complex disclosures.¹ A more recent study suggests that consumers are less likely to become well informed when certain disclosures are displayed in a video, as compared to a print, format.²

In the past, the Commission itself has recognized that less detailed disclosure requirements are sometimes appropriate for broadcast claims, and has entered orders which tailored the disclosure requirements to particular media. For instance, in *Sorga, Inc.*, 97 FTC 205 (1981), the Commission charged an advertising agency with having made deceptive and unsubstantiated representations about the efficacy and safety of a contraceptive, where the potential adverse impact of the misrepresentations was highly serious. Lengthy disclosures were required in print ads, whereas the television and radio ad disclosures were greatly abbreviated. Similarly, in *Southwest Sunsites, Inc.*, 105 FTC 7 (1985), a brief, simple disclosure concerning the riskiness of land purchases was required for radio, television, and short print advertisements, with a lengthy, more complex disclosure mandated for larger print ads, promotional materials, and oral sales presentations. In addition, a detailed disclosure about cancellation rights was required in each land sale contract.

More recently, the Commission has recognized the differences between disclosures in print on labels, and in broadcast media. In Congressional testimony presented in November of last year, the Commission noted that:

¹ W. Wilkie, *Affirmative Disclosure at the FTC: Communication Decisions*, 6 J. Pub. Pol'y & Marketing 33, 35 (1987).

² See A. Best, *The Talismanic Use of Incomprehensible Writings: An Empirical and Legal Study of Words Displayed in TV Advertisements*, 33 St. Louis U. L. J. 285 (1989).

we feel it is important that the Commission have the ability to take account of the practicalities of regulating advertising. For example, regulations enacted pursuant to the [Nutrition Labeling and Education Act] might require more extensive explanations of a health claim in food labeling than would be necessary for a television or radio advertisement.³

Finally, the length and detailed nature of the disclosures mandated by the Commission for radio and television ads in these orders appear to resemble proposed Food and Drug Administration labeling disclosure requirements that Commission staff from the Bureaus of Consumer Protection and Economics have recently criticized, in the print context of labels. With respect to the length of the numerical disclosures required in connection with relative nutrient content claims, the staff argued:

The length of the required disclosure is a concern primarily because it could reduce the information available to consumers by reducing producers' incentives to make valid relative claims.... Lengthy disclosures contribute to label clutter, which may discourage consumers from reading the information on the label.

The staff proposed, instead, a more concise disclosure similar in length to the general maintenance disclaimer that would be required under these consent orders.⁴

I strongly suspect that many consumers will have great difficulty in absorbing or recalling the relatively complex disclosures of these orders if made during broadcast ads. Although these particular respondents have to date not made great use of broadcast media in marketing their programs, some such undesirable effects from the

³ Prepared Statement of the Federal Trade Commission, before the Transportation and Hazardous Materials Subcommittee, Energy and Commerce Committee, U.S. House of Representatives (Nov. 21, 1991) at 12.

⁴ The staff cited as an example of a problematic mandated disclosure: "Less fat -- 38 percent less fat than our regular popcorn. This popcorn has 5 grams of fat compared to 8 grams in our regular popcorn." They proposed as an alternative: "Less fat -- 3 grams less than our regular popcorn." Federal Trade Commission Staff Comments Before the Dept. of Health and Human Services, Food and Drug Administration, In the Matters of Nutrition Labeling; Nutrient Content Claims; Health Claims; Ingredient Labeling, Prop. Rules, Dkt. Nos. 91N-0384, 84N-0153, 85N-0061, 91N-0098, 91N-0099, 91N-0094, 91N-0096, 91N-0095, 91N-0219 (Feb. 25, 1992) at 39-40.

present orders will still obtain in the broadcast advertising that they do. Moreover, I am very concerned that the approach in these orders may be viewed as precedent in any future matter that involves firms whose use of broadcast media is much more extensive.

In my view, the orders would have been more effective had they required for broadcast ads only the general disclaimer on weight-loss maintenance. But I am also convinced that the other disclosures on percent of weight loss maintained, duration of that maintenance, and the representativeness of the triggering claim would be important in helping consumers decide whether they will get their money's worth when they sign up for a particular program. Consequently, based on available information, I would have supplemented the more concise general disclosure for broadcast ads with requirements that respondents provide at point-of-sale, and prior to the execution of any contract, a clearly written statement of all the disclosures otherwise required,⁵ and that the broadcast ads alert consumers to the availability of that additional information. This approach, in my view, would provide the relevant information to consumers at a time when they most need it, and in a format more likely to be useful in evaluating and comparing diet programs.

⁵ See, e.g., *Arthur Murray, Inc.*, 95 FTC 347 (1980) (disclosures required of firm and its franchisees in contracts with consumers); see also, Letter from the Honorable Janet D. Steiger (by direction of the Commission) to Senator Slade Gorton (Sept. 25, 1991) at 7 n.11 ("The principle that detailed information of the kind usually found on labels is most useful when available at the point when comparisons can be made or decisions can be affected has been supported by many consumer information processing studies.").

IN THE MATTER OF

PACIFIC RICE PRODUCTS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3395. Complaint, Aug. 17, 1992--Decision, Aug. 17, 1992*

This consent order prohibits, among other things, a California company from misrepresenting the contents, validity, results, conclusions or interpretations of any test or study; and from representing that any food produces any health benefit, unless the respondent possesses and relies upon competent and reliable scientific evidence to substantiate the representation.

Appearances

For the Commission: *Philip L. Broyles, Michael Milgrom and Mark D. Kindt.*

For the respondent: *Peter Goodman, Brobeck, Phleger & Harrison, San Francisco, CA.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pacific Rice Products, Inc., a corporation ("respondent"), has violated the 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. Respondent is a California corporation, with its office or principal place of business located at 1275 Santa Anita Court, Post Office Box 2060, Woodland, California.

PAR. 2. Respondent has advertised, offered for sale, sold or distributed food products, including Vita Fiber Rice Bran.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce.