

Request was placed on the public record, and the thirty-day comment period expired on October 14, 1994. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. C-1010 was issued on November 3, 1965, and has been in effect for more than twenty-nine years. Consistent with the Commission's July 22, 1994, Sunset Policy Statement, the presumption is that the order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceeding and set aside the order in Docket No. C-1010.

Accordingly, it is ordered that this matter be, and it hereby is, reopened;

It is further ordered that the Commission's order in Docket No. C-1010 be, and it hereby is, set aside, as of the effective date of this order.

By the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 95-2305 Filed 1-30-95; 8:45 am]

BILLING CODE 6750-01-M

[File No. 922 3212]

Formu-3 International, Inc., et al.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the Ohio weight-loss centers from making false and unsubstantiated weight-loss and weight-loss maintenance claims, and from misrepresenting the price of the program in any way, and would require the respondents to make certain disclosures in conjunction with weight-loss and safety maintenance claims in the future.

DATES: Comments must be received on or before April 3, 1995.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary,

Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT:

Brenda Doubrava, Cleveland Regional Office, Federal Trade Commission, 520-A Atrium Office Plaza, 668 Euclid Ave., Cleveland, Ohio 44114-3006. (216) 522-4210.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

In the Matter of: Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and Formu-3 of Southern Ohio, Inc., a corporation, File No. 922 3212.

Agreement Containing Consent Order To Cease and Desist

The Federal Trade Commission having initiated an investigation of certain acts and practices of Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and Formu-3 of Southern Ohio, Inc., a corporation ("proposed respondents"), and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between Formu-3 International, Inc., a Formu-3 of Northern Ohio, Inc., and Formu-3 of Southern Ohio, Inc., by their duly authorized officers, and their attorneys, and counsel for the Federal Trade Commission that:

1. Proposed respondents Formu-3 International, Inc., Formu-3 of Northern Ohio, Inc., and Formu-3 of Southern Ohio, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Ohio. The principal place of business of all three corporations is located at 4790 Douglas Circle NW., Canton, Ohio 44718.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft complaint.

3. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act, 5 U.S.C. 504.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of complaint.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents: (a) issue its complaint corresponding in form and substance with the draft complaint and its decision containing the following Order to cease and desist in disposition of the proceeding; and (b) make information public in respect thereto. When so entered, the Order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to Order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the Order, and no agreement, understanding, representation, or interpretation not contained in the

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45,289.

Order or the agreement may be used to vary or contradict the terms of the Order.

7. Proposed respondents have read the draft complaint and the Order. Proposed respondents understand that once the Order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the Order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the Order after it becomes final.

Order

Definitions

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

A. "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 relevant profession or science to yield accurate and reliable results;

B. "Weight loss program" shall mean any program designed to aid consumers in weight loss or weight maintenance;

C. A "broadcast medium" shall mean any radio or television broadcast, cablecast, home video or theatrical release;

D. For any Order-required disclosure in a print medium to be made "clearly and prominently" or in a "clear and prominent" manner, it must be given both in the same type style and in: (1) Twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is small than twelve point type. For any Order-required disclosure given orally in a broadcast medium to be made "clearly and prominently" or in a "clear and prominent manner", the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

E. A "short broadcast advertisement" shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I

It is Ordered that respondents, Formu-3 International, Inc., a corporation, Formu-3 of Northern Ohio, Inc., a corporation, and Formu-3 of

Southern Ohio, Inc., a corporation, their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program 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, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

1. Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants using the program, said evidence shall, at a minimum, be based on a representative sample of:

a. All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance, or who were unable to complete the program due to illness, pregnancy, or change of residence; or

b. All participants 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 participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program or earlier termination, as applicable; and

3. Any weight loss is maintained permanently said evidence shall, at a minimum, be based upon the experience of participants 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 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.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary."; provided, further that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; provided, however, that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D. herein, and except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

1. The Average percentage of weight loss maintained by those participants;

2. The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed; and

3. If the participant population referred to is not representative of the general participant population for respondents' programs:

a. The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

b. The statement: "Form-You-3 Weight Loss Centers makes no claim that this [these] result[s] is [are] representative of all participants in the Form-You-3 Weight Loss Centers program.";

provided, further, that compliance with the obligations of this paragraph I.C. in no way relieves respondents of the requirement under paragraph I.A. of this Order to substantiate any representation

about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

1. Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record.";

2. For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

a. Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B. and subparagraphs I.C.1-3 of this Order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D.2 shall be included therein:

Maintenance Information

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes here _____.]

For many dieters, weight loss is temporary.

I have read this notice.

(Client Signature)

(Date)

b. Require each potential client to sign such document; and

c. Give each client a copy of such document; and

3. Retain in each client file a copy of the signed maintenance notice required by this paragraph; provided, further, that:

(i) Compliance with the obligations of this paragraph I.D. in no way relieves

respondents of the requirement under paragraph I.A. of this Order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and

(ii) Respondents must comply with both paragraph I.D. and paragraph I.C. of this Order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term"; and provided, however, that the provisions of paragraph I.D. shall not apply to endorsements or testimonials referred to in paragraph I.E. herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss programs if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants in respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

1. What the generally expected success would be for Form-You-3 Weight Loss Centers customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Form-You-3 Weight Loss Centers customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

2. One of the following statements:

a. "You should not expect to experience these results."

b. "This result is not typical. You may not do as well."

c. "This result is not typical. You may be less successful."

d. "_____'s success is not typical. You may not do as well."

e. "_____'s experience is not typical. You may achieve less."

f. "Results not typical."

g. "Results not typical of program participants.";

provided, further, that if the endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be

communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; and

provided, however, that:

(i) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E.1. by accurately disclosing the generally expected success in the following phrase: "Form-You-3 Weight Loss Centers clients lose an average of _____ pounds over an average _____ - week treatment period"; and

(ii) If the weight loss success or weight loss maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraph I.E.1. or 2. herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents' customers that the group or subset defined in the advertisement represents.

F. Representing, directly or by implication, the average or typical rate or speed at which participants or prospective participants in any weight loss program have lost or will lose weight, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

G. Representing, directly or by implication, that participants or prospective participants in respondents' weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

G. Representing, directly or by implication, that participants or prospective participants in respondents' weight loss programs have reached or will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

H. Failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weekly weight loss that exceeds two percent (2%) of said participant's initial body weight, or three pounds, whichever is less, for at least two

consecutive weeks, or (2) in writing to all participants, when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

I. Representing, directly or by implication, the daily, weekly, or monthly price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, and in close proximity to such representation, either: (1) The number of days, weeks, or months participants will be obligated to pay the weekly price represented; or (2) the total cost of the weight loss program; provided, further, that in broadcast media, if the representation that triggers any disclosure required by this paragraph is oral, the required disclosure must also be made orally.

J. Misrepresenting, directly or by implication, the competence, skill, training, credentials or expertise of any of respondents' employees or any of the employees of respondents' franchisees.

K. Misrepresenting, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of calories, fat, or any other nutrient or ingredient in any food product, or otherwise misrepresenting the performance, efficacy, safety, nutritional composition, or benefits of any food or drug, as those terms are defined in Section 15 of the Federal Trade Commission Act.

L. Misrepresenting, directly or by implication, the performance, efficacy, price, or safety of any weight loss program.

II

Nothing in this Order shall prohibit respondents from making any representation that is specifically permitted in labeling for any such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990, or by nutrition labeling regulations promulgated by the Department of Agriculture pursuant to the Federal Meat Inspection act or the Poultry Products Inspection Act.

III

Nothing in this Order shall prohibit respondents from making any representation for any drug that is permitted in labeling for any 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

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 respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this Order.

V

It is further ordered that for three (3) 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.

VI

It is further ordered that respondents shall distribute a copy of this Order to each of their officers, agents, representatives, independent contractors and employees, who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this Order; and, for a period of five (5) years from the date of entry of this Order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

VII

It is further ordered that:

A. Respondent Formu-3 International, Inc., shall distribute a copy of this Order to each of its franchises and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this Order; respondent may satisfy this contractual requirement by incorporating such Order requirements into its current Operations Manual; and

B. Respondent Formu-3 International, Inc., shall further make reasonable efforts to monitor its franchisees' and licensees' compliance with the Order provisions; respondent may satisfy this

requirement by: (1) Taking reasonable steps to notify promptly any franchisee or licensee that respondent determines is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant Order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, diligently pursuing reasonable and appropriate remedies available under its franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

Provided, however, that respondent Formu-3 International, Inc.'s compliance with this Part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondent's franchisees or licensees that violates this Order where respondent: a) has not authorized, approved or ratified that conduct; b) has reported that conduct promptly to the Federal Trade Commission under this Part; and c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the Order, has diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about cessation of that conduct by the franchisee or licensee.

VIII

It Is Further Ordered that respondents shall, within sixty (60) days after the date of service of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Formu-3 International, Inc., Formu-3 of Northern Ohio, Inc., and Formu-3 of Southern Ohio, Inc., (hereinafter referred to collectively as "Formu-3"), marketers of the Formu-You-3 (or "Formu-3") Weight Loss Centers' low-calorie diet program. The Formu-3 diet program is offered to the public throughout much of the United States through centers franchised by Formu-3 International, Inc., and through centers owned by

Formu-3 of Northern Ohio, Inc., and Formu-3 of Southern Ohio, Inc.

The proposed consent order has been placed on the public record for sixty (60) days for the reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Commission's complaint charges that the proposed respondents deceptively advertised: (1) Their diet program's success in helping customers achieve and maintain weight loss; (2) the rate at which customers will lose weight; (3) the time frame within which consumers will achieve their desired weight loss goals; (4) the purchase price of the Formu-3 program; (5) the benefits to dieters of the food products Formu-3 sells; and (6) the qualifications and expertise of counselors employed at Formu-3 weight loss centers. The complaint also alleges that Formu-3 engaged in the deceptive practice of failing to warn clients it monitors of the health importance of following the diet protocol.

Success

The complaint against Formu-3 alleges that the company failed to possess a reasonable basis for claims it made regarding the success of its customers in losing weight and avoiding the regain of weight lost during the program. Through consumer testimonials and other advertisements, Formu-3 represented that its customers typically are successful in reaching their weight loss goals and in maintaining their weight loss achieved under the Formu-3 diet program long-term or permanently.

The Commission believes that these success claims for customer weight loss and maintenance of achieved weight loss are deceptive because Formu-3, at the time it made the claims, did not possess adequate substantiation for those claims.

The proposed consent order seeks to address the alleged success misrepresentations cited in the accompanying complaint in several ways. First, the order (Part I.A.) requires the company to possess a reasonable basis consisting of competent and reliable scientific evidence substantiating any claim about the success of participants on any diet program in achieving or maintaining weight loss. To ensure compliance, the order further specifies what this level of

evidence shall consist of when certain types of success claims are made:

(1) In the case of claims that weight loss is typical or representative of all participants using the program or any subset of those participants, that evidence shall be based on a representative sample of: (a) all participants who have entered the program, where the representation relates to such persons; or (b) all participants who have completed a particular phase of the program or the entire program, where the representation *only* relates to such persons.

(2) In the case of claims that any weight loss is maintained long-term, that evidence shall be based upon the experience of participants 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.

(3) In the case of claims that weight loss is maintained permanently, that evidence shall be based upon the experience of participants 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.

Second, as measures to ensure future compliance, the proposed order requires the proposed respondents for any claim that participants of any diet program have successfully maintained weight loss to disclose the fact that "For many dieters, weight loss is temporary" (Part I.B.), as well as the following information relating to that claim (Part I.C.):

(1) The average percentage of weight loss maintained by those participants (e.g., "60% of achieved weight loss was maintained"),

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, and the fact that all or a portion of the time period covered includes participation in proposed respondent's maintenance program(s) that follows active weight loss, if that is the case—e.g., "participants maintain an average of 60% of weight loss 22 months after active weight loss (includes 18 months on maintenance program)", and

(3) Where the participant population referred to is not representative of the

general participant population for the program, the proportion of the total participant population that those participants represent, expressed in terms of a percentage of actual numbers of participants—e.g. "Participants on maintenance—30% of our customers—kept off an average of 66% of the weight for one year (includes time on maintenance program)" or, in lieu of that factual disclosure, the statement: "Form-You-3 Weight Loss Centers makes no claim that this result is representative of all participants in the Form-You-3 Weight Loss Centers program."

Third, for maintenance success claims made in broadcast advertisements of thirty seconds or less duration, the proposed order (Part I.D.) requires that Formu-3, in lieu of making the factual disclosures required for such claims by Part I.C:

(1) Include in such advertisements the statement "Check at our centers for details about our maintenance record."; and

(2) Provide consumers at point-of-sale with a required form that includes the factual disclosures required by Part I.C, which form must be signed by the client and retained in the company's client file. If any potential participant who does not then participate in the program refused to sign or accept a copy of such document, respondent shall so indicate on such document.

The proposed order makes clear that this alternative disclosure requirement does not relieve Formu-3 of the obligation to substantiate any maintenance success claim, in accordance with Part I.A of the order, and it "takes back" the exception from full quantitative disclosures in short broadcasting advertising if Formu-3 makes a maintenance success claim that uses numbers or descriptive terms that convey a quantitative measure, such as "most of our customers maintain their weight loss long term." Formu-3 in that case would have to make all the required disclosures in the ad and provide the disclosures at point-of-sale.

Fourth, for weight-loss and weight-loss maintenance success claims made through endorsements or testimonials that are not representative of what Formu-3 diet program participants generally achieve, the order (Part I.E.) requires that Formu-3 disclose either what the generally expected success would be for Formu-3 customers, or one of several alternative statements, such as "This result is not typical. You may be less successful," which explains the limited applicability of atypical testimonials in accordance with the Commission's "Guides Concerning Use

of Endorsements and Testimonials in Advertising" 16 C.F.R. 255.2 (a). Under the proposed order, Formu-3 may satisfy the requirements of the first disclosure concerning generally expected success by accurately disclosing those facts in the following format: "Form-You-3 Weight Loss Centers clients lose an average of _____ pounds over an average _____ - week treatment period."

Finally, the proposed order (Part I.L.) generally prohibits Formu-3 from misrepresenting the performance or efficacy of any weight loss program.

Rate of Weight Loss

The Commission's complaint further alleges that Formu-3 failed to possess a reasonable basis for claims it made concerning the rate of weight loss for participants in its program and that the rate of weight loss claims it made were false.

The proposed consent order addresses these practices (Part I.F.) by prohibiting Formu-3 from representing that participants in its program will lose weight at an average or typical rate or speed unless Formu-3 possesses and relies upon competent and reliable scientific evidence substantiating the representation.

Projection of Weight Loss

The Commission's complaint also alleges that Formu-3 failed to possess a reasonable basis for its claim, made during initial sales presentations, that consumers will typically reach their desired weight-loss goals within the time frame computed by Formu-3 personnel.

To address this practice, the proposed order (Part I.G.) prohibits Formu-3 from representing that prospective participants will reach a specified weight within a specified period of time, unless proposed respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

Price

The Commission's complaint against Formu-3 also alleges that Formu-3 failed to disclose adequately to consumers the total price of the diet program.

The proposed consent order seeks to address the practice in two ways. First, Part I.I. of the proposed order prohibits Formu-3 from advertising a daily, weekly or monthly price for its program unless it also discloses: (1) the number of days, weeks or months participants will be required to pay the advertised price; or (2) the total cost of the weight loss program. Second, Part I.L. of the order prohibits Formu-3 from

misrepresenting the price of the program in any way.

Monitoring Practices

According to the complaint, Formu-3 provides its customers with diet protocols that require customers to come in to one of proposed respondents' centers three times per week for monitoring of their progress, including weighing-in. In the course of regularly ascertaining weight loss progress, respondents, in some instances, are presented with weight loss results indicating that customers are losing weight significantly in excess of their projected goals, which is an indication that they may not be consuming all of the food prescribed by their diet protocol. According to the complaint, such conduct could, if not corrected promptly, result in health complications. In light of this monitoring practice, the Commission's complaint alleges that Formu-3 has failed to disclose to consumers who are losing weight significantly in excess of their projected goals that failing to follow the diet protocol and consume all of the food prescribed could result in health complications.

The proposed consent order seeks to address the alleged monitoring misrepresentation cited in the accompanying complaint in two ways. First, the order (Part I.H.) requires Formu-3 to disclose in writing to all participants when they enter the program, that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications. Second, the proposed order (Part I.L.) generally prohibits any misrepresentation concerning the safety of any weight loss program.

Certified Counselors

The Commission's complaint also charges that Formu-3 falsely claimed counselors employed in its diet centers are certified by an objective evaluation process in the treatment of obesity.

The order seeks to address this practice by prohibiting Formu-3 from misrepresenting the competence, training or expertise of any of its employees or employees of its franchisees. (Part I.J.)

Benefits of Food Products

The complaint alleges that Formu-3 misrepresented the benefits to dieters of the food products it sells. To remedy this practice, the order (Part I.K.) prohibits respondents from misrepresenting the existence or amount of calories, fat or any other nutrient or

ingredient in any food product, or the benefits of any such product.

Parts II. and III. of the order allow respondents to make claims about food products and drugs that are specifically permitted in labeling by regulations of the Food and Drug Administration or the Department of Agriculture pursuant to statutes administered by those agencies.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms.

Donald S. Clark,

Secretary.

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[File No. 941 0124]

Nestle Food Company; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would allow, among other things, Nestle, a California-based manufacturer, to complete its planned acquisition of Alpo PetFoods, but would require that it divest the Fort Dodge, Iowa, manufacturing plant within twelve months. The consent agreement also would require Nestle to obtain prior Commission approval of the divestiture and if not completed on time, would permit the Commission to appoint a trustee to complete the transaction. In addition, the consent agreement would require Nestle, for ten years, to obtain Commission approval before acquiring stock in any entity engaged in, or assets used for, manufacturing canned cat food in the United States.

DATES: Comments must be received on or before April 3, 1995.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Ronald Rowe or Stephen Riddell, FTC/S-2105, Washington, DC 20580. (202) 326-2610 or 326-2721.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's