

IN THE MATTER OF

THE WINNING COMBINATION, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3398. Complaint, Aug. 24, 1992--Decision, Aug. 24, 1992*

This consent order prohibits, among other things, a California corporation and its officer from misrepresenting the efficacy of Essential Factors with Oxy-Energizer, a food supplement, or any similar product; from making certain representations unless they possess competent and reliable scientific evidence to substantiate the representations; and from representing that any such product has been accepted by the U.S. Government as effective for relieving fatigue or providing extra energy.

Appearances

For the Commission: *Michael Milgrom and Brinley H. Williams.*
For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Winning Combination, Inc., a corporation, and Andrew Lessman, individually and as an officer of said corporation ("respondents"), have 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 The Winning Combination, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office or principal place of business located at 1661 19th Street, Santa Monica, California.

Respondent Andrew Lessman is an officer of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and

practices hereinafter set forth. His address is the same as that of said corporation.

PAR. 2. Respondents have advertised, offered for sale, sold or distributed food products, including Essential Factors with Oxy-Energizer (hereinafter referred to as "Essential Factors"), intended for human consumption.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or caused to be disseminated advertisements for Essential Factors, which is a "food" or "drug" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52. These advertisements have been disseminated by various means in or affecting commerce for the purpose of inducing the purchase of such product by members of the public.

PAR. 5. Respondents' advertisements include, but are not necessarily limited to the attached Exhibit A. These advertisements contain the following statements:

(A) Can you really get extra energy from a vitamin? This US-patented formula says yes. Oxy-EnergizerTM is the first nutritional supplement ever to be granted a US patent. Supported by over 300 independent clinical trials, this anti-fatigue formula consistently demonstrates increases in stamina, endurance, recovery time, and cardiovascular function-results that simply can't be duplicated by any other nutritional supplement.

(B) The proof of patent #3,009,858. Oxy-Energizer contains a trade-secret blend of potassium, magnesium, and aspartic acid. People who take the formula feel more energetic throughout the day, especially at normal tired periods in mid-afternoon and early morning. Double-blind swimming, running, and aerobics studies consistently show improvements in stamina and endurance for subjects who regularly take the active ingredients in Oxy-Energizer. Taken daily, the formula can help you accomplish more at the office because you're not fighting tiredness. After work, you have more energy to enjoy sports or a late evening out. You may even feel less need for sleep (most test subjects do).

(C) People who take Essential Factors with Oxy-Energizer regularly report feeling more energetic. They spend extra productive hours at the desk, and still have energy for competitive sports.

(D) You only have about 16 waking hours each day to work, play, dine, make love.... Call today to order the formula triathletes, aerobics instructors, and top executives choose for extra energy and start living every hour to its fullest.

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the advertisement attached hereto as Exhibit A, respondents have represented, directly or by implication, that:

(A) Competent and reliable scientific tests have established that Essential Factors prevents fatigue and tiredness;

(B) Competent and reliable scientific tests have established that Essential Factors provides energy, stamina and endurance beyond its caloric value; and

(C) The United States Government has accepted the active ingredient in Essential Factors as effective for relieving fatigue and providing extra energy.

PAR. 7. In truth and in fact:

(A) It has not been established by competent and reliable scientific tests that Essential Factors prevents fatigue and tiredness;

(B) It has not been established by competent and reliable scientific tests that Essential Factors provides energy, stamina or endurance beyond its caloric value; and

(C) The United States Government has not accepted the active ingredient in Essential Factors to be effective for relieving fatigue and providing extra energy.

Therefore, the representations set forth in paragraph six were and are false and misleading.

PAR. 8. Through the use of the statements referred to in paragraph five, and others in advertisements and promotional materials not specifically set forth herein, respondents have represented, directly or by implication, that:

(A) Consumption of Essential Factors can prevent fatigue and tiredness; and

(B) Consumption of Essential Factors provides energy beyond its caloric value.

PAR. 9. Through the use of the statements set forth in paragraph five, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph eight, respondents possessed and relied upon a reasonable basis, consisting of competent and reliable scientific evidence, for each such representation.

PAR. 10. In truth and in fact, at the time respondents made the representations set forth in paragraph eight, they did not possess and rely upon a reasonable basis, consisting of competent and reliable scientific evidence, for making each such representation. Therefore, respondents' representation as 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 or 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.

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Complaint

EXHIBIT A

Can you really get extra energy from a vitamin?

This US-patented formula says yes.

Oxy-Energizer™ is the first nutritional supplement ever to be granted a US patent. Supported by over 300 independent clinical trials, this anti-fatigue formula consistently demonstrates increases in stamina, endurance, recovery time, and cardiovascular function—results that simply can't be duplicated by any other nutritional supplement.

Once provided only to professional athletes like Kathy Smith (see box), Essential Factors™ with the patented Oxy-Energizer is now available through The Sharper Image. This formula contains all the vitamins and minerals you require, in the specific amounts and proportions recommended for maximum effectiveness.

The proof of patent #3,009,858.

Oxy-Energizer contains a trade-secret blend of potassium, magnesium, and aspartic acid. People who take the formula feel more energetic throughout the day, especially at normal tired periods in mid-afternoon and early morning.

Double-blind swimming, running, and aerobics studies consistently show improvements in stamina and endurance for subjects who regularly take the active ingredients in Oxy-Energizer. Taken daily, the formula can help you accomplish more at the office because you're not fighting tiredness. After work, you have more energy to enjoy sports or a late evening out. You may even feel less need for sleep (most test subjects do).

In a class beyond any ordinary vitamin.

Because vitamins and minerals amplify the effects of Oxy-Energizer, the manufacturer combines the energy formula with the most potent nutritional supplement you can buy. Essential Factors is the only supplement derived completely from hypoallergenic, contaminant-free, natural sources—the rarest and most expensive ingredients available. The vitamin C, for example, comes from calcium ascorbate (which doesn't cause stomach discomfort like commonly used ascorbic acid). The formula contains all the lipotropics, or "fat burners," which help you metabolize body fat. Powerful anti-oxidants such as germanium sesquioxide, beta-carotene, and selenium are also added to help support the immune system.

Nutrients are absorbed, not flushed away.

Vitamins and minerals can only be absorbed in the first part of the digestive system, just past the stomach. In order to be utilized, a supplement must fully dissolve quickly prior to leaving this small area.

Most multi-vitamins are made by "glueing" together and compressing bits of nutrient matter. Researchers and radiologists consistently observe that these tablets do not dissolve in time to be absorbed. The binders, cellulose, and glazes prevent your body from breaking down the tablets. And the sudden flash of heat produced in the 50,000 psi tableting process actually destroys many nutrients—the same way overcooking leaches nutrition from food.

Essential Factors with Oxy-Energizer begins with the freshest ingredients, purchased in small amounts (not bulk materials that lose potency while they sit in warehouses). Ingredients are micro-granulated into an extra-fine pH-balanced powder and inserted into capsules in a 100% heat-free process. The gelatin capsule dissolves quickly in the stomach to immediately

release the nutrients at the exact time for maximum absorption (it also makes them easier to swallow than tablets).

Even the pharmaceutical-quality packaging is unique. In the final step of production, nine filled capsules are immediately sealed in each Perma-fresh packet. Made of space-age foil mylar, these packages are impervious to light, moisture, and oxygen—forces which break down potency. Packets are then sealed in an airtight plastic container for an extra measure of protection. Each capsule you take is as fresh as on the day it was produced.

Your daily energizer.

Simply take one packet a day, preferably with breakfast or lunch. The convenient foil packets slip easily into your briefcase, purse, or overnight bag—so you never forget to take your vitamins. The two-month supply (60 packets) works out to about \$1.25 per day—about the price of coffee and a doughnut. Or order the 120-day supply (great for couples) and save even more.

This formula contains no milk, soy, yeast, sodium, starch, fats, oils, emulsifiers, waxes, allergens, animal products, artificial flavors or colors, or preservatives. It is the only additive-free complete nutritional supplement you can buy.

You only have about 16 waking hours each day to work, play, dine, make love.... Call today to order the formula triathletes, aerobics instructors, and top executives choose for extra energy—and start living every hour to its fullest.

Essential Factors

with Oxy-Energizer

60-day Supply

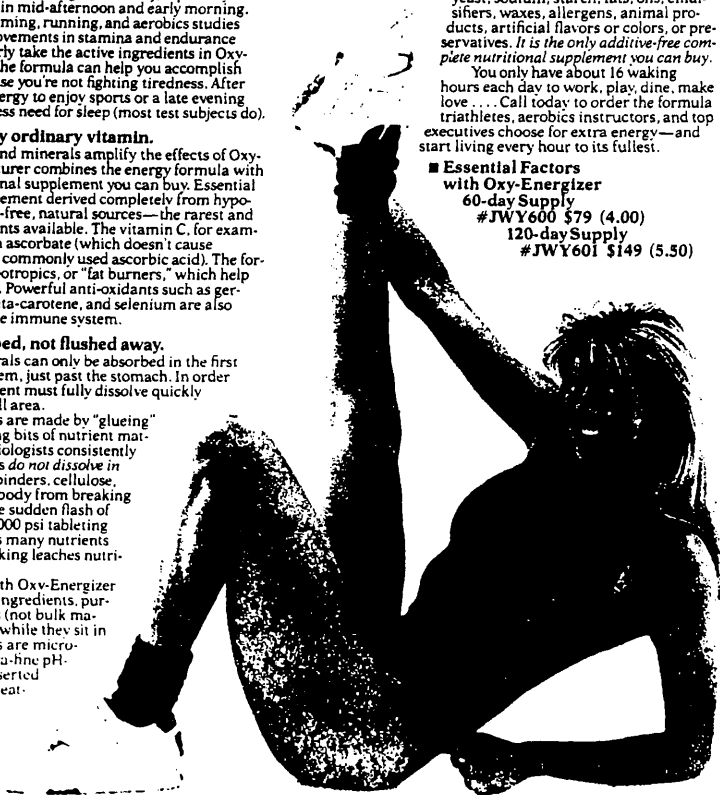
#JWY600 \$79 (4.00)

120-day Supply

#JWY601 \$149 (5.50)



People who take Essential Factors with Oxy-Energizer regularly report feeling more energetic. They spend extra productive hours at the desk—and still have energy for competitive sports.



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 Cleveland 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 The Winning Combination, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1661 19th Street, Santa Monica, California.

Respondent Andrew Lessman is an officer of the corporate respondent named herein. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

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 respondents The Winning Combination, Inc., a corporation, and Andrew Lessman, individually and as an officer of said corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the food supplement Essential Factors with Oxy-Energizer, or any other product of similar composition, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, directly or by implication:

A. That consumption of such product has been scientifically proven to prevent fatigue and tiredness;

B. That consumption of such product has been scientifically proven to provide energy, stamina or endurance beyond its caloric value; and

C. That such product has been accepted by the United States Government, or any agency or division thereof, as effective for relieving fatigue or providing extra energy.

II.

It is further ordered, That respondents The Winning Combination, Inc., a corporation, and Andrew Lessman, individually and as an officer of said corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the food supplement Essential Factors with Oxy-Energizer or any other health-

related service or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the existence, contents, validity, results, conclusions or interpretations of any test or study.

III.

It is further ordered, That respondents The Winning Combination, Inc., a corporation, and Andrew Lessman, individually and as an officer of said corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any 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:

- A. Consumption of such product prevents fatigue and tiredness;
- or
- B. Consumption of such product provides energy beyond its caloric value;

unless, at the time such representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation. For purposes of the order for any test, analysis, research, study or other evidence to be "competent and reliable," the test, analysis, research, study, or other evidence shall be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

IV.

It is further ordered, That respondent The Winning Combination, Inc., a corporation, shall distribute a copy of this order to each of its operating divisions and to each officer and other person responsible for the preparation or review of advertising materials at the time this order becomes effective.

V.

It is further ordered, That, for a period of five (5) years from the date that any representation covered by this order is last disseminated, respondents The Winning Combination, Inc., a corporation, and Andrew Lessman, individually and as an officer of said corporation, shall maintain and, upon request, make available to the Commission for inspection and copying, all advertising, promotional and/or sales materials containing any representation covered in this order and all materials relied upon to substantiate such representation, and all test reports, studies, surveys, demonstrations or other evidence in respondents' possession or control that contradict, qualify or call into question either the representation or the basis upon which respondents relied in making the representation.

VI.

It is further ordered, That respondent Andrew Lessman shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the service date of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities relate to the manufacture, sale or distribution of food or drug products, or of his affiliation with a new business or employment in which his own duties and responsibilities relate to the manufacture, advertising, offering for sale, sale or distribution of food or drug products. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged, as well as a description of respondent's 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.

VII.

It is further ordered, That respondent The Winning Combination, Inc., a corporation, shall:

A. 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, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order; and

B. Require, as a condition precedent to the closing of the sale or other disposition of 50 percent of the stock or assets of The Winning Combination, Inc., that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of this order.

VIII.

It is further ordered, That respondents The Winning Combination, Inc., and Andrew Lessman shall, within one hundred twenty (120) 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, including, but not limited to, the names and addresses of all recipients of materials distributed pursuant to Part IV of this order.

IN THE MATTER OF

AUTOMATIC DATA PROCESSING, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3399. Complaint, Aug. 27, 1992--Decision, Aug. 27, 1992*

This consent order prohibits, among other things, a New Jersey-based company that sells computer software programs and its subsidiary from making misrepresentations concerning the advantages of financing purchases, and from selling or licensing software or printed materials the firm knows or should know are likely to be used to misrepresent comparative costs.

Appearances

For the Commission: *John F. Lefevre.*

For the respondents: *Resa T. Drasin*, in-house counsel, Roseland, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Automatic Data Processing, Inc., a corporation, and ADP, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in public interest, hereby issues its complaint stating as follows:

PARAGRAPH 1. Respondents Automatic Data Processing, Inc., and ADP, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware. Respondents have their principal office and place of business at One ADP Boulevard, Roseland, N.J.