

IN THE MATTER OF

UNIVERSITY HEALTH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 9246. Complaint, April 2, 1991--Decision, Sept. 9, 1992

This consent order prohibits, among other things, a non-profit corporation and two of its subsidiaries, for ten years, from acquiring St. Joseph Hospital or any other hospital in the Augusta, Georgia area -- and from consolidating the operations of respondents' University Hospital with those of St. Joseph or any other local general hospital -- without prior FTC approval.

Appearances

For the Commission: *Mark J. Horoschak* and *Oscar M. Voss*.

For the respondents: *Robert McCann* and *William G. Kopit*,
Epstein, Becker & Green, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that the respondents, University Health, Inc., University Health Services, Inc., and University Health Resources, Inc., corporations subject to the jurisdiction of the Commission, have agreed to acquire St. Joseph Hospital (Augusta, Georgia) and related assets and other interests from Health Care Corp. of the Sisters of St. Joseph of Carondelet; that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, stating its charges as follows:

I. THE RESPONDENTS

1. Respondent University Health, Inc. ("UHI") is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. UHI is governed by a board of trustees. UHI's board of trustees is substantially self-perpetuating, in that the board controls the designation of a majority of all new UHI trustees.

2. Respondent University Health Services, Inc. ("UHS") is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. UHS is governed by a board of trustees. UHI controls the designation of a majority of all new UHS trustees, and thereby controls UHS.

3. Respondent University Health Resources, Inc. ("UHR") is a for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 810 13th Street, Augusta, Georgia. UHS is the sole shareholder of UHR.

4. UHI, UHS, and UHR (hereinafter referred to collectively as "respondents") are primarily engaged in the operation and management of health care facilities in the Augusta, Georgia area, including but not limited to 690-bed University Hospital in Augusta ("University Hospital"), which is operated by UHS. In its fiscal year ending December 30, 1990, University Hospital reported approximately \$155 million in sales, and total profits of over \$12 million.

5. Health Care Corp. of the Sisters of St. Joseph of Carondelet ("HCC"), a Missouri non-profit corporation, operates approximately 12 hospitals in various regions of the United States. HCC holds the right to designate a majority of the directors of St. Joseph Center for Life, Inc. ("SJCFL"), which in turn controls St. Joseph Hospital, Augusta, Georgia, Inc., the owner and operator of 236-bed St. Joseph Hospital in Augusta, Georgia ("St. Joseph Hospital"). In its fiscal year ending June 30, 1990, St. Joseph Hospital earned approximately \$4 million on over \$51 million in sales.

II. JURISDICTION

6. At all times relevant herein, respondents, and HCC and St. Joseph Hospital, have been and are now engaging in or affecting commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12.

7. Respondents are persons subject to the jurisdiction of the Commission pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21.

III. THE PROPOSED ACQUISITION

8. Pursuant to an acquisition agreement signed January 21, 1991, respondents agreed to acquire St. Joseph Hospital and related interests and other assets from HCC and its affiliated corporations. Among these interests are the rights held by HCC and its parent religious order to designate directors of SJCFI, which rights if acquired by respondents would give respondents control of SJCFI and indirect control over the assets of St. Joseph Hospital. Also among the interests subject to the acquisition agreement are a general partnership interest in a medical office building under construction next to St. Joseph Hospital, which UHR has agreed to acquire from an affiliate of HCC. The value of the assets and interests to be acquired by respondents pursuant to the agreement is in excess of \$38 million.

IV. NATURE OF TRADE AND COMMERCE

9. For purposes of this complaint, the relevant line of commerce is the production and sale of general acute care hospital services (excluding services provided by psychiatric hospitals, rehabilitation hospitals, and Federally-owned facilities) and/or any narrower group of services contained therein. General acute care hospital services are services provided by health facilities that provide 24-hour inpatient care in connection with services of physicians for conditions for which nursing, medical or surgical services would be appropriate for care, diagnosis, or treatment, other than services provided by

facilities that are specially intended for treatment of mental illness, emotional disturbance or substance abuse.

10. For purposes of this complaint, the relevant section of the country is the Augusta, Georgia area, including Richmond County, Georgia, Columbia County, Georgia, and Aiken County, South Carolina, and/or any narrower area contained therein.

V. MARKET STRUCTURE

11. The relevant market -- the production and sale of general acute care hospital services in the Augusta, Georgia area -- is highly concentrated whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VI. ENTRY CONDITIONS

12. Entry into the relevant market is difficult due to certificate-of-need regulation of entry by the Georgia and South Carolina state governments, substantial lead times required to establish a new hospital, and other factors.

VII. ACTUAL AND POTENTIAL COMPETITION

13. University Hospital and St. Joseph Hospital are actual and potential competitors in the production and sale of general acute care hospital services in the Augusta, Georgia area.

VIII. EFFECTS

14. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between St. Joseph Hospital and University Hospital, and between St. Joseph Hospital and others;

(b) It would significantly increase the already high levels of concentration;

(c) It would create a firm whose market share is so high as to lead to dominant firm status;

(d) It would eliminate St. Joseph Hospital as a substantial independent competitive force;

(e) It may enhance the possibility of collusion or interdependent coordination by the remaining firms; and

(f) It may deny patients, physicians, and purchasers of health care coverage the benefits of free and open competition based on price, quality, and service.

15. All of the above increase the likelihood that firms producing and selling general acute care hospital services in the Augusta area will increase prices and restrict output, both in the near future and in the long term.

IX. VIOLATION CHARGED

16. The proposed acquisition of St. Joseph Hospital and related assets and interests by respondents would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Owen dissenting.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all of the jurisdictional facts set forth in the aforesaid 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 would have been violated by their proposed acquisition as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(b) of its Rules; and

The Commission having considered the matter 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 procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent University Health, Inc. is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. Respondent University Health Services, Inc. is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1350 Walton Way, Augusta, Georgia. Respondent University Health Resources, Inc. is a for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 810 13th Street, Augusta, Georgia.

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

I.

It is ordered, That, for the purposes of this order, the following definitions shall apply:

A. "*University*" means University Health, Inc., University Health Services, Inc., and University Health Resources, Inc., and their directors, trustees, officers, employees, representatives, agents, parents, subsidiaries, affiliates, divisions, successors, and assigns.

B. "*Hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities. For purposes of this order, retirement communities (*e.g.*, the Brandon Wilde facility operated by Augusta Resource Center on Aging, Inc.), or health facilities whose inpatient services are limited to rehabilitation care (*e.g.*, Walton Rehabilitation Hospital in Augusta, Georgia), mental health care, or substance abuse care, are not "hospitals."

C. To "*acquire a hospital*" means to directly or indirectly acquire the whole or any part of the assets of a hospital; acquire the whole or any part of the stock or share capital of, the right to designate directly or indirectly directors or trustees of, or any equity or other interest in, any person which operates a hospital; or enter into any other arrangement to obtain direct or indirect ownership, management or control of a hospital or any part thereof, including but not limited to a lease of or management contract for a hospital.

D. To "*operate a hospital*" means to own, lease, manage, or otherwise control or direct the operations of a hospital, directly or indirectly.

E. "*Affiliate*" means any entity whose management and policies are controlled or directed in any way, directly or indirectly, by the person with which it is affiliated.

F. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

G. The "*Augusta area*" means the area consisting of Richmond and Columbia Counties in Georgia, and Aiken County, South Carolina.

H. The "*Commission*" means the Federal Trade Commission.

II.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not, without the prior approval of the Commission:

- A. Acquire any hospital in the Augusta area; or
- B. Permit any hospital it operates in the Augusta area to be acquired by any person that operates, or is in the process of acquiring, any other hospital in the Augusta area.

Provided, however, That such prior approval shall not be required for:

- (a) The establishment of a new hospital service or facility (other than as a replacement for a hospital service or facility not operated by University, pursuant to an agreement or understanding between University and the person operating the replaced service or facility),
- (b) Any transaction exempt from the requirements of paragraph III of this order by operation of subpart (b) of the proviso to that paragraph III; or
- (c) Any transaction subject to this paragraph II of this order if the fair market value of (or, in case of a purchase acquisition, the consideration to be paid for) the hospital, part thereof or interest therein to be acquired does not exceed one million dollars (\$1,000,000).

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not, without providing advance notification to the Commission, enter into any joint venture or other arrangement with any other hospital in the Augusta area for the joint establishment or operation of any new hospital, hospital medical or surgical diagnostic or treatment service or facility, or part thereof in the Augusta area. Such advance notification shall be required upon University's issuance of a letter of intent for, or

execution of an agreement to enter into, such a transaction, whichever is earlier.

No notification shall be required by this paragraph III of this order for any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or for which prior approval by the Commission is required, and has been requested, pursuant to paragraph II of this order.

The notification required by this paragraph III of this order shall be made according to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that notification need not be transmitted to the United States Department of Justice. The notification required by this paragraph III of this order shall apply to University and shall not apply to any other party to the transaction. If the transaction for which notification is required by this paragraph III of this order requires state regulatory approval under a health facilities certificate of need law, University may, in lieu of the foregoing notification, submit to the Commission a copy of the application for such state approval.

Provided, however, That no transaction shall be subject to this paragraph III of this order if:

(a) The fair market value of the assets to be contributed to the joint venture or other arrangement by hospitals not operated by University does not exceed one million dollars (\$1,000,000); or

(b) The service, facility or part thereof to be established or operated is to engage in no activities other than the provision of the following services: laundry; data processing; purchasing; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; personnel education, testing, or training; or health care financing (such as through a health maintenance organization or preferred provider organization).

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, University shall not permit all or any substantial part of any hospital it operates in the Augusta area to be acquired by any other person unless the acquiring person files with the Commission, prior to the closing of the acquisition, a written agreement to be bound by the provisions of this order, which agreement University shall require as a condition precedent to the acquisition.

V.

It is further ordered, That University shall, one year after the date this order becomes final and annually for nine (9) years thereafter, file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and intends to comply with this order.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to University made at its principal offices, University shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in University's possession or control relating to any matter contained in this order; and
2. Upon five days' notice to University and without restraint or interference from University, to interview its officers or employees, who may have counsel present, regarding such matters.

VII.

It is further ordered, That University shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, or the creation or dissolution of subsidiaries or affiliates, which may affect compliance obligations arising out of this order.

Commissioner Owen dissenting.

IN THE MATTER OF

DIRAN M. SEROPIAN, M.D.

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

Docket 9248. Complaint, June 12, 1991--Decision, Sept. 11, 1992

This consent order prohibits, among other things, a Florida physician from conspiring with the medical staff of Broward General Medical Center to prevent competition from physicians of the Cleveland Clinic Florida, a non-profit provider of health care services, or any other provider of health care services.

Appearances

For the Commission: *Mark J. Horoschak and Paul Nolan.*

For the respondent: *Davis W. Duke, Jr. and J. Cameron Story, III,
Gunster, Yoakley & Stewart, Ft. Lauderdale, FL.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Diran M. Seropian, M.D., hereinafter sometimes referred to as "respondent" or "Dr. Seropian," has violated and is violating Section 5 of the Federal Trade Commission Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Diran M. Seropian, M.D., is a plastic surgeon licensed by the State of Florida and practices in Fort Lauderdale, Florida. His office address is 1414 S.E. 3rd Avenue, Fort Lauderdale, FL. Dr. Seropian is engaged in the business of providing health care services to patients for a fee.

PAR. 2. The Medical Staff of Broward General Medical Center ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Florida, with its mailing address at 1600 South Andrews Avenue, Fort Lauderdale, FL. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Broward General Medical Center ("Broward General" or "the Hospital"). Appointment to the Medical Staff is a prerequisite for physicians who seek to admit, diagnose, or treat patients at Broward General. Dr. Seropian has been the Chief of the Medical Staff at Broward General since 1986.

PAR. 3. The North Broward Hospital District ("NBHD") is a public hospital district chartered under Florida law to serve the northern two-thirds of Broward County, Florida. The NBHD is licensed by the State of Florida to operate 1567 general acute care beds. NBHD owns and operates four hospitals including Broward General, which is licensed to operate 744 general acute care beds. Broward General offers subspecialty services such as cardiac surgery, and is one of the few tertiary care hospitals in the Northern Broward County area.

PAR. 4. The Cleveland Clinic Florida ("CCF"), which is an affiliate of the Cleveland Clinic Foundation located in Cleveland, Ohio, provides comprehensive health care services to patients. CCF, which is located in Fort Lauderdale, operates a multispecialty group medical practice that provides consumers an alternative to traditional individual and single specialty group forms of practice. Under CCF's multispecialty group practice format, patients can obtain all necessary specialized medical care and ancillary services from CCF employees, including salaried physicians.

PAR. 5. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. As early as September 1985, the Medical Staff and respondent Dr. Seropian had formally resolved: (a) to demand that NBHD "immediately cease all negotiations with the Cleveland Clinic"; and (b) that the Medical Staff had "no confidence" in Broward General's administration or the NBHD Board because of

their negotiations with the Clinic. The Medical Staff's resolutions were intended as, and were understood by hospital officials to be, threats that the Medical Staff's members would withhold patient admissions from Broward General if NBHD entered an affiliation with CCF.

PAR. 7. From January 1988 to October 1989, the Medical Staff and respondent Dr. Seropian engaged in, among other things, the following concerted acts and practices:

A. Soliciting physicians on the Medical Staff to join in a combination or conspiracy to threaten to withhold patient admissions from Broward General if the NBHD established a business relationship with CCF or supported CCF's application for a certificate of need to build its own hospital;

B. Threatening to boycott Broward General by representing to the NBHD that doctors would act jointly to withhold patient admissions from Broward General if the NBHD approved the hospital privilege applications of CCF physicians;

C. Threatening Broward General that all Medical Staff officers would refuse to provide their services to the Hospital, and threatening to have the Medical Staff cease to perform its functions, if the NBHD took steps to provide CCF physicians with access to Broward General's facilities; and

D. Refusing to process applications of CCF physicians for hospital privileges, and obstructing the NBHD's attempt to have an independent panel of Medical Staff physicians review the hospital privilege applications of CCF physicians.

PAR. 8. The acts and practices described in paragraphs six and seven were undertaken as part of a combination or conspiracy by and among respondent Dr. Seropian, the Medical Staff and others to prevent, delay, and limit competition from CCF in Northern Broward County through the use of boycott threats and other coercive means. The combination was directed at restricting competition in Northern Broward County from (1) CCF, (2) CCF physicians, and (3) any joint venture or affiliation between CCF and Broward General.

PAR. 9. The purpose, effects, tendency, or capacity of the respondent's conduct described in paragraphs six to eight are and

have been to restrain trade unreasonably and hinder competition in the provision of health care services in the Northern Broward County area in the following ways, among others:

A. Depriving consumers of the benefits of competition between CCF's integrated multispecialty group practice and independent fee-for-service practitioners;

B. Depriving consumers of the full array of services that CCF sought to offer consumers in Northern Broward County;

C. Hindering CCF's ability to offer health care services to consumers by raising its costs and reducing its efficiency, and delaying or preventing CCF from offering specialty and subspecialty services; and

D. Limiting competition among physicians in Northern Broward County.

PAR. 10. The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been furnished with a copy of that complaint, together with a notice of contemplated relief; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter 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 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent is a licensed physician and doing business under and by virtue of the laws of the State of Florida, with his office and principal place of business located at the address listed in the complaint attached hereto.

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

ORDER

I.

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

A. "*Medical Staff*" means the Medical Staff of Broward General Medical Center, its successors, assigns, officers, directors, committees, agents, employees, and representatives.

B. "*NBHD*" means the North Broward Hospital District, a tax supported entity with its principal offices located at 1625 Southeast Third Avenue, Fort Lauderdale, FL., the hospitals that are owned by the North Broward Hospital District, and its subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

C. "*Broward General*" means the Broward General Medical Center, one of the hospitals of the North Broward Hospital District, located at 1600 South Andrews Avenue, Fort Lauderdale, FL., its

subsidiaries, affiliates, successors, assigns, officers, administrators, directors, committees, agents, employees, and representatives.

D. "CCF" means Cleveland Clinic Florida, a nonprofit corporation organized under Florida law, located at 3000 West Cypress Creek Road, Ft. Lauderdale, FL., its parent foundation (Cleveland Clinic Foundation, which is located at 9500 Euclid Avenue, Cleveland, OH.), any entity located in Florida that is owned, controlled or under the management of Cleveland Clinic Florida or Cleveland Clinic Foundation, and its successors, assigns, officers, directors, committees, agents, employees, and representatives of Cleveland Clinic Florida or Cleveland Clinic Foundation.

E. "*Corrective action*" means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with hospital privileges at Broward General whose activities or professional conduct is reasonably believed to be detrimental to patient safety or the delivery of quality patient care.

II.

It is ordered, That respondent directly or indirectly, or through any device, in connection with activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from entering into, attempting to enter into, organizing, continuing, or acting in furtherance of any agreement or combination, express or implied, between or among the Medical Staff or its members or with other physicians, providers of health care services, medical societies, hospitals, or medical staffs, for the purpose or with the effect of preventing or restricting the offering or delivery of health care services by the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including any agreement to:

A. Refuse to deal or threaten to refuse to deal with the NBHD, Broward General, CCF, any CCF physician, or any other provider of health care services, including, but not limited to, any agreement or combination to refuse or threaten to refuse to:

1. Participate in any Medical Staff or NBHD committee, admit any patient to any NBHD hospital, fulfill any Medical Staff obligation imposed or recognized under any provision of the Florida statutes, the Code of the NBHD, the By-Laws or Rules and Regulations of the Medical Staff, or fulfill any other function customarily performed by the Medical Staff;

2. Refer patients to, accept patient referrals from, provide back-up for, or consult in the treatment of any patient with, any CCF physician; or

3. Associate with NBHD or CCF as an employee or independent contractor, or otherwise deal with NBHD, CCF or any CCF physician.

B. Deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with CCF.

C. Deny or recommend to deny, limit, or otherwise restrict hospital privileges for any CCF physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services.

D. Discriminate, or threaten to discriminate, against any CCF physician with hospital privileges at Broward General with respect to the rights accorded to a member of the Medical Staff.

E. Encourage, advise, pressure, induce, or attempt to induce any person to engage in any action prohibited by this order.

III.

A. *It is further ordered*, That this order shall not be construed to prohibit the respondent from engaging, pursuant to the Medical Staff's by-laws, in credentialing, corrective action, utilization review, quality assurance, or peer review at Broward General, where such conduct neither constitutes nor is part of any agreement, combination or conspiracy the purpose, effect or likely effect of which is to impede competition unreasonably.

B. *It is further ordered*, That this order shall not be construed to prohibit respondent from entering into an agreement or combination

with any other physician or health care practitioner with whom he practices in partnership or in a professional corporation, or who is employed by the same person, as respondent.

C. *It is further ordered*, That this order shall not be construed to prohibit respondent from lawfully carrying on his private medical practice and providing patient care at Broward General or otherwise prohibit the respondent from unilaterally exercising his professional judgment in connection with the making or receiving of patient referrals to and from other physicians.

IV.

It is further ordered, That respondent shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order to the Chairman of the Board of the NBHD and to each member of the Medical Council of the Medical Staff of Broward General Medical Center.

B. Within sixty (60) days after this order becomes final, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which respondent complied with this order and intends to comply with this order.

C. For a period of three (3) years after this order becomes final, respondent shall promptly notify the Commission: (1) of any change in his business address; and (2) whenever he enters into any new business, employment, or hospital affiliation that involves the provision of medical care. Each such notice shall include the respondent's new business address, hospital affiliation, a statement of the nature of the business or employment in which respondent is newly engaged, and 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.

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.

Complaint

115 F.T.C.

EXHIBIT A-1

A-1

C-3392
902337
B129002

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® Life-Style® 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 TODAY — OR ASK YOUR PHYSICIAN

MEDIFAST

Complaint

115 F.T.C.

EXHIBIT B-1

C-3392, 9023337, B129002

B-1

No caloric counting and no complicated meal planning. Just the Medifast supplements. A refreshing and satisfying beverage — 5 times a day. A diet couldn't be easier to follow.

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.

Under your doctor's supervision, you'll be given check-ups at regular intervals to manage your program and insure your progress.

Meanwhile, you'll have all the energy you need to continue your usual recreational and employment activities without disruption.

Soon, you'll begin to sense the "healing" relief of weight reduction. Without a doubt, you'll feel better physically. You'll also experience a renewal of 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.

At first, your counselor's guidance and encouragement will enable you to comply with 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 *LifeStyles*™ Program of Patient Support, you'll discover the key elements to vibrant health and weight control. *LifeStyles* provides a positive and lasting approach to: Self-esteem, Relationships, Nutrition, Fitness, and Healthful Living — all of which are vitally important to your continued success.

Please don't worry about cost.

The Medifast Program may sound expensive at first.

Actually, the cost is quite reasonable in

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 a 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 a time when 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.

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 PHYSICIAN'S ASSISTANT TO YOUR CHAIR

EXHIBIT B-2

B-2
Questions Patients Ask

C-3392
9023337
B129002

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.

Complaint

115 F.T.C.

EXHIBIT B-3

B-3

C-3392
9023337
B129002**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:

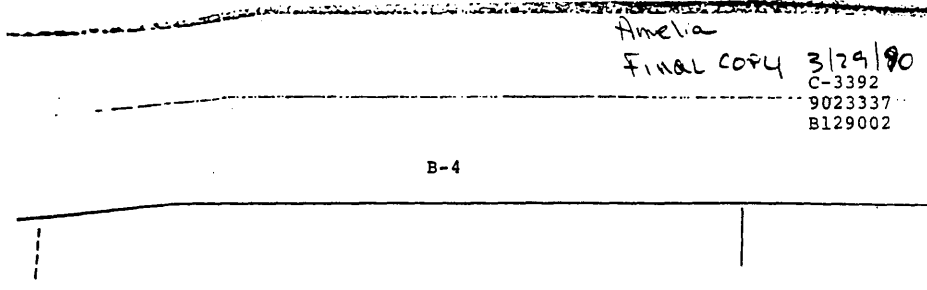
1. Weight loss is RAPID. (3.6-5.2 pounds of FAT STORES per week.)
2. There is NO HUNGER.
3. It is EASY TO FOLLOW - No complicated diet necessary. No exotic foods to purchase or prepare.
4. It is SAFE UNDER MEDICAL SUPERVISION on an outpatient basis in your home and job environment.
5. It is RELATIVELY 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



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;