

Complaint

126 F.T.C.

IN THE MATTER OF

HERBAL WORLDWIDE HOLDINGS CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3827. Complaint, Sept. 16, 1998--Decision, Sept. 16, 1998*

This consent order prohibits, among other things, a Florida-based company and its two principal officers from making any unsubstantiated weight-loss claims for "Fattaché," a purported dietary product, or from representing that any dietary supplement, food or drug can cause or contribute to achieving or maintaining weight loss without dieting, that such a product can prevent the absorption of ingested fat, helps eliminate ingested fat, or has any beneficial effect, unless the claims are supported by competent and reliable scientific evidence. In addition, the consent order prohibits the respondents from representing that any endorsement or testimonial represents the typical experience of users, unless they can substantiate the experience or the respondents provide the required disclosure.

Participants

For the Commission: *Sylvia Kundig and Jeffrey Klurfeld.*

For the respondents: *Stephen Nagin, Nagin, Gallop & Figueredo,*
Miami, FL.

COMPLAINT

The Federal Trade Commission, having reason to believe that Herbal Worldwide Holdings Corp., a corporation, José Diaz, individually and as an officer of the corporation, and Eduardo Naranjo, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.

2. Respondent José Diaz is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

3. Respondent Eduardo N. Naranjo is an owner and officer of respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

4. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed an over-the-counter weight-loss product to the public called "Fattaché." The ingredients of Fattaché include psyllium, chitosan (from deacetylated shellfish shells), glucomannan, and apple pectin. Fattaché is a "food" and/or "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

5. 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.

6. Respondents have disseminated or have caused to be disseminated Spanish-language advertisements for Fattaché, including but not necessarily limited to the attached Exhibit A, which is the transcription of a television advertisement with an English-language translation. The advertisement contains the following statements:

- A. Fattaché, a revolutionary product to lose weight easily and in little time.
- B. I obtained results very quickly without having to leave my favorite foods. [During this statement, a subscript states "voluntary testimonial"].
- C. Nutrition specialists agree that Fattaché is the best alternative to absorb the fat in your body.
- D. ... two capsules of Fattaché that will look for fat converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain
- E. Fattaché helps eliminate the fat that enters your body before it is digested.

7. Through the means described in paragraph six, respondents have represented, expressly or by implication, that:

- A. Fattaché causes weight loss without a change in diet.
- B. Fattaché prevents the absorption of ingested fat.
- C. Fattaché helps eliminate ingested fat before it is absorbed.
- D. Testimonials from consumers appearing in advertisements for Fattaché reflect the typical or ordinary experience of members of the public who use Fattaché.

8. Through the means described in paragraph six, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph seven, at the time the representations were made. Among other reasons, much of the research relied on by respondents did not address the weight loss and fat absorption effects discussed in the advertisement, and/or the results of the research could not be extrapolated to the population as a whole because of methodological weaknesses. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

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EXHIBIT A

TRANSLATION

Announcer: To show a nicer figure get Fattache.

Fattache, a revolutionary product to lose weight easily and in little time.

Subscript: "Voluntary testimony"

"I obtained result very quickly without having to leave my favorite foods."

Subscript: "Fattache helps eliminate the fat that enters your body before it is digested. It is not designed to directly reduce the fat already in your body. Results may vary individually."

Announcer: Nutrition specialists agree that Fattache is the best alternative to absorb the fat in your body. Mixing water with olive oil, we will add two capsules of Fattache that will look for fat, converting it into a layer of fiber which the body will automatically eliminate. That fat, if it remains in our body, is what causes weight gain and serious health problems.

Subscript: "Voluntary testimony:"

With Fattache, I lost what I was not able to lose with other diets.

Jar of Fattache with 180 tablets for only \$39.95. Free gift of additional jar with 60 tablets.

Call toll free now at 1-800-600-4040

7940 SW 8th St., Miami, FL 33144

PARA LUCIR UNA MEJOR FIGURA obtenga Fattache.

Fattache un producto revolucionario para adelgar facil y en poco tiempo.

"Testimonio voluntario"

Yo obtuve resultado muy rapido sin tener que dejar las comidas que mas me gustan."

"Fattache ayuda a eliminar la grasa que entra en su cuerpo antes que esta sea digerida. No esta disenada para directamente reducir la grasa que ya esta en su cuerpo. Los resultados pueden variar en cada persona."

Especialista en nutricion estan de acuerdo en que Fattache es la mejor alternative para absorber las grasas de su cuerpo. Mezclando agua con aceite de oliva, le agregaremos dos capsulas de Fattache que buscara la grasa convirtiendola en una capa de fibra que el cuerpo automaticamente eliminara. Esa grasa, si permanece en nuestro cuerpo es la que produce todas las causas de sobrepeso y problemas graves de salud.

"Testimonio voluntario:"

Con Fattache baje lo que no pude bajar con otras dietas.

Frasco de Fattache con 180 capsulas por tan solo \$39.95. Te regalo con su orden reciba un frasco adicional con 60 capsulas.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their 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, or that the facts as alleged in such complaint, other than jurisdictional facts, are true 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 a 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 Herbal Worldwide Holdings Corp. ("Herbal") is a Florida corporation with its principal office or place of business at 3326 Mary Street, Miami, Florida.
2. Respondent José Diaz is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.
3. Respondent Eduardo N. Naranjo is an owner and officer of proposed respondent Herbal. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Herbal, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Herbal.

4. 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

For purposes of this order, the following definitions shall apply:

1. “*Competent and reliable scientific evidence*” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has 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.

2. “*Clearly and prominently*” shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement, promotional material or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in all of the languages that are present in the advertisement. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. Unless otherwise specified, "*respondents*" shall mean Herbal Worldwide Holdings Corp., a corporation, its successors and assigns and their officers; José Diaz, individually and as an officer of Herbal, Eduardo Naranjo, individually and as an officer of Herbal, and each of the above's agents, representatives, and employees.

4. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. "*Drug*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

6. "*Food*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Fattaché®, or any food, drug or dietary supplement, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

- A. Such product causes weight loss without a change in diet;
- B. Such product prevents the absorption of ingested fat;
- C. Such product helps eliminate ingested fat before it is absorbed; or
- D. Such product has any beneficial effect,

unless at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the

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product represents the typical or ordinary experience of members of the public who use the product, unless:

- A. At the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. Respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either:
 - 1. What the generally expected results would be for users of the product, or
 - 2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0 (b).

III.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

IV.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

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

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent Herbal, and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent Herbal, and its successors and assigns, and respondents José Diaz and Eduardo N. Naranjo shall,

within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

It is further ordered, That respondents José Diaz and Eduardo N. Naranjo, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment, or of their affiliation with any new business or employment. The notice shall include the respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

This order will terminate on September 16, 2018, or twenty (20) 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 Part in this order that terminates in less than twenty (20) 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 Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents 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 Part as though the complaint never had been 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.

IN THE MATTER OF

GERALD W. SCHWARTZ, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3828. Complaint, Sept. 17, 1998--Decision, Sept. 17, 1998*

This consent order, among other things, prohibits, for ten years, Gerald W. Schwartz and his subsidiary, Sky Chefs, Inc., from acquiring any concern that controls the Las Vegas catering operations formerly operated by Ogden Aviation Food Services without prior Commission approval. In addition, for ten years, Sky Chefs is required to provide prior notice to the Commission before it acquires its only in-flight catering competitor at any airport in the United States.

Participants

For the Commission: *Stephen Riddell, Phillip Broyles, William Baer, Charlotte Wojcik, and Jonathan Baker.*

For the respondents: *Mark Godler, Kaye, Scholer, Fierman & Hays, New York, N.Y. and Steve Palmer, Swidler & Berlin, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Gerald W. Schwartz, through his subsidiaries, Onex Corporation, SC International Services, Inc. and Sky Chefs, Inc., entered into a letter of intent to acquire all the voting stock of Ogden Aviation Food Services, Inc. and Ogden Aviation Food Services (ALC), Inc., and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. The Respondents

1. Respondent Gerald W. Schwartz ("Schwartz") is a natural person with a principal place of business located at Onex Corporation, 161 Bay Street, Toronto, Ontario, Canada M5J 2S1.