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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, LL

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

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 placeti 0.0960.2800 TD0.0000 Tc0.

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

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