[Federal Register: July 13, 1998 (Volume 63, Number 133)]
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[DOCID:fr13jy98-107]

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FEDERAL TRADE COMMISSION

[File No. 972-3255]

TrendMark Inc., et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order--embodied in the consent agreement--that would settle these allegations.

DATES: Comments must be received on or before September 11, 1998.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Michael Bloom or Ronald Waldman, New York Regional Office, Federal Trade Commission, 150 William Street, 13th Floor, New York, N.Y. 10038-2603. (212) 264-1242.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been **filed** with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period

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of sixty (60) days. The following Analysis to Aid Public Comment

describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for June 25, 1998), on the World Wide Web, at ``http://www.ftc. gov/os/ actions97.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H-130, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326-3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted, subject to fine approval, an agreement to a proposed consent order (``proposed order'') from TrendMark Inc., also doing business as TrendMark International (``TrendMark''), and its principals, William McCormack and E. Robert Gates.

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

This matter concerns weight loss products which were marketed by the proposed respondents via unsolicited commercial e-mail sent to users of America Online. The e-mail directed recipients to click on a hyperlink that would then take them to TrendMark's website on the Internet. Both the e-mail and Internet website made various weight loss and health-related claims about respondents' Thin-Thin Diet^{TM} which consisted of two products--Neuro-Thin^{TM} and Lipo-Thin^{TM}.

The Commission's complaint alleges that proposed respondents engaged in deceptive advertising in violation of Sections 5 and 12 of the FTC Act by making unsubstantiated claims that: (1) Neuro-Thin^{TM} controls appetite; (2) taking Neuro-Thin^{TM} and Lipo-Thin^{TM} in combination causes significant weight loss without a change in diet; (3) taking Neuro-Thin^{TM} and Lipo-Thin^{TM} in combination causes long-term or permanent weight loss; (4) Lipo-Thin^{TM} helps prevent the absorption of ingested fat; (5) Lipo-Thin^{TM} lowers LDL cholesterol and boosts HDL cholesterol; (6) Lipo-Thin^{TM} promotes healing of ulcers and lesions; (7) Lipo-Thin^{TM} helps prevent irritable bowel syndrome; (8) Lipo-Thin^{TM} reduces levels of uric acid in the blood; (9) Lipo-Thin^{TM} helps improve cardiovascular health; and (10) testimonials from consumers appearing in advertisements for the Thin-Thin Diet^{TM} reflect the typical or ordinary experience of members of the public who use Neuro-Thin^{TM} and Lipo-Thin^{TM}. The complaint alleges that the proposed respondents did not have a reasonable basis for these

weight loss and health-related claims. In addition, the complaint alleges that testimonials given by individuals on respondents' website failed to disclose adequately that these individuals had material connections with individuals marketing and profiting from the sales off Neuro-Thin^{TM} and Lipo-Thin^{TM}.

The proposed respondents indicated that they neither possessed nor were aware of any studies relating specifically to the Neuro-Thin^{TM} or Lipo-Thin^{TM} products. Moreover, the purported support which proposed respondents did rely upon for the above claims--studies on individual components of Neuro-Thin^{TM} or Lipo-Thin^{TM}--did not relate adequately to their advertising claims. For example, most of the studies that were submitted by the proposed respondents as support were test tube studies and studies of rats. These studies cannot be used as adequate support for the therapeutic effects of Neuro-Thin^{TM} and Lipo-Thin^{TM} in human beings.

The complaint further alleges that proposed respondents made a false claim that clinical evidence proves that Neuro-Thin^{TM} and Lipo-Thin^{TM} cause users to lose significant weight.

The proposed order contains provisions designed to remedy the violations charged and to prevent proposed respondents from engaging in similar acts in the future.

Paragraph I of the proposed order prohibits proposed respondents from claiming that Neuro-Thin^{TM} and Lipo-Thin^{TM} or any other product or program: (1) controls appetite; (2) causes significant weight loss without a change in diet; (3) causes long-term or permanent weight loss; (4) prevents or helps prevent the absorption of ingested fat; (5) lowers LDL cholesterol or boosts HDL cholesterol; (6) promotes healing of ulcers or lesions; (7) helps prevent irritable bowel syndrome; (8) reduces levels of uric acid in the blood; and (9) helps improve cardiovascular health, unless, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Paragraph II of the proposed order states that the proposed respondents shall not represent, in any manner, expressly or by implication, that the experience represented by any user who gives a testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless: (a) at the time it is made, the proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or (b) the proposed respondents disclose, clearly and prominently, and in close proximity to the testimonial or endorsement, either: (1) what the generally expected results would be for users of the product, or (2) the limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

Paragraph III of the proposed order prohibits proposed respondents from making any representation for Neuro-Thin^{TM} and Lipo-Thin^{TM} or any other food, drug, dietary supplement, drug, or

device, about the health benefits, performance, or efficacy of such product unless, at the time the representation is made, proposed respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Paragraph IV of the proposed order prohibits proposed respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or study.

Paragraph V of the proposed order requires the proposed respondents to disclose, clearly and prominently, a material connection, when one exists, between a person providing an endorsement for any product or program and any respondent, or any individual or entity labeling, advertising, promoting, offering for sale, selling, or distributing such product or program.

Paragraph VI of the proposed order provides that nothing in this order shall prohibit proposed respondents from making any representation about any drug permitted by the Food and Drug Administration.

Paragraph VII of the proposed order provides that nothing in this order shall prohibit proposed 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

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Administration pursuant to the Nutrition Labeling and Education Act of 1990.

Paragraph VIII of the proposed order contains record keeping requirements for materials that substantiate, qualify, or contradict covered claims and requires the proposed respondents to keep and maintain all advertisements and promotional materials containing any representation covered by the proposed order. In addition, paragraph IX requires distribution of a copy of the consent order to current and future officers and agents having responsibility with respect to the subject matter of the order. Further, Paragraph X provides for Commission notification upon a change in the corporate respondent. Paragraph XI requires proposed respondents William McCormack and E. Robert Gates to notify the Commission when either of them discontinues his current business or employment and of an affiliation by either of them with any new businesses or employment. Paragraph XII of the proposed order requires the proposed respondents to file a compliance report. Finally, paragraph XIII of the proposed order provides for the termination of the order after twenty years under specified conditions.

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

By direction of the Commission.
Donald S. Clark,
Secretary.

[FR Doc. **98-18616 Filed** 7-10-**98**; 8:45 am]
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