

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Janet D. Steiger, Chairman
Mary L. Azcuenaga
Deborah K. Owen
Roscoe B. Starek, III
Dennis A. Yao

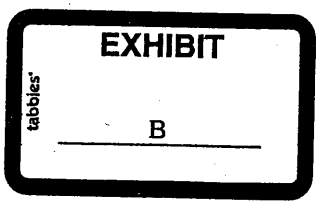
In the Matter of)
)
MICHAEL S. LEVEY, individually)
and as an officer of Positive)
Response Marketing, Inc., and)
)
POSITIVE RESPONSE MARKETING, INC.,)
a corporation, also trading)
and doing business as)
POSITIVE RESPONSE TELEVISION and)
POSITIVE RESPONSE ADVERTISING.)

DOCKET NO. C-3459
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 Seattle Regional Office 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, 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 said Act, and that a 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, 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 Positive Response Marketing, Inc., is a California corporation with its principal office and place of business at 1861 Topanga Canyon Boulevard, Topanga, California 90290. Positive Response also trades and does business as Positive Response Television and Positive Response Advertising.
2. Respondent Michael S. Levey resides at 1975 Topanga Canyon Boulevard, Topanga, California 90290. He is an officer and shareholder of Positive Response Marketing, Inc.
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

Definitions

For purposes of this Order:

- 1) "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.
- 2) "Material connection" shall mean any relationship between an endorser of any product or service and any individual or other entity advertising, promoting, offering for sale, selling or distributing such product or service, which relationship might materially affect the weight or credibility of the endorsement and which relationship would not reasonably be expected by consumers.

I.

IT IS ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from selling, broadcasting or otherwise disseminating, or assisting others to sell, broadcast or otherwise disseminate, in part or in whole:

A. The 30-minute television advertisement for the EuroTrym Diet Patch described in the complaint and sometimes known as "The Michael Reagan Show."

B. The 30-minute television advertisement for Foliplexx described in the complaint and sometimes known as "Breakthrough '88."

C. The 30-minute television advertisement for Y-Bron described in the complaint and sometimes known as "Let's Talk" or "Let's Talk with Lyle Waggoner."

II.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the EuroTrym Diet Patch or any other substantially similar weight control or weight reduction product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of such product prevents feelings of hunger;

(2) Use of such product enables users to lose substantial amounts of weight;

(3) Use of such product enables users to lose weight in a large majority of cases; or

(4) Any competent and reliable test or study establishes that such product promotes weight loss.

For purposes of this Part II a "substantially similar weight control or weight reduction product" shall be defined as any product that is advertised as causing or aiding weight loss through acupressure, acupathy or homeopathy that uses a bandaid or patch to apply a solution to the skin or that purportedly contains as its active ingredient calcarea carbonica.

B. Representing, directly or by implication, in connection with the advertising, packaging, labeling, promotion,

offering for sale, sale or distribution of any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of the product prevents or reduces feelings of hunger;
- (2) Use of the product enables users to lose substantial amounts of weight;
- (3) Use of the product enables users to lose weight in a substantial number of cases; or
- (4) Any competent and reliable test or study establishes that use of the product promotes weight loss,

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

- C. Failing to disclose clearly and prominently in any advertisement for any weight control or weight reduction product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that dieting and/or exercise is required in order to lose weight; provided, however, that this disclosure shall not be required if respondents possess and rely upon competent and reliable scientific evidence demonstrating that the product in question is effective without dieting and/or exercise.

III.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

- A. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Foliplexx or any other substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of such product curtails loss of hair;

- (2) Use of such product promotes growth of new hair where hair has already been lost;
- (3) Use of such product relieves, cures, prevents or reverses baldness;
- (4) Such product is an effective remedy for baldness in a large majority of cases; or
- (5) Any competent and reliable test or study establishes that such product relieves, cures, prevents or reverses the advance of baldness.

For purposes of this Part III, a "substantially similar product" shall be defined as any product that is advertised as preventing or reversing baldness or hair loss and that purportedly contains as an ingredient one or more of the following: sulfanated mucopolysaccharides, polysorbates, trichoepptides, takanal, kallikrein, alpha-tocopheral, methyl nicotinate, retinyl palmitate, allantoin, or bovine serum albumin.

B. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- (1) Use of the product prevents or reduces loss of hair;
- (2) Use of the product promotes growth of new hair where hair has already been lost;
- (3) Use of the product relieves, cures, prevents or reverses baldness;
- (4) The product is an effective remedy for baldness in a substantial number of cases; or
- (5) Any competent and reliable test or study establishes that the product relieves, cures, prevents or reverses baldness,

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

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as promoting hair growth or preventing hair loss, unless the product is the subject of an approved new

drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., provided that this subpart shall not limit the requirements of Part III.A and B herein.

IV.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from:

A. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of Y-Bron or any other substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of such product relieves, cures, prevents or reverses impotence;

(2) Use of such product increases sexual drive, ability, desire or libido;

(3) Such product is an effective remedy for impotence or increases sexual drive, ability, desire or libido in a substantial number of cases; or

(4) Any competent and reliable test or study establishes that such product is an effective remedy for impotence or increases sexual drive, ability, desire or libido.

For purposes of this Part IV, a "substantially similar product" shall be defined as any product that is advertised for sale over-the-counter as a sexual stimulant or as a treatment for impotence and that purportedly contains as its active ingredient yohimbine or any derivative thereof.

B. Representing, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

(1) Use of the product relieves, cures, prevents, reverses or is an effective remedy for impotence;

- (2) Use of the product increases sexual drive, ability, desire or libido;
- (3) The product is an effective remedy for impotence or increases sexual drive, ability, desire or libido at any stated measure of efficacy; or
- (4) Any competent and reliable test or study establishes that the product relieves, cures, prevents or reverses impotence or increases sexual drive, ability, desire or libido,

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

C. Advertising, packaging, labeling, promoting, offering for sale, selling, or distributing any product that is represented as increasing sexual desire or improving sexual performance, unless the product is the subject of an approved new drug application for such purpose under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., provided that this subpart shall not limit the requirements of Part IV.A and B herein.

V.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of the Magic Wand or any other immersion-style kitchen mixer of similar size and construction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, that:

- A. The product can crush a whole, fresh pineapple in seconds.
- B. Skim milk whipped by the product can be used as mousse-like desserts and cake frosting.

VI.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and

its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product 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, in any manner, directly or by implication, regarding the efficacy or safety of any food, drug or device, as those terms are defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55, unless at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; provided, however, that any such representation for any food product that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to be substantiated by competent and reliable scientific evidence; provided further that any such representation for any over-the-counter drug product that is specifically permitted in labeling for such over-the-counter drug product in Final Regulations establishing conditions under which such product is safe and effective promulgated by the Food and Drug Administration under the Food, Drug and Cosmetic Act, will be deemed to be substantiated by competent and reliable scientific evidence.

B. Making any representation, in any manner, directly or by implication, regarding the performance, benefits, efficacy or safety of any product or service (other than a representation covered under Subpart VI.A above), unless at the time of making such representation respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

VII.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to disclose, clearly and prominently, a material connection, where one exists, between an endorser of any product or service and any respondent or respondents.

B. Representing, in any manner, directly or by implication, that any endorsement (as "endorsement" is defined in 16 C.F.R. § 255.0(b)) of the product or service represents the typical or ordinary experience of members of the public who use the product or service, unless such is the case.

C. Representing, in any manner, directly or by implication, by words, depictions or symbols, that such product or service has been endorsed by a person, group or organization that is an expert with respect to the endorsement message unless:

(1) The endorser is an existing person, group or organization whose qualifications give it the expertise that the endorser is represented as possessing with respect to the endorsement; and

(2) The endorsement is supported by an objective and valid evaluation or test using procedures generally accepted by experts in that science or profession to yield accurate and reliable results.

VIII.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with any advertisement depicting a demonstration, experiment or test, do forthwith cease and desist from making any representation, in any manner, directly or by implication, that any demonstration, picture, experiment or test depicted in the advertisement proves, demonstrates or confirms any material quality, feature or merit of any product, when such demonstration, picture, experiment or test does not prove, demonstrate or confirm the representation for any reason, including but not limited to:

A. The undisclosed use or substitution of a material mock-up or prop.

B. The undisclosed material alteration in a material characteristic of the advertised product or any other material prop or device depicted in the advertisement.

C. The use of a visual perspective or camera, film, audio or video technique that, in the context of the advertisement as a whole, materially misrepresents a material characteristic of the advertised product or any other material aspect of the demonstration.

IX.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., a corporation, its successors and assigns, and its officers, and respondent Michael S. Levey, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any partnership, corporation, subsidiary, division or other device, in connection with the advertising, packaging, labeling, promotion, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from creating, producing, selling or disseminating:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement.

B. Any commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, in a clear and prominent manner and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the commercial or other advertisement and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

"THE PROGRAM YOU ARE WATCHING IS A PAID
ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number or address for viewers to contact to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein.

X.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., its successors and assigns, and respondent

Michael S. Levey shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the Regional Director, Federal Trade Commission, 915 Second Avenue, Suite 2806, Seattle, Washington 98174, the sum of two hundred seventy-five thousand dollars (\$275,000). Respondents shall make this payment on or before the tenth day following the date of entry of this Order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of the EuroTrym Diet Patch, Foliplexx and/or Y-Bron. If the Federal Trade 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 disbursed, but shall have no right to contest the manner of distribution chosen by the Commission.

XI.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., shall, for a period of ten (10) years from the date of issuance of this Order, distribute a copy of this Order to each of its operating divisions, to each of respondent's present and future principals and officers, and to every present and future employee, agent and representative who performs discretionary functions in sales or advertising, and shall secure from each such person a signed statement acknowledging receipt of the copy of the Order.

XII.

IT IS FURTHER ORDERED that respondent Michael S. Levey shall, for a period of ten (10) years from the date of issuance of this Order, notify the Commission within thirty (30) days of the discontinuance of his present business or employment and of his affiliation with any new business or employment. Each notice of affiliation with any new business or employment shall include the respondent's new business address and telephone number, current home address, and a statement describing the nature of the business or employment and his duties and responsibilities.

XIII.

IT IS FURTHER ORDERED that respondent Positive Response Marketing, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation, such as a dissolution, the emergence of a successor corporation, the creation or dissolution of a subsidiary,

transfer of the business by assignment to another entity, or any other change in the corporation that may affect compliance obligations under the Order.

XIV.

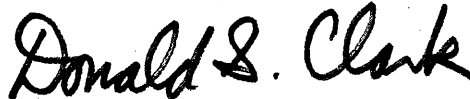
IT IS FURTHER ORDERED that respondents shall, for five (5) years after the date of the last dissemination of any representation covered by this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All materials that were relied upon in disseminating such representation.
- B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.
- C. All advertisements and promotional materials subject to this Order.

XV.

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after service of this Order upon them, and at such other times as the 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.

By the Commission, Commissioner Azcuenaga recused.



Donald S. Clark
Secretary

SEAL

ISSUED: September 23, 1993