

Complaint

120 F.T.C.

IN THE MATTER OF

ARIZONA INSTITUTE OF REPRODUCTIVE MEDICINE, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3616. Complaint, Sept. 25, 1995--Decision, Sept. 25, 1995*

This consent order prohibits, among other things, an Arizona institute and its president from misrepresenting the success rate of their in vitro fertilization program or any other infertility treatment services. In addition, the consent order stipulates that any comparison with other success rates be based upon the same calculating methodology. Finally, the order requires the respondents to possess competent and reliable scientific evidence for any future comparative success-rate claims for fertility services.

Appearances

For the Commission: *Matthew Daynard, Michael Katz, Richard Kelly and Joan Bernstein.*

For the respondents: *Thomas R. Lofy, Scottsdale, AZ.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, individually and as president of Arizona Institute of Reproductive Medicine, Ltd., ("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 Arizona Institute of Reproductive Medicine, Ltd. is a limited corporation formed under the laws of the state of Arizona, with its principal place of business located at 2850 North 24th Street, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D. is president of the corporate respondent. Individually, or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint.

His principal office or place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged in offering for sale and the sale of services in connection with the treatment of infertility in the human reproductive system.

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 have caused to be disseminated promotional materials, including but not necessarily limited to the attached Exhibit A. Exhibit A contains the following statements:

"The success rate of most IVF programs are [sic] quoted as the percentage of embryo transfer procedures that result in clinical pregnancies....However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby":). Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine to the average success rate of other IVF programs in the United States.

IVF PROGRAM	Nat'l Av.	%	AIRM Av	%
	1991		1992	
Couples entering IVF program	100	100%	92%	
Successful ovarian stimulation	72	100%	93%	
Successful egg capture	---	100%	99%	
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%	
Chemical Pregnancies/embryo transfer	--	20%	8%	
DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%	
			(1-92 to 6-92)"	

(Exhibit A)

PAR. 5. Through the use of the statements contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit A, respondents have represented, directly or by implication, that during each of the time periods specified in the promotional material set forth in paragraph four, patients in respondents' in vitro fertilization program achieved live births (delivery rate) per embryo transfer at

rates higher than the national average for in vitro fertilization programs.

PAR. 6. Through the use of the statements contained in the promotional materials referred to in paragraph four, including but not necessarily limited to the promotional material attached as Exhibit A, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph five, respondents possessed and relied upon a reasonable basis that substantiated such a representation.

PAR. 7. In truth and in fact, at the time they made the representation set forth in paragraph five, respondents did not possess and rely upon a reasonable basis that substantiated such a representation. Respondents calculated the success statistics in their promotional materials counting multiple births (*i.e.*, twins, triplets, etc.) as multiple deliveries. The national percentages were based on data published by The Society for Assisted Reproductive Technology (SART), a national organization whose members, including respondents, are providers of assisted reproductive technologies. SART publishes annually national averages for live births achieved through its members' services. National averages for live births are based on a protocol which requires members to report multiple births as single deliveries. The published report counts a multiple birth as a single delivery. According to SART data for the year 1991, the national average for live births per embryo transfer was approximately 17 percent rather than respondents' cited 14 percent. Had respondents likewise counted multiple births as a single delivery, respondents' success statistics for deliveries would have been lower than both the actual national average or the national average cited in Exhibit A. Therefore, the representation set forth in paragraph six was, and is, misleading.

PAR. 8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

SUCCESS RATES

There is an enormous variation in the success rates of IVF (and GIFT) programs in the United States. About 90% of all IVF pregnancies are achieved by only 15% of IVF programs, and one half of all IVF programs started will close down within one or two years because no pregnancies are achieved.

The Arizona Institute of Reproductive Medicine has one of the most successful IVF programs in the country. Over 111 pregnancies have been achieved with IVF, with 75 babies delivered to date, including 17 sets of twins and 3 sets of triplets since the IVF program was begun in 1984. Since 1988, over 60 pregnancies have been achieved with the Frozen Embryo program, with 42 deliveries to date, including 7 sets of twins. Part of the reason for the success of the Arizona Institute of Reproductive Medicine program is tight quality control and a commitment to medical research related to IVF.

The success rate of most IVF programs are quoted as the percentage of embryo laboratory procedure efficiencies. However, this figure may not accurately reflect the success rate that most patients are interested in (ie; the percentage of couples entering the IVF program who achieve a "take home baby"). Because IVF success rates can be calculated in a variety of ways, one must exercise caution when comparing success rates of different programs. To avoid confusion, the best way to express the success of IVF programs is to list the percent success of each step of the IVF procedure during the most recent 6-12 month period. The chart below compares the success rate of the Arizona Institute of Reproductive Medicine program to the average success rate of the other IVF programs in the United States.

IVF PROGRAM	Nat'l Av. %		AIRM Av %
	1991	1992	
Couples entering IVF program	100	100%	92%
Successful ovarian stimulation	72	100%	93%
Successful egg capture	---	100%	99%
CLINICAL PREGNANCIES/EMBRYO TRANSFER	16	15%	20%
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DELIVERY RATE/EMBRYO TRANSFER	14	17%	16%

(1-92 to 6-92)

The above success rates of the Arizona Institute of Reproductive Medicine's IVF program are updated every three months and reflect the statistics from the most recent twelve month period. The "success rate" quoted by most other programs (clinical pregnancies per embryo transfer) is highlighted in the chart for comparison.

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 attorney, 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 an 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 Arizona Institute of Reproductive Medicine, Ltd., is a limited corporation existing and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business located at 2850 North 24th Street, Suite 500-A, Phoenix, Arizona.

Respondent Robert H. Tamis, M.D., is president of respondent Arizona Institute of Reproductive Medicine. His principal office or place of business is the same as that of the corporate respondent. Dr. Tamis formulates, directs and controls the acts and practices of said corporation.

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

ORDER

DEFINITIONS

"Competent and reliable scientific evidence" shall mean those tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents Arizona Institute of Reproductive Medicine, Ltd., a limited corporation, and Robert H. Tamis, M.D., individually and as president of said corporation, their successors and assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, sale or offering for sale of services relating to the treatment of infertility, do forthwith cease and desist from representing, directly or by implication, that respondents' success rates in terms of achieving deliveries is higher than or compares favorably with the success rates of any single provider or group of providers of these services, unless at the time of making such a representation, respondents possess and rely upon competent and reliable scientific evidence for making such a comparison which shall, at a minimum, consist of results for its own patients that are based upon the same criteria for determining the calculation of delivery rates that were used to produce the results with which the comparison is made, or otherwise misrepresenting the past or present success of respondents in achieving live births or pregnancies or the past or present success of any single provider or group of providers of these services in achieving live births or pregnancies.

II.

It is further ordered, That respondents, shall forthwith distribute a copy of this order to each of their officers, agents, representatives, and employees, who are engaged in the preparation and placement of

advertisements or promotional materials, who communicated 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 respondents' future officers, agents, representatives, and employees having said responsibilities.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That:

(1) Respondent Arizona Institute of Reproductive Medicine, Ltd. shall notify the Commission at least thirty (30) days prior to any proposed change in 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 respondent which may affect compliance obligations arising out of this order; and

(2) Respondent Robert H. Tamis, M.D. shall promptly notify the Commission of the discontinuance of his present business or of his affiliation with the corporate respondent. In addition, for a period of three (3) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment that involves an infertility program. Each such notice shall include the respondent's new business address and

a statement of the nature of the business or employment in which the 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.

V.

It is further ordered, That this order will terminate on September 25, 2015, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VI.

It is further ordered, That respondents shall, within (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 all requirements of this order.

Complaint

120 F.T.C.

IN THE MATTER OF

BODY WISE INTERNATIONAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3617. Complaint, Sept. 25, 1995--Decision, Sept. 25, 1995*

This consent order prohibits, among other things, a California-based company from falsely representing that any nutritional supplement, food or drug contains any ingredient that can cause or contribute to achieving or maintaining weight loss without diet or exercise, and bars unsubstantiated weight-loss, weight-loss maintenance, cholesterol reduction, or other health benefit claims for such products. In addition, the consent order prohibits the deceptive use of consumer testimonials or professional endorsements, and requires clear disclosures of any financial connection between endorsers and the respondent or its products.

Appearances

For the Commission: *David M. Newman and Jeffrey A. Klurfeld.*
For the respondent: *Robert Armstrong, Chicago, IL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Body Wise International, Inc., a Nevada corporation (hereinafter "Body Wise"), 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 Body Wise is a Nevada corporation with its principal office and place of business located at 6350 Palomar Oaks Court, Suite A, Carlsbad, California.

PAR. 2. Respondent has advertised or otherwise promoted, offered for sale, sold and distributed nutritional supplements, including but not limited to Future Perfect, Right Choice AM, Right Choice PM and The Reshape Formula (hereinafter "weight loss products"), as weight loss products, through a multi-level network of distributors. Respondent has also advertised or otherwise promoted,