

Complaint

90 F.T.C.

IN THE MATTER OF

PORTER &amp; DIETSCH, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT*Docket 9047. Complaint, July 29, 1975 — Final Order, Dec. 20, 1977*

This order, among other things, requires a St. Paul, Minn. distributor of non-prescription drugs, its Chicago, Ill. advertising agency, and a Seattle, Wash. drug store chain to cease making unsubstantiated claims or misrepresenting that products contain a unique ingredient, or that users of weight control products can achieve weight loss without restricting their caloric intake or limiting their choice of foods. Further, the firms are required to include prescribed disclosure statements in promotional materials for products containing certain ingredients, and to recall all advertising data disseminated during the past two years for X-11 tablets.

*Appearances*

For the Commission: *Dean A. Fournier* and *William H. Patton*.  
For the respondents: *Albert A. Carretta*, Washington, D.C. and *Jerold W. Dorfman*, New York City for Porter & Dietsch, Inc., et al. and *Michael Rayton*, Seattle, Washington for Pay'n Save Corporation.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Porter & Dietsch, Inc., a corporation, and William H. Fraser, individually and as an officer of said corporation, and Kelly Ketting Furth, Inc., a corporation, and Joseph Furth, individually and as an officer of said corporation, and Pay'n Save Corporation, a corporation, hereinafter sometimes referred to as 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, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Porter & Dietsch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2453 University Ave., St. Paul, Minnesota. Respondent William H. Fraser is president of said corporation. He formulates, directs and controls the policies, acts and [2] practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Kelly Ketting Furth, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 400 North Michigan Ave., Chicago, Illinois. Respondent Joseph Furth is an officer of said corporation and formulates, directs and controls certain acts and practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Pay'n Save Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1511 Sixth Ave., Seattle, Washington.

PAR. 2. For purposes of this complaint, the term "commerce" shall mean commerce as defined in the Federal Trade Commission Act.

PAR. 3. Respondents Porter & Dietsch, Inc. and William H. Fraser are now and have been engaged in the packaging, advertising, offering for sale and sale of various products at wholesale and retail levels. Among such products is a non-prescription preparation which comes within the classification of "drug" (as that term is defined in the Federal Trade Commission Act) and which has the following designation, directions for use and active ingredients:

*Designation:* "X-11 Tablets"

*Dosage:*

One tablet three times daily, one-half hour before each meal.

*Active Ingredients:*

Vitamin A	1388.0 U.S.P. units
Vitamin B	0.5 mg.
Vitamin B <sub>2</sub>	0.5 mg.
Vitamin B <sub>6</sub>	1.0 mg.
Vitamin C	15.0 mg.
Calcium Pantothenate	1.0 mg.
[3]Niacinamide	5.0 mg.
Vitamin E	5.0 int. units
Vitamin B <sub>12</sub>	0.5 mg.
Phenylpropanolamine Hydrochloride	25.0 mg.
Methylcellulose	25.0 mg.
Caffeine	25.0 mg.

PAR. 4. Respondent Kelly Ketting Furth, Inc. is now and has been the advertising agency of Porter & Dietsch, Inc. Respondent Joseph Furth is now and has been the account executive in such agency responsible for advertising of products marketed by Porter & Dietsch, Inc. As such, these respondents have prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of the aforesaid preparation and other products. In the course and conduct of their business, and at all times mentioned herein, these respondents have been and are now in substantial competition, in or affecting commerce, with other corporations, firms and individuals in the advertising business.

PAR. 5. Respondent Pay'n Save Corporation operates a chain of drug and sundries stores in Washington, Oregon, Alaska, California, Hawaii, and Canada. Said respondent is now and has been engaged in the advertising, offering for sale and sale of various products including the aforesaid preparation.

PAR. 6. In the course and conduct of their business, respondents Porter & Dietsch, Inc. and William H. Fraser ship, distribute and cause to be shipped and distributed the aforesaid preparation from their place of business in the State of Minnesota to retail stores and purchasers located in various other States of the United States.

In the course and conduct of its business, respondent Pay'n Save Corporation operates retail stores and storage warehouses in several States of the United States. Said respondent causes the aforesaid preparation to be shipped from Minnesota to storage points and Pay'n Save stores located in various other states, for sale to the general public.

In the further course and conduct of their businesses, and using means and mechanisms of commerce, these respondents and respondents Kelly Ketting Furth, Inc. and Joseph Furth cause advertisements for said preparation to be published in media of interstate circulation. [4]

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in the aforesaid preparation and advertisements, in or affecting commerce.

PAR. 7. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparation by the United States mail and by various means in or having an effect upon commerce, including but not limited to advertisements inserted in newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated

770

Complaint

and caused the dissemination of advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in or having an effect upon commerce.

PAR. 8. Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

Eat well . . . and lose that fat! - without ever missing a meal . . .

\* \* \* \* \*

You eat 3 satisfying balanced meals a day - plus snacks. You eat what you want . . .

\* \* \* \* \*

You do not deny yourself.

\* \* \* \* \*

. . . Laboratory Science has perfected a Tiny Tablet for EASY REDUCING . . . clinic-tested ingredients . . .

\* \* \* \* \*

I lost 80 pounds! When I started on the X-11 Reducing Plan, I weighed 205 pounds. Now my weight is down to 125 pounds. I enjoy wearing dresses sizes 11 or 12's, rather than size 20 1/2 . . .

\* \* \* \* \*

Part of the secret of this method is a unique ingredient . . . which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies.

# USED TO WEIGH 160 LBS. NOW I'M DOWN TO 105



says Mrs. George Stowe  
Canon, Georgia

"I started on the X-11 Plan and started losing weight almost right away. I am so grateful . . . I recommend the X-11 Plan to everyone I see. It's wonderful."

## I LOST OVER 40 LBS.



says Mrs. Beverly Tollier  
Chula Vista, California

"I used to weigh over 170 lbs. Now I'm less than 125 lbs. and going down. I have recommended your plan to a lot of people because they just couldn't believe the results."

Mrs. George Stowe says:  
"I am 53 years old and here are my before and after measurements . . ."

	WAS	AM
WEIGHT	160 lbs.	105 lbs.
HEIGHT	5-2 1/2 in.	5-2 1/2 in.
DRESS SIZE	18	8
BUST	38 in.	34 in.
WAIST	29 in.	24 in.

## ...and I LOST OVER 40 LBS., TOO

says Mrs. Ken Schmidt  
Norfolk, Nebraska

"When I started on the X-11 Reducing Plan, I weighed 180 lbs. Now I'm under 125. I enjoy wearing dresses sizes 11 - 12's rather than 20's. It's good to know there's a way to lose ugly fat and keep my weight at a level I dreamed of holding."



FROM GEORGIA TO NEBRASKA TO CALIFORNIA  
AMERICAN WOMEN HAVE FOUND A WAY  
THAT REALLY HELPS OFF THAT UGLY FAT

### No Starvation Dieting - No Strenuous Exercise RESULTS ARE GUARANTEED - OR MONEY BACK

Here, at last, is that wonderful kind of plan that offers you a way to help get rid of 5, 10, 25 or more pounds of unsightly fat. Not by suffering thru starvation dieting hunger . . . not by sticking to boring reducing diets . . . not by extra-tiring exercises . . . not by any of the humdrum methods you have known and given up.

Now . . . Lose Ugly Fat . . . and don't go to bed hungry. The X-11 Plan is not a crash or starvation diet. That's because X-11 is the proved and sound method, used from one end of America to the other, to curb the appetite and still eat 3 satisfying, sensible meals a day.



Laboratory Science has perfected a low-calorie tablet with a special taste so you eat 3 satisfying meals a day. See "Lose Ugly Fat" booklet.

#### EAT WELL ...and lose that Fat.



42 Tablets  
**3.00**  
105 Tablets  
**5.00**  
OR MAIL COUPON:

You will eat, satisfying meals and snacks, but you won't be the prisoner of the overeating habit. If you aren't 100% delighted, return your first package for an immediate refund — no questions asked.

**PAY 'n SAVE**  
AVAILABLE AT ALL STORES

Mail to: PAY 'n SAVE DRUGS — Dept. AD,  
1811-8th AVE., SEATTLE, WASH. 98101  
Please send me . . . . . Packages of X-11  
 42 Tablets at \$3.00 (plus 16¢ Sales Tax)  
 105 Tablets at \$5.00 (plus 26¢ Sales Tax)

PLEASE PRINT YOUR NAME AND ADDRESS BELOW:

Name \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Cash enclosed  Money Order  Check enclosed  
GUARANTEE — You must be 100% delighted with results of your first package or your money will be refunded — no questions asked.

[6] PAR. 9. Through the use of said advertisements and others similar thereto but not specifically set out herein, respondents have represented and are now representing, directly or by implication, that:

A. Users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice.

B. Respondents have a reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet contains a unique ingredient.

PAR. 10. In truth and in fact:

A. Users of X-11 tablets cannot lose weight without restricting their accustomed caloric intake nor while they continue to eat the foods of their choice. In fact, each X-11 package includes a diet highly restricted as to calories and choice of foods, which must be adhered to if weight loss is to be achieved.

B. Respondents have no reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet does not contain any unique ingredient.

PAR. 11. Several of the advertisements described and alluded to in Paragraph Eight hereof include testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the aforesaid preparation, when such stated results do not reflect the typical or ordinary experience of consumers with said preparation under circumstances similar to those depicted in the advertisements. These advertisements do not disclose or identify such typical or ordinary experience in any way. Thus, respondents have failed to disclose in their advertising a material fact which, if known to consumers, would be likely to affect their consideration of whether or not to purchase said preparation. [7]

PAR. 12. Respondents have marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use said preparation only as directed by a physician. Inasmuch as a substantial number of overweight persons are suffering from one or more of said physical conditions, respondents have failed to disclose in their advertising a material fact which, if known to such persons, would be likely to affect their consideration of whether or not to purchase said preparation.

PAR. 13. Respondents have marketed and advertised the "X-11 Reducing Plan" without disclosing in the advertising thereof that a

highly restricted caloric diet is an integral part of said plan. Such fact, if known to consumers, would be likely to affect their consideration of whether or not to purchase said product. Thus, respondents have failed to disclose a material fact in their advertising.

PAR. 14. The advertisements referred to in Paragraphs Eight, Eleven, Twelve and Thirteen were and are misleading in material respects, as alleged in Paragraphs Ten, Eleven, Twelve and Thirteen, and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, and the statements, representations and omissions described in Paragraphs Nine, Eleven, Twelve and Thirteen were and are misleading, deceptive and unfair acts or practices.

PAR. 15. The use by respondents of the aforesaid misleading, deceptive and unfair statements, representations, acts and practices, and the dissemination of the aforesaid "false advertisements," have had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of X-11 tablets by reason of said erroneous and mistaken belief.

PAR. 16. In the course and conduct of their businesses, and at all times mentioned herein, respondents Porter & Dietsch, Inc., William H. Fraser and Pay'n Save Corporation have been and now are in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of products and services for weight reduction. [8]

PAR. 17. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JULY 29, 1975

I share the majority's view that the principal distributor of an alleged weight-reducing pill ought to be able to substantiate the claims he makes for it and that, if it is in fact dangerous for people with heart disease, diabetes, high blood pressure, and other diseases

to take it, he ought to say so in his ads. But I cannot agree with my Brethren that a *retailer* with no involvement in the preparation of the ads in question should be subjected to liability here.

The advertisements in question are prepared by the distributor of these pills, Porter & Dietsch,<sup>1</sup> with the actual copy being written by its president and controlling owner, Mr. William H. Fraser. Advertising mats are prepared and sent out to the major regional and local drug chains, including Pay'n Save Corporation, a Seattle-based drug retailer with some 90 stores located in five (5) states. The distributor pays for approximately 90 percent of the cost of these ads, with the cooperating retailer paying the remaining 10 percent. Since the messages are directed to the ultimate consumer and generally exhort him to buy from the drug chain, it is the latter's name rather than that of the distributor which appears in the ads.

Why pick on Pay'n Save? Other drug chains have been similarly "involved," including Fred Meyer (Portland); Western Drug (Montana); Pay Less (Tacoma); Skaggs and Grand Central Stores (Boise); Tiffany [2] Drugstores (Eugene, Oregon); Drug Fair (Washington, D.C.); and Walgreens (Chicago). The staff explains the selection of Pay'n Save by simply noting that it is the largest of the participating chains in the Pacific Northwest. (The investigation was conducted by our Seattle regional office.) In other words, Pay'n Save was the most *convenient* retailer target.

It is conceded that Pay'n Save "had a significantly lower level of involvement" in the ads than Porter & Dietsch and its president, Mr. Fraser, but the staff believes this factor is more than outweighed by the need to establish a new legal precedent. An "important aspect of this case," the staff tells us, "is the inclusion of the advertising retailer, Pay'n Save Corporation, as a named respondent." A retailer who *uses* a deceptive ad, we're told, ought to be held just as liable as the fellow who created it in the first place. Had Pay'n Save made a "thoughtful" examination of the packages in question, including the disclosures on the package insert, it would have known something was wrong.

The problem, the staff reports to us, is that the country's retailers have been getting away with murder in this area. While "major general-merchandise retailers are frequently involved and/or specifically identified as the advertiser in highly questionable ads devoted to a single product, our research has disclosed no clearcut instances of such retailers being held responsible for manifestly deceptive product claims appearing in such ads. Subjection of Pay'n Save to

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<sup>1</sup> Porter & Dietsch is the "exclusive national distributor" of this product, the "X-11" reducing pill.



the 'cease and desist' provisions of this order will help to reestablish this responsibility principle in the context of this type of advertising."

So there we have it. The staff wants to establish a new principle of trade regulation law. *Any retailer who runs an ad prepared by a supplier is legally liable for the truthfulness of everything in it.* Never mind that he didn't participate in the preparation of the ad and that it would be economically prohibitive for [3] him to maintain a staff of scientists and lawyers to screen all the supplier ads that a substantial retailer is confronted with in the course of a business year. In short, strict "no-fault" liability. Run the ad at your peril.

I think the Commission is embarking on an unwise, dangerous, and unnecessary course of action here. It is unwise because it defies common sense. It is dangerous because it imposes an intolerable cost burden on the nation's retailers that can only be passed on to the consumer in the form of still more inflated prices than those we now labor under. And it is unnecessary because a cease and desist order that stops the development of deceptive advertisements at the headwaters clearly makes it unnecessary to seine all the downstream tributaries.

I would dismiss Pay'n Save from this complaint.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE  
LAW JUDGE

MAY 21, 1976

I

STATEMENT OF THE CASE

ALLEGATIONS OF COMPLAINT

The complaint in this proceeding charged respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., Joseph Furth and Pay'n Save Corporation with the dissemination of false advertisements and unfair, misleading and deceptive statements and representations in the advertising, promotion and sale of X-11 tablets in violation of Sections 5 and 12 of the Federal Trade Commission Act.<sup>1</sup> More specifically, the complaint alleged that respondents disseminated advertisements which misrepresented,

<sup>1</sup> Then Commissioner Thompson dissented from the naming of Pay'n Save Corporation, a large West Coast drug chain, as a respondent in this proceeding on the grounds, *inter alia*, that he could not agree that "a retailer with no involvement in the preparation of the ads in question should be subjected to liability here," and that Pay'n Save was being singled out among many drug store chains, as "the most *convenient* retailer target." See statement issued with the complaint.

directly or by implication, that “[u]sers of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice,” that respondents had a “reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight,” and that each “X-11 tablet contains a unique ingredient.”

The complaint further alleged that some of respondents’ advertisements included testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the “aforesaid preparation” which did not reflect the “typical” or “ordinary” experience of consumers “under circumstances [3] similar to those depicted in the advertisements.” Failure of the advertisements to disclose or identify the typical or ordinary experience of persons using the tablets was alleged to constitute a failure to disclose a material fact which, if known, would have affected the consumer’s consideration of “whether or not to purchase said preparation.”

The complaint also alleged that respondents “marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use [them] only as directed by a physician,” and that in doing so respondents failed to disclose a material fact in such advertising. Finally, the complaint charged that the “X-11 Reducing Plan” was marketed and advertised without disclosing that “a highly restricted caloric diet [was] an integral part of said plan,” and that such constituted a failure to disclose a material fact.

#### RESPONDENTS’ ANSWERS

Respondents filed answers denying most of the substantive allegations of the complaint, and raising a number of affirmative defenses. Respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth denied that they ever marketed a product designated “X-11 Tablets,” contending that they were engaged in the sale of the “X-11 Reducing Plan” which “includes for ingestion tablets having the ingredients set forth in Paragraph Three of the Complaint.” The foregoing respondents also denied representing that “users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice,” and denied representing “that substantially all users of X-11 tablets [would] lose a significant amount of weight.” Respondents contended that they had advertised [4] only the “X-11 Reducing Plan,” not tablets and represented only that users of the “X-11 Reducing Plan” would lose some weight, and

that they had a reasonable basis for this assertion. Lack of public interest also was urged.

Respondent Pay'n Save maintained that it received the prepared X-11 advertisements from Porter & Dietsch, Inc., and therefore "cannot be held liable for the truthfulness of representations made therein by others."

Prior to the completion of evidentiary hearings respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc. and Joseph Furth filed an amended answer contending that the Federal Trade Commission is "precluded from bringing this proceeding . . . under the principles of collateral estoppel and/or stare decisis." Respondent Pay'n Save likewise filed an amended answer contending that "Complaint Counsel is precluded from bringing this proceeding under the principles of res judicata, collateral estoppel and/or stare decisis." According to respondents, three litigated decisions, *Alleghany Pharmacal Corporation*, 75 F.T.C. 990 (1969), *Hanover House* and *Romar Sales*, proceedings before the Postal Service,<sup>2</sup> preclude trial in this proceeding of issues relating to the "safety and efficacy of phenylpropanolamine as an appetite suppressant for weight reduction."

#### PROCEDURAL HISTORY

Complaint was served on the various respondents between the end of August and early September 1975. On September 10, the law judge issued an order directing counsel to attempt agreement on a timetable for completion of prehearing matters and a date and place for hearings on the merits. Thereafter, at the request of counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, a prehearing conference was held on October 7, 1975, [5] and a timetable was issued the following day setting hearings on the merits to commence January 6, 1976.

The parties disagreed as to the location of hearings. After considering all submissions, the law judge ordered that hearings be held in Seattle, Washington, where Pay'n Save Corporation and its counsel<sup>3</sup> and a number of witnesses and complaint counsel were located, and in Washington, D.C., to take the testimony of East Coast witnesses. Hearings in Chicago, Illinois, to accommodate Porter &

<sup>2</sup> *Hanover House and Romar Sales Corp.*, P.S. Dkt. Nos. 2/143 and 2/149, decision of December 5, 1975.

<sup>3</sup> Original counsel for Pay'n Save Corporation withdrew on October 2, and Albert A. Carretta, counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, took over as counsel for all respondents. However, on October 28, Mr. Carretta withdrew as counsel for Pay'n Save Corporation because of a possible conflict of interest between that respondent and one or more of the other respondents. Original counsel for Pay'n Save Corporation then reentered the proceeding.

Dietsch, Inc., William H. Fraser, Kelly Ketting Furth and Joseph Furth were also offered if requested by those respondents.<sup>4</sup>

In the meantime, Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth moved on September 24, 1975, for a "Corrective News Release" and a stay of the date for filing an answer on the ground that the Commission's News Release failed to contain the usual caveat that the Commission issues a complaint when it has "reason to believe" that the law has been violated, and that such action did not imply adjudication of the matters alleged. This motion for a "Corrective News Release" was certified to the Commission recommending that it be granted, but the request for a stay of the date for filing an answer was denied. On October 17, 1975, the Commission granted the motion for such correction. [6]

Thereafter, discovery and various other pretrial proceedings continued. The law judge issued a number of subpoenas requiring the production of documents and information by respondents, directed the production of specified Commission materials, ordered the taking of certain depositions and disposed of a variety of motions. Included among the latter were a motion and supporting memorandum of Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth to "Dismiss Complaint Before Trial For Lack Of Public Interest Sufficient To Justify Issuance Of A Cease And Desist Order" and their motion and supporting memorandum for a "Supplementary Corrective News Release." The latter motion was certified to the Commission with a recommendation pursuant to §3.22 of the rules and was denied by the Commission on December 19, 1975.

Respondent Pay'n Save Corporation also filed a motion to "Dismiss Complaint Before Trial Or, In The Alternative, For Summary Decision" which was supported by a memorandum filed by Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth. This motion was denied by the law judge on December 30, 1976.

On December 23, 1975, all respondents filed an action in the U.S. District Court for the District of Columbia seeking a declaratory judgment and restraint of further proceedings in this matter. They alleged that a cease and desist order against them would not be in the public interest, that the Commission's News Releases were improper, and that the scheduling of hearings in Seattle and Washington, D.C., rather than in one location "convenient to all parties," violated the due process clause of the Fifth Amendment,

<sup>4</sup> On December 29, 1975, counsel for respondents formally declined hearings in Chicago, Illinois, and evidentiary hearings were not held at this location.

the Administrative Procedure Act and the Commission's rules. On January 5, 1976, after hearing oral argument, the District Court denied respondents' motion for a preliminary injunction and thereafter dismissed the complaint. [7]

Hearings on the merits commenced in Seattle, Washington, on January 7 and concluded in Washington, D.C., on January 26, 1976, 8 actual hearing days having been utilized during that period. The record consisting of 220 exhibits, many of them multi-paged, and 1,405 pages of transcript was closed by order of the law judge on February 10. Twelve witnesses testified including the individual respondents and an official of Pay'n Save Corporation, and the testimony of three witnesses was entered in the record by stipulation. Complaint counsel called four medical or scientific experts, Drs. Margen, Drenick, Prout and Sorer, and respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth called three, Dr. Fineberg, a medical doctor, Dr. Silverman, a pharmacologist, and Dr. Hoebel, a specialist in physiological psychology.

At the conclusion of the case-in-chief respondents orally moved to dismiss on the ground that complaint counsel had not made out a prima facie case (Tr. 1038-97). Ruling was deferred by the law judge until decision on the entire case after all evidence had been received, and permission was granted to respondents to reduce their motion to writing supporting it with record references and legal authority. On March 29, 1976, respondents (except Pay'n Save) filed a comprehensive written motion to dismiss with a separately bound appendix in support. This motion will be referred to hereinafter as "Motion to Dismiss" and will be ruled upon in this Initial Decision in accordance with the findings, discussion and conclusions set forth.

This matter is now before the undersigned for decision based upon the allegations of the complaint, the answers, the evidence and the proposed findings of fact, conclusions and legal authority filed by all parties. All proposed findings of fact, conclusions and arguments, including those in the Motion to Dismiss, not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of the parties, makes the following findings and conclusions and issues the order set out at the end hereof: [8]

## II

## FINDINGS OF FACT

## RESPONDENTS

1. Respondent Porter & Dietsch, Inc. (Porter & Dietsch), is a Minnesota corporation with its office and principal place of business in St. Paul. It is engaged in the packaging and sale of pharmaceutical products, principally by mail and through retail drug stores (Ans. P&D, ¶1; Fraser, Tr. 753-54). Porter & Dietsch has sold its X-11 tablets since 1967 (Ans. P&D, ¶3; Fraser, Tr. 769, 823) and, although a few other products are sold, the tablets are by far its largest volume item, amounting to over 80 percent of all sales (Fraser, Tr. 757-61).

2. Individual respondent William H. Fraser is the president and sole owner of Porter & Dietsch (Fraser, Tr. 753-54). As such, Mr. Fraser formulates, directs and controls the policies, acts and practices of corporate respondent Porter & Dietsch (Ans. P&D, ¶1).

3. In the course and conduct of their business, Porter & Dietsch and William H. Fraser have been and now are in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms and individuals in the sale of products and services for weight reduction (Ans. P&D, ¶16).

4. Respondent Kelly Ketting Furth, Inc. (Kelly Ketting Furth) is an advertising agency incorporated in Illinois, with its office and principal place of business in Chicago (Ans. P&D, ¶1). Since its organization in 1968, Kelly Ketting Furth has been, and is, the advertising agency for Porter & Dietsch in the marketing of X-11 tablets (Ans. P&D, ¶4; Fraser, Tr. 805; Furth, Tr. 927-32). [9]

5. Individual respondent Joseph Furth is a vice-president of Kelly Ketting Furth and is the advertising account executive for respondent Porter & Dietsch (Ans. P&D, ¶4; Furth, Tr. 927-36). Mr. Furth participates in the management of Kelly Ketting Furth and is among those responsible for the formulation, direction and control of its acts and practices, including those alleged in the complaint (Ans. P&D, ¶1).

6. In the course and conduct of their business Kelly Ketting Furth and Joseph Furth are now, and have been, throughout the period that Kelly Ketting Furth has been the advertising agency for Porter & Dietsch, in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with

