

IN THE MATTER OF

JASON PHARMACEUTICAL, INC., ET AL.

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

Docket C-3392. Complaint, Sept. 16, 1992--Decision. Sept. 16, 1992

This consent order prohibits, among other things, the Maryland marketers of the Medifast diet programs, from misrepresenting the efficacy of any very-low-calorie diet program, and from falsely claiming that their physicians are certified in the treatment of obesity. In addition, the order requires the respondents to possess competent and reliable scientific evidence to substantiate any claims about the success of patients on any diet program in achieving or maintaining weight loss, and 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 Matthew Daynard.*

For the respondents: *Edward F. Glynn and Jeffrey D. Knowles, Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jason Pharmaceuticals, Inc. ("Jason"), a corporation, and Nutrition Institute of Maryland, Inc. ("NIM"), a corporation (hereinafter "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. (a) Respondent Jason Pharmaceuticals, Inc., is a Maryland corporation, with its offices and principal place of business at 11435 Cronhill Drive, Owings Mills, MD.

(b) Respondent Nutrition Institute of Maryland, Inc., is a Maryland corporation, with its offices and principal place of business at 11435 Cronhill Drive, Owings Mills, MD.

(c) The aforementioned respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents are engaged, and have been engaged, in advertising and promotion of the physician-supervised Medifast 55 and 70 very-low-calorie diet ("VLCD") programs and related nutritional products for sale to the public by Medifast Associate Physicians. VLCDs are rapid weight-loss, modified fasting diets of 800 calories or less per day requiring medical supervision. Medifast 55 and 70 diet supplements provide between 440 and 480 calories per day. The Medifast diet programs include "food" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

PAR. 3. Respondents have created and placed advertisements, and provided camera-ready advertising copy to their Medifast Associate Physicians for placement, in various professional periodicals and consumer publications to promote the Medifast programs to prospective patients. Typical of respondents' advertising, but not necessarily inclusive thereof, are the advertisements entitled "Obesity Is A Serious Disease That Deserves A Serious Medical Treatment" ("Obesity advertisement"), and "The Burden Of Being Overweight Isn't Something You Have To Face Alone" ("Burden advertisement"), attached hereto as Exhibits A-1 and A-2. Respondents further advertise the Medifast programs to the public by means of brochures, pamphlets, and booklets that they provide to Medifast Associate Physicians to give to patients and prospective patients. Typical of respondents' brochures, pamphlets, and booklets, but not necessarily inclusive thereof, are the brochures, pamphlets and booklets entitled "Medifast - Your Physician's Answer to Weight Control" ("Physicians brochure") "Questions Patients Ask" ("Questions pamphlet"), "Medifast, Out-Patient Supplemented Fast, Weight Reduction Phase" ("Weight Reduction pamphlet"), and "Medifast Patient Information Booklet" ("Patient Information booklet"), attached hereto as Exhibits B-1 through B-4.

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

PAR. 5. Respondents' advertising contains the following statements:

(a) "...more than 300,000 formerly obese patients had already been helped by Medifast without one instance of serious side effect associated with their treatment." (Patient Information booklet, p. 8)

(b) "...we have experienced no deaths or serious side effects in patients on the Medifast program." (Questions pamphlet, p. 3)

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, respondents represent, and have represented, directly or by implication, that the Medifast diet programs are unqualifiedly free of serious health risks. Respondents have 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 respondents' representation that the Medifast programs are free of serious health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondents' failure to disclose, said representation was and is misleading.

PAR. 7. Respondents' advertising contains the following statements:

(a) "...obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment... the effectiveness of Medifast has been proven by over 200,000 patients..." (Obesity advertisement)

(b) "...you will not experience a rebound phenomenon [regain lost weight] after you attain your goal." (Weight Reduction pamphlet, p. 1)

(c) "Through the right combination of physician supervision, supplemented fasting, and behavior modification, your ideal weight will be easily achieved and maintained." (Burden advertisement)

(d) "...more than 300,000 formerly obese patients had already been helped by Medifast..." (Patient Information booklet)

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, respondents represent, and have represented, directly or by implication, that:

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

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

PAR. 9. By and through the statements and representations referred to in paragraphs seven and eight, respondents represent, and have represented, directly or by implication, that at the time respondents made those representations, respondents possessed and relied upon a reasonable basis for those representations.

PAR. 10. In truth and in fact, at the time respondents made the statements and representations referred to in paragraphs seven and eight, respondents 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. Respondents' advertising contains the following statements:

(a) "Obesity is a serious disease that deserves a serious medical treatment...We're certified, experienced and dedicated to the highest professional standards." (Obesity advertisement)

(b) "...obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment...We're certified, experienced and dedicated to the highest professional standards." (Physicians brochure)

PAR. 12. By and through the use of the statements referred to in paragraph eleven, and others not specifically set forth herein of similar import and meaning, respondents have represented, directly or by implication, that all of respondents Medifast Associate Physicians are certified, through an objective evaluation process, in the treatment of obesity.

PAR. 13. In truth and in fact, many of respondents' Medifast Associate Physicians are not certified, through an objective

evaluation process, in the treatment of obesity. Therefore, the representation set forth in paragraph twelve was and is false and misleading.

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

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EXHIBIT A-1

A-1

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Notes to advertiser:
All ads are "Camera Ready"
fine art and may be sized up
or down to accommodate the
publication of your choice.

(Caution: Take extra care
with your ad type size.
Reducing an ad that already
has small type could result in
a type size too small to read.)

Obesity Is A Serious Disease That Deserves A Serious Medical Treatment.

Obesity is more than just a problem. The National Institutes of Health considers obesity a disease with serious medical consequences.

Eventually, it can lead to the development of high blood pressure, diabetes, elevated cholesterol, coronary heart disease, and even some forms of cancer.

But obesity may exert its worst effect on your sense of self-esteem. The National Institutes of Health states: "Obesity creates an enormous psychological burden. In fact, in terms of suffering, this burden may even be the greatest adverse effect of obesity."

Indeed, obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment.

If you're more than 20 pounds overweight, you owe it to yourself to do something about it.

The MEDIFAST® Program treats obesity as the serious, chronic disease that it is.

MEDIFAST® starts with a complete medical evaluation: physical examination, EKG, medical history, laboratory testing, nutrition assessment, and other tests when indicated.

Next comes the easy part: losing the weight. A diet couldn't be easier to follow. During your Weight Reduction Phase, every nutritional

requirement is provided by medically formulated MEDIFAST® supplements.

No calorie counting and no complicated meal planning. Just the MEDIFAST® supplements. A refreshing, satisfying beverage — 5 times a day.

Best of all is the result: rapid and continuous weight reduction. You can expect to lose an average of 3 to 5 pounds of excess fat stores every week.

Safe, yes. And convenient, too.

You'll have all the energy you need to continue your usual recreational and employment activities without disruption. Meanwhile, you'll receive regular check-ups under a doctor's supervision, to manage your program and insure your success.

Soon, you'll sense the "healing" relief of weight reduction. You'll feel better physically. You'll also experience renewed emotional strength and self-confidence. In most cases, associated medical conditions will improve dramatically or even clear up entirely as weight reduction continues.

Finally, you'll learn to control your weight. For good.

MEDIFAST® counselors will give you the guidance and encouragement you'll need in the beginning to persevere in your weight reduction program.

Then, as you approach your Desired Weight, the focus will shift

toward maintaining your goals in the future.

In the MEDIFAST® LifeStyle® Program of Patient Support, you'll discover a positive and caring approach to Self-esteem, Relationships, Nutrition, Fitness and Healthful Living — all vitally important to your continued success.

Call or visit our MEDIFAST® Center today.

For almost a decade, the safety and effectiveness of MEDIFAST® has been proven by over 200,000 patients in private practice and outpatient clinics across the nation.

The program is available only through designated MEDIFAST® Associate Physicians who have completed the required course of training.

We're certified, experienced and dedicated to the highest professional standards.

In a word, we're committed to providing you with the finest medical care available.

Obesity is truly a serious disease that deserves a serious medical treatment. We'll be happy to show you how to start. Give us a call.



Your Physician's Answer To Weight Control!

NAME, ADDRESS & PHONE NUMBER
OF YOUR OFFICE HERE

EXHIBIT A-2

The Burden Of Being Overweight Isn't Something You Have To Face Alone.

If you have a health problem, where do you turn for help?

Thousands of specially trained doctors nationwide have been offering the MEDIFAST® Weight Control Program for nearly a decade.

Their professional supervision means you will lose weight quickly and safely. The benefits are immediate improvements in your health and appearance.

Through the right combination of physician supervision, supplemented fasting, and behavior modification, your ideal weight will be easily achieved and maintained.

You already know how frustrating it is to lose weight on your own. don't do it alone — THERE IS A MEDIFAST PHYSICIAN NEARBY WANTING TO HELP.

CALL NOW — OR ASK YOUR PHYSICIAN

MEDIFAST

EXHIBIT B-1

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Obesity — A serious disease that deserves a serious medical treatment.

According to the National Institutes of Health, obesity is more than just a problem. It is, in fact, a disease with serious medical consequences.

Eventually, it can lead to the development of high blood pressure, diabetes, elevated cholesterol, coronary heart disease, and even some forms of cancer.

Obesity may even exert its worst effect on your sense of self-esteem. The National Institutes of Health says: "*Obesity creates an enormous psychological burden. In fact, in terms of suffering, this burden may even be the greatest adverse effect of obesity.*"

Indeed, obesity is serious. But like many diseases, it can now be controlled through a program of medical treatment.

How do you know if you're obese?

Obese isn't a word people like to apply to themselves. And you needn't use the word if you don't like it.

But it is important to realize that if you're more than 20 percent over your Ideal Weight, you owe it to yourself to do something about it.

The Medifast® Program starts with a physical, not a diet sheet.

There was overweight patients were handed a diet sheet, a prescription for appetite suppressants, and a pep talk.

But times change. Today, the treatment for obesity is much like treatment for any other chronic disease.

Medifast starts with a complete medical evaluation: nutrition assessment, medical history, laboratory testing, EKG, physical examination, and other tests when indicated.

Next comes the easy part: losing the weight.

During your Weight Reduction Phase, every nutritional requirement is provided by medically formulated Medifast supplements.

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the long run because of the rapid and continuous weight reduction.

Remember, also, the money you will be saving on food, snacks and restaurant bills will cover much of the cost of restoring your health.

In many cases, fees for professional services will be paid by your health insurance. And, you may also be able to deduct part of the cost on your tax return as a medical expense.

The point is, you're a patient with a medical problem who deserves medical treatment. We'll be glad to sit down with you and work out the best possible way to handle the cost of your Medifast Program.

Visit our Medifast Center today.

The safety and effectiveness of Medifast has been proven by over 340,000 patients in private practice and outpatient clinics across the nation.

The program is available only through designated Medifast Associate Physicians who have completed the required course of training. We're certified, experienced and dedicated to the highest professional standards.

In a word, we're committed to providing you with the finest medical care available.

Obesity is truly a serious disease that deserves a serious medical treatment. We'll be happy to show you how to get started. Give us a call.



YOUR FIRST STEP TOWARD A HEALTHY CHANGING

EXHIBIT B-2

B-2

Questions Patients Ask

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Halitosis. Bad breath has been noted occasionally while patients are on the fast. It is the result of using up body fat. Sugarless gum and mouthwash will get rid of the taste, and increasing fluid intake will help eliminate the problem.

MAY I TAKE HOLY COMMUNION?

Yes.

IS THE SUPPLEMENT KOSHER?

Yes. Medifast® is certified as a Kosher dairy product by the Union of Orthodox Jewish Congregations of America.

WILL MY INSURANCE COMPANY PAY FOR THE PROGRAM?

This depends on your insurance company, your policy, and whether or not you have any medical problems that may be helped by a loss of weight. Insurance will often pay for part or all of your medical costs. Our physicians and clinic will be sure to list every diagnosis that could increase your chances of receiving insurance reimbursement.

IS OBESITY HEREDITARY?

The primary cause of obesity is a pattern of behaviors. Children often learn these behavior patterns from obese parents, and then say "fat runs in my family." There are some very rare cases in which slow metabolisms can be inherited, but for greater than 98% of the population it is only behavior that is "inherited," and behavior can be changed.

WHY CAN MY HUSBAND EAT LIKE A HORSE AND NEVER GAIN AN OUNCE, WHILE I SMELL FOOD AND IT ENDS UP ON MY HIPS?

There is some variation in metabolic rates. A stocky person may need fewer calories than a lean person, or the other way around, but when careful records are kept it usually turns out that thin people eat fewer calories and exercise more than overweight people.

HAVE YOU HAD ANY SERIOUS SIDE EFFECTS OR DEATHS?

We are pleased to report that we have experienced no deaths or serious side effects in patients on the Medifast® program.

WHAT ABOUT THE SET POINT THEORY?

The set point theory suggests that your body "wants" to be a certain weight, and will tend to stay at that weight whether you diet or gorge. This theory ignores most of what we know about nutrition, and is not accepted by experts in the field.

I HAVE PROBLEMS EXERCISING. WHAT CAN I DO?

The Medical Director and Group Leader will work with you to develop a series of physical activities which you can do instead of conventional exercise.

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EXHIBIT B-3

B-3

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**MEDIFAST
OUT-PATIENT SUPPLEMENTED FAST
WEIGHT REDUCTION PHASE**

All that you have done so far has been in preparation for this phase. You will remain in this phase until you have reached your IDEAL BODY WEIGHT.

If you are to be successful, you cannot play games with the program. You may not "test the edges". We provide the technique and the education which you must strictly adhere to. We will do our part to monitor and guide you through the program in a safe and effective manner.

As you will see, a modified fasting program is quite spartan. However, you will mobilize and lose FAT STORES at a predictable and steady rate; you will have virtually no sensation of hunger; you will conserve LEAN BODY MASS and you will feel very well with a sense of energy and vitality.

As you probably know, most patients who have lost weight in the past have regained the lost pounds (and more). The reason for this REBOUND PHENOMENON is quite clear and simple. The weight that they lost was largely (40-50%) LEAN BODY MASS and there was a natural, inner drive to replenish this LBM. In the OPSF, there is virtually NO LOSS OF LBM and you will not experience a rebound phenomenon after you have attained your goal. However, all excess fat tissue must be lost - not just part of it.

Again:

1. Weight loss is RAPID. (3.6-5.2 pounds of FAT STORES per week.)
2. There is NO HUNGER.
3. It is EASY TO FOLLOW - No complicated diet necessary. No exotic foods to purchase or prepare.
4. It is SAFE UNDER MEDICAL SUPERVISION on an outpatient basis in your home and job environment.
5. It is RELATIVELY INEXPENSIVE considering the length of time it would take to lose all excess fat and to achieve normal weight by any other program available today.

You must, of course, regard your previous overweight condition as a chronic problem associated with many years of improper dietary patterns. As you approach your IDEAL BODY WEIGHT, you will be gradually introduced to a nutritionally sound maintenance diet and behavioral modification by our nutritional counselor and by printed materials.

The MEDIFAST PROGRAM is a CHEMICALLY DEFINED DIET consisting of a natural protein formula, carefully calculated nutritional supplements (vitamins, minerals, micronutrients, electrolytes, trace elements, fiber) and fluids. The MEDIFAST protein formula should be considered to be medication rather than a food substance.

In spite of all the advantages, we DO NOT recommend this program without physician supervision, careful metabolic monitoring and the provision of nutritional supplementation (some will be taken orally and some will be given by injection).

EXHIBIT B-4

Amelia

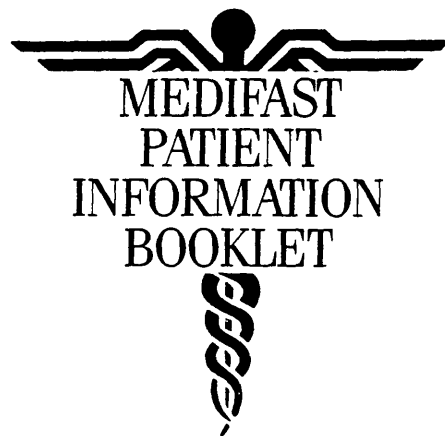
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YOUR PHYSICIAN'S ANSWER
TO WEIGHT CONTROL™

The Medifast Program Benefits 300,000 Patients

Having developed the programs and protocols which became known as the Medifast Program, the Nutrition Institute of Maryland began providing specialized training for physicians.

By 1989, NIM had trained over 12,000 Medifast Associate Physicians in private practice and outpatient clinics across the U.S. More than 300,000 formerly obese patients had already been helped by Medifast without one instance of serious side effect associated with their treatment.

*What You Can
Expect*

BENEFITS OF THE MEDIFAST PROGRAM

After medical evaluation, you will begin the Protein-Sparing Modified Fast. During the Weight Reduction Phase of your Medifast Program, every nutritional requirement will be provided by modified fasting supplements.

Medifast Supplements are specially formulated to include the precise balance of natural protein, vitamins, minerals, trace elements, electrolytes, fiber and other micronutrients essential to good health. (Additional medications may be prescribed at your physician's discretion.)

We urge you not to begin the Weight Reduction Phase until you fully understand the instructions and intend to follow them to the letter.

Good News...

You may be somewhat anxious at the prospect of going on a Protein-Sparing Modified Fast. But, rest assured that any apprehensions you might have will soon be allayed.

*...specially
formulated to
include the precise
balance of nutrients
essential to good
health....*

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 Bureau of Consumer Protection 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, 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 Jason Pharmaceuticals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its offices and principal place of business located at 11435 Cronhill Drive, Owings Mills, Maryland.

2. Respondent Nutrition Institute of Maryland, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its offices and

principal place of business located at 11435 Cronhill Drive, Owings Mills, Maryland.

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

ORDER

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 respondents Jason Pharmaceuticals, Inc., and Nutrition Institute of Maryland, Inc., corporations, their successors and assigns, and their 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 respondents clearly and prominently disclose 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 respondents' 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, respondents possess and rely 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 their completion of the respondents' program (including any periods of participation in respondents' maintenance program); 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 respondents disclose, 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 respondents' 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 respondents' programs that those patients represent, expressed in terms of a percentage or actual numbers of patients, or the statement: "Medifast makes no claim that this [these] result[s] is [are] representative of all patients in the Medifast program;" and

(2) The statement:

"For many dieters, weight loss is only temporary," *provided, however*, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' diet programs.

E. Representing, directly or by implication, that any physician associated with a diet program is certified in the treatment of obesity unless that is the case.

II.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondents 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 respondents 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 their possession or control and which to their knowledge contradict, qualify or call into question any such claim or representation.

IV.

It is further ordered, That respondents and their successors or assigns, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are engaged in the preparation and placement of advertisements or promotional materials, 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 respondents' future officers, agents, representatives, independent contractors and employees having said responsibilities.

V.

It is further ordered, That respondents and their successors or assigns shall, within thirty (30) days after service of this order, advise Medifast Associate Physicians that advertising previously furnished by respondents for use by physicians, and brochures, pamphlets and booklets previously provided by respondents to physicians for dissemination to patients and prospective patients, shall not be further used by those physicians where that advertising or other materials would violate this order; and respondents further shall attempt to insure that such advertising or other materials shall not be further used by Medifast Associate Physicians.

VI.

It is further ordered, That respondents and their 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 advertisement.

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

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).

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:

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

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;

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 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.

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.

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
TARRA HALL CLOTHES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
THE WOOL PRODUCTS LABELING ACT

Docket C-2797. Consent Order, Feb. 24, 1976--Modifying Order, Oct. 27, 1992

This order reopens the proceeding and modifies the Commission's cease and desist order issued on Feb. 24, 1976 (87 FTC 294), by narrowing the conditions under which Abraham Cohen, former president of Tarra Hall Clothes, Inc., must post a bond before importing wool products. The Commission concluded that the petition to modify the order should be granted to require bonding only for importation of recycled wool products.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On May 1, 1992, Abraham Cohen ("Petitioner") filed a Petition to Reopen Proceeding and Modify Consent Order ("Petition") in Docket No. C-2797, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Sections 2.51 and 3.72 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51 and 3.72, to reopen and modify the consent order entered by the Commission on February 24, 1976 ("consent order"), as it applies to him individually.

The final order in this matter was the product of a consent agreement Tarra Hall Clothes, Inc. ("Tarra Hall") and its president and owner, Petitioner, entered into with the Commission to resolve charges that they had imported mislabeled fabrics containing wool in violation of the Wool Products Labeling Act of 1939 ("Wool Act"). Tarra Hall is an importer of wool blend fabrics and a manufacturer of