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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

In the Matter of	)	
CYTODYNE, LLC,	)	
a limited liability company,	)	**DOCKET NO. C-4146**
EVERGOOD PRODUCTS CORP.,	)	
a corporation, and	)	**DECISION AND ORDER**
MELVIN L. RICH,	)	
individually and as a manager of Cytodyne, LLC and an officer of Evergood Products Corp.	)	

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 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 the 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cytodyne, LLC is a New York limited liability company with its principal office or place of business at 200 Adams Boulevard, Farmingdale, NY 11735.

Respondent Evergood Products Corp. ("Evergood") is a Delaware corporation with its principal office or place of business at 200 Adams Boulevard, Farmingdale, NY 11735.

Respondent Melvin L. Rich ("Melvin Rich") is a manager of respondent Cytodyne, LLC and an officer and director of respondent Evergood. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of Cytodyne, LLC and Evergood, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Cytodyne, LLC and Evergood.

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, "respondents" shall mean Cytodyne, LLC, a limited liability company, Evergood Products Corp., a corporation, their successors and assigns, and their officers, members, and managers, and Melvin L. Rich, and each of the above's agents, representatives, and employees.

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

3. "Xenadrine EFX" shall mean the Xenadrine EFX dietary supplement.

4. "Substantially similar product" shall mean any product containing one or more of the following ingredients: caffeine, citrus aurantium (bitter orange), or green tea extract.

5. "Weight loss product" shall mean any product, program, or service designed, used, or purported to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit in a user of the product, program, or service.

6. "Food," "drug," and "device" shall mean as "food," "drug," and "device" are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

7. "Covered product" shall mean any weight loss product, dietary supplement, food, drug, or device.

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

9. "Endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

10. "Clear(ly) and prominent(ly)" shall mean as follows:

a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.

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

I.

IT IS ORDERED that the respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other weight loss product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a trade name or endorsement, that:

A. Such product causes rapid or substantial weight loss without the need to reduce caloric intake or increase physical activity;

B. Xenadrine EFX or any substantially similar product causes rapid and substantial weight loss; or

C. Xenadrine EFX or any substantially similar product causes rapid and substantial fat loss.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a trade name or endorsement:

A. That such product causes weight loss or fat loss;

B. That such product enables users to lose weight or fat without the need to increase exercise or reduce caloric intake;

C. That such product causes permanent or long-term weight loss; or

D. About the health benefits, performance, efficacy, safety or side effects, of such product;

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

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other covered product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other covered product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the actual experience of the endorser as a result of use of the product under the circumstances depicted in the endorsement.

V.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Xenadrine EFX or any other covered product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any endorser of such product unless they disclose, clearly and conspicuously, any material connection between such endorser and any respondent or any other individual or entity manufacturing, advertising, promoting, offering for sale, selling, or distributing such product. For purposes of this Paragraph, a "material connection" shall mean any relationship that materially affects the weight or credibility of the endorsement and would not reasonably be expected by consumers, including, but not limited to, monetary payments and the provision of goods, services, or other benefits to any consumer endorser.

VI.

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

VII.

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

VIII.

IT IS FURTHER ORDERED that respondents shall pay to the Federal Trade Commission the sum of one hundred thousand dollars ($100,000). This payment shall be made in the following manner:

A. The payment shall be made by wire transfer or certified or cashier's check made payable to the Federal Trade Commission, the payment to be made no later than ten (10) days after the date that this order becomes final.

B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, shall immediately become due and payable.

C. The funds paid by respondents, together with any accrued interest, shall, in the discretion of the Commission, be used by the Commission to provide direct redress to purchasers of Xenadrine EFX in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Commission determines, in its sole discretion, that redress to purchasers of these products is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty or punitive assessment.

D. Respondents relinquish all dominion, control and title to the funds paid, and all legal and equitable title to the funds vests in the Treasurer of the United States and in the designated consumers. Respondents shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any respondent, respondents acknowledge that the funds are not part of the debtor's estate, nor does the estate have any claim or interest therein.

IX.

IT IS FURTHER ORDERED that respondents must, in connection with this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the Commission's Complaint, cooperate in good faith with the Commission's reasonable requests for documents and testimony. Respondents or their representatives shall appear at such places and times as the Commission shall reasonably request for interviews, conferences, pretrial discovery, review of documents, and for such other matters, after written

notice to respondents and their counsel of record. Respondents or their representatives shall make themselves available for trial consistent with the Federal Rules of Civil Procedure. Respondents also shall produce such documents and information in a manner as may be reasonably requested by the Commission, after written notice to respondents and to their counsel of record.

X.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall:

A. Within thirty (30) days after the date of service of this order, send by first class mail, postage prepaid and return receipt requested, to each purchaser for resale of Xenadrine EFX with which respondents have done business since May 1, 2003 an exact copy of the notice attached hereto as Attachment A. The mailing shall not include any other document, information, or enclosures.

B. In the event that respondents receive information that any of respondents' resellers or distributors are disseminating any advertisement or promotional material that contains any representation prohibited by this order, immediately notify each such reseller or distributor that respondents will stop doing business with that reseller or distributor if it continues to use any advertisement or promotional material that contains any representation prohibited by this order.

C. Terminate all sales to any reseller or distributor within twenty (20) days if the reseller or distributor has continued to use any advertisement or promotional material that contains any representation prohibited by this order after receipt of the notice required by Subpart B of this Part.

XI.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall, for five (5) years after the last correspondence to which they pertain, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. Copies of all notification letters sent to and return receipts from purchasers for resale pursuant to Subpart A of Part X of this order; and

B. Copies of all communications with resellers or distributors pursuant to Subpart B and C of Part X of this order.

XII.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation including videotape recordings of all such broadcast advertisements;

B. All materials that were relied upon in disseminating the representation; and

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

XIII.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich, for a period of ten (10) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

XIV.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, each shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of

Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

XV.

IT IS FURTHER ORDERED that respondent Melvin Rich shall for a period of five (5) years after the date of issuance of this order, notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that may affect his compliance obligations arising out of this order. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

XVI.

IT IS FURTHER ORDERED that respondents Cytodyne, LLC, Evergood, and their successors and assigns, and respondent Melvin Rich shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XVII.

This order will terminate on August 23, 2025, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

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

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

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had

never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: August 23, 2005

ATTACHMENT A

GOVERNMENT-ORDERED DISCLOSURE
[on Cytodyne, LLC Letterhead]

[Insert Date]

Dear Xenadrine EFX Reseller or Distributor,

This letter is to inform you that Cytodyne, LLC recently settled a dispute with the Federal Trade Commission ("FTC") regarding its advertising for Xenadrine EFX. Among other things, the settlement requires us to instruct resellers and distributors to stop using advertising or promotional materials that make any of the representations prohibited by the settlement. We will terminate all sales to resellers or distributors that make any of these prohibited representations.

The FTC complaint alleges that Cytodyne, LLC engaged in deceptive advertising of Xenadrine EFX, and the FTC order imposes various requirements on us in connection with its past and future advertising of these and other products.

The FTC complaint alleges, among other things, that our advertising materials claimed, expressly or by implication, that Xenadrine EFX causes rapid and substantial weight loss and fat loss; that it does so without the need to reduce caloric intake or increase physical activity; and that it causes permanent or long-term weight loss. The complaint alleges that these claims were false and that the information on which we relied in making these claims was not competent and reliable scientific evidence, as required by law. The FTC order prohibits us from making any claims similar to the challenged claims about any weight loss product unless we have competent and reliable scientific evidence to support them.

In addition, the FTC order provides that we must not make any claim about the health benefits, performance, safety, or efficacy of any weight loss product, dietary supplement, food, drug, or device unless we have competent and reliable scientific evidence to support such claims.

The FTC order further provides that we must not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or scientific research relating to any weight loss product, dietary supplement, food, drug, or device.

The FTC complaint also alleges that our Xenadrine EFX ads represented that the featured consumer endorsers achieved the weight loss reported in those ads solely through the use of Xenadrine EFX, but that endorsers had engaged in rigorous diet and/or exercise programs in order to lose weight. The FTC order prohibits us from making similar misrepresentations in the future.

The FTC order also requires us to monitor resellers' and distributors' advertisements and promotional materials and terminate all sales to resellers and distributors making prohibited claims, whether expressly or by implication, for our products.

Resellers and distributors should visit the Xenadrine website, www.Xenadrine.com, for the most up-to-date promotional materials regarding our products.

If you have any questions, please contact [insert name and telephone number of the responsible Cytodyne, LLC Attorney or Officer].

Sincerely,

Melvin Rich, Manager
Cytodyne, LLC