

FS-1 and Vancol, the respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for FS-1 and Vancol reflect the typical or ordinary experience of members of the public who have used the products. The complaint charges that the respondents failed to possess and rely upon a reasonable basis for these representations.

The proposed order contains provisions designed to remedy the alleged violations. The proposed order also provides for consumer redress of \$100,000. In the event that consumer redress is not feasible, the proposed order provides that the funds will be deposited in the United States Treasury.

Part I of the proposed order requires the respondents to cease from making any representation that any product or program provides any weight loss benefit, is an effective treatment for obesity, reduces hunger or suppresses the appetite, decreases the intestinal absorption of calories, reduces serum cholesterol, provides, can provide or helps provide any other health benefit or has any effect on cellulite or on the user's body measurements, unless they possess and rely upon competent and reliable scientific evidence that substantiates the representation. Part II(a) of the order prohibits the respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test or study. Part II (b) and (c), respectively, prohibit misrepresentation of the amount of fiber or any nutrient contained in a product and prohibit false claims that a product is a high source of fiber or any other nutrient. Part II(d) prohibits misrepresentation of the research activities or other activities of National Dietary Research or any other organization affiliated with the respondents.

Part III of the proposed order prohibits the respondents from disseminating any advertisement for any product or program that misrepresents, in any manner, that it is not a paid advertisement. Part IV of the order prohibits representations that testimonials represent the typical or ordinary experience of consumers who use the product, unless the representations are true and the respondents have competent and reliable evidence that substantiates such representations. An additional provision in this Part permits the respondents to use a truthful, non-typical testimonial, if they disclose clearly and prominently in close proximity to the testimonial what the generally expected performance would be in the depicted circumstances,

or 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.

Parts V and VI of the proposed order contain provisions permitting certain claims that are approved for labels by the FDA, under either the Nutrition Labeling and Education Act, a tentative final or final monograph, or any new drug application approved by the FDA.

Part VII of the proposed order requires the respondents to pay \$100,000 in consumer redress, or if that is impracticable, to pay the same amount to the U.S. Treasury.

Parts VIII, IX, X, XI and XII of the proposed order are compliance reporting provisions that require the respondents to: retain all records that would bear on the respondents' compliance with the order; to notify the Commission of any changes in the structure of the corporate respondents that may affect their compliance obligations under the order, or any changes in the business affiliations of the individual respondent relating to the advertising, offering for sale, sale or distribution of consumer products; to distribute copies of the order to the corporate respondents' operating divisions and to those persons responsible for the preparation and review of advertising material covered by the order; and to report to the Commission their compliance with the terms of the order.

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.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 95-12587 Filed 5-22-95; 8:45 am]

BILLING CODE 6750-01-M

[Dkt. 9271]

**B.A.T Industries p.l.c., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions**

**AGENCY:** Federal Trade Commission.

**ACTION:** Consent order.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order permits, among other things, B.A.T Industries and Brown & Williamson Tobacco Corporation to consummate the acquisition of American Tobacco Company, but

requires them to divest, within twelve months, six American Tobacco discount cigarette brands and to divest to the purchaser of these brands three American Tobacco full-revenue brands, as well as the American Tobacco manufacturing facility in Reidsville, N.C. If the required divestitures are not completed on time, the consent order permits the Commission to appoint a trustee to complete the transactions. In addition, the consent order requires the respondents, for ten years, to obtain Commission approval before acquiring any interest in a cigarette manufacturer or any assets used to manufacture or distribute cigarettes in the United States.

**DATES:** Complaint issued November 28, 1994. Order issued April 19, 1995.<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Joseph Krauss, FTC/H-324, Washington, D.C. 20580. (202) 326-2713.

**SUPPLEMENTARY INFORMATION:** On Wednesday, January 11, 1995, there was published in the **Federal Register**, 60 FR 2751, a proposed consent agreement with analysis in the Matter of B.A.T Industries p.l.c., et al., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of the order.

Comments were filed and considered by the Commission. The Commission has made its jurisdictional findings and entered an order to divest, as set forth in the proposed consent agreement, in disposition of this proceeding.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

**Donald S. Clark,**

*Secretary.*

[FR Doc. 95-12585 Filed 5-22-95; 8:45 am]

BILLING CODE 6750-01-M

[File No. 932-3234]

**Original Marketing Inc.; Proposed Consent Agreement with Analysis to Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the Florida-based

<sup>1</sup> Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580.

corporation, two of its officers and an affiliated advertising agency from making performance or benefit claims for any weight-loss or weight-control product or program or acupressure device unless the claims are true and substantiated by competent and reliable scientific evidence. Also, the proposed consent agreement would prohibit the respondents from misrepresenting any endorsement or testimonial for any weight-loss or weight-control product or program or any acupressure device as representing the typical or ordinary experience of users. In addition, the individual respondents would be required to post a \$300,000 performance bond, or to pay that amount into an escrow account, before marketing any weight-loss or weight-control product or program or any acupressure device.

**DATES:** Comments must be received on or before July 24, 1995.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Richard Cleland, FTC/S-4002, Washington, D.C. 20580, (202) 326-3088.

**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 following 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 of sixty (60) days. 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)).

In the matter of Original Marketing, Inc., d/b/a ACU-STOP 2000, and Franklin & Joseph, Inc., corporations, Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc., and Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc., File No. 932-3234.

#### **Agreement Containing Consent Order To Cease and Desist**

The Federal Trade Commission having initiated an investigation of certain acts and practices of Original Marketing, Inc. d/b/a Acu-Stop 2000 ("OMI") and Franklin & Joseph, Inc., corporations; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; and

Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc., hereinafter sometimes referred to as proposed respondents, and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between Original Marketing, Inc. d/b/a Acu-Stop 2000 and Franklin & Joseph, Inc., by their duly authorized officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; and Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc., and their attorney and counsel for the Federal Trade Commission that:

1. Proposed respondent OMI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 11570 Wiles Road, in the City of Pompano Beach, State of Florida.

Proposed respondent Franklin & Joseph, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 237 Mamaroneck Avenue, in the City of White Plains, State of New York.

Proposed respondent Barry A. Weiss is an officer and director of OMI. He formulates, directs and controls the policies, acts and practices of OMI. He resides at 22471 Vista Wood Way, Boca Raton, Florida.

Proposed respondent Roger Franklin is an officer and director of OMI and Franklin & Joseph, Inc. He formulates, directs and controls the acts and practices of said corporations. He resides at 33 Maplemoor Lane, White Plains, New York.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint.

3. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be

placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents of facts, other than jurisdictional facts, or of violations of law as alleged in the draft of complaint.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' addresses as stated in this agreement shall constitute service. Proposed respondents waive any right they might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

#### **Order**

For the purposes of this Order:

1. "Component 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. "Acupressure device" shall mean any product, program, or service that is intended to function by means of the principles of acupressure.

#### I

*It is ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; 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 the AcuStop 2000 or any other acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that

a. Such product causes significant weight loss;

B. Such product causes significant weight loss without the need to diet or exercise;

C. Such product controls appetite or eliminates a person's craving for food; or

D. Such product is scientifically proven to cause significant weight loss or control appetite.

#### II

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; 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 weight-loss

or weight-control product or program or any acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, regarding the performance, benefits, efficacy, or safety of such product, program, or device unless such representation is true and unless, at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

#### III

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; 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 weight-loss or weight-control product or program or any acupressure device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that any endorsement (as "endorsement" is defined in 16 C.F.R. § 255.0(b)) of the product, program, or device represents the typical or ordinary experience of members of the public who use the product, program, or device unless this is the case.

#### IV

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc.; 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 weight-loss or weight-control product or program or any acupressure device in or affecting commerce, as "commerce" is defined in

the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the contents, validity, results, conclusions, or interpretations of any test or study.

#### V

*It is further ordered* That respondents, and their successors and assigns, are jointly and severally liable for, and shall pay refunds to eligible consumers of Acu-Stop 2000 as provided herein. "Eligible consumer" shall mean any person who purchases, or has purchased, an Acu-Stop 2000 from respondents; who returns, or has returned, the device to respondents requesting a refund prior to ninety (90) days after the date this Order becomes final; and who has not previously received a refund. "Eligible consumer" shall not include persons who request a credit from a credit card issuer and who do not otherwise request a credit or refund from respondents. Respondents shall provide to the Commission all information necessary to identify eligible consumers and to verify their eligibility.

A. Not later than the date this Order becomes final, respondents shall deposit into an escrow account, to be established by the Commission for the purpose of receiving payments due under the provisions of this Order ("escrow account"), the sum of fifty thousand dollars (\$50,000.00). These funds, together with accrued interest, less any amount necessary to pay the costs of administering the escrow account and refund program provided herein, shall be used by the Commission or its representative to pay refunds to those eligible consumers who purchased an Acu-Stop 2000 from respondents prior to January 1, 1995. Any funds remaining in the escrow account after all refunds to consumers under this subparagraph have been paid shall be paid to the United States Treasury.

At any time after this Order becomes final, the Commission may direct the escrow agent to transfer funds from the escrow account, including accrued interest, to the Commission to be distributed as herein provided. 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. The Commission, or its representative, shall, in its sole discretion, select the escrow agent. Costs associated with the administration of the escrow account and refund program provided herein, if any, shall be paid from funds in the escrow account.

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

B. Respondents shall pay from their own funds refunds to all eligible consumers who are not paid from the escrow account provided herein. This requirement shall include:

(1) all refund requests from eligible consumers who purchased an Acu-Stop 2000 after January 1, 1995, and

(2) all refund requests under subparagraph A that exceed the amount available in the escrow account.

All refunds required in subparagraph B.1 shall be paid within thirty (30) days after the receipt of the request, or within thirty (30) days after the date this Order becomes final, whichever is later. All refunds required in subparagraph B.2 shall be paid within thirty (30) days after notification to respondents that the funds available in the escrow account to pay refunds have been depleted.

#### VI

*It is further ordered* That for three (3) years after this Order becomes final, respondents, and their successors and assigns, shall maintain documents and records demonstrating the manner and form of respondents' compliance with Part V of this Order, and upon request make available to the Commission, at a place it designates for inspection and copying, copies of:

A. All documents and records evidencing the refunds respondents paid, or charge card credits issued, to eligible consumers, as that term is defined in Part V;

B. A list containing the name, mailing address, and purchase price for each eligible consumer who requested a refund;

C. The name and last known address of each consumer who requested a refund but was refused and the reason for each refusal to refund; and

D. Copies of all correspondence and other communications to, or from, any consumers regarding a refund.

#### VII

*It is further ordered* the respondents Barry A. Weiss, Roger Franklin, and their agents, representatives, and employees, directly or through any

partnership, corporation, subsidiary, division, joint venture or other device, do forthwith cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss or weight-control product or program or any acupuncture device to the general public, unless, prior to advertising, promoting, offering for sale, selling, or distributing to the general public any such product, respondents Weiss and Franklin first obtain a performance bond in the principal sum of three hundred thousand dollars (\$300,000). Said bond shall be conditioned upon compliance by respondents Weiss and Franklin with the provisions of the Federal Trade Commission Act, and with the provisions of this Order. The bond shall be deemed continuous and remain in full force and effect as long as respondents Weiss and Franklin continue to advertise, promote, offer for sale, sell, or distribute any weight-loss or weight-control product or program or any acupuncture device, directly or indirectly, to the general public, and for at least five (5) years after they have ceased any such activity. The bond shall cite this Order as the subject matter of the bond and provide surety against respondents' failure to pay consumer redress or disgorgement as set forth herein. Such performance bond shall be an influence agreement providing surety issued by a surety company that is admitted to do business in a state in which respondents Weiss and Franklin are doing business and that holds a Federal Certificate of Authority as Acceptable Surety on Federal Bonding and Reinsuring.

Respondents Weiss and Franklin shall provide a copy of such performance bond to the associate director of the Federal Trade Commission's Division of Enforcement, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580, prior to the commencement of any business for which such bond is required.

*Provided, however,* in lieu of a performance bond, respondents Weiss and Franklin may establish and fund, pursuant to the terms set forth herein, an escrow account in the principal sum of three hundred thousand dollars (\$300,000) in cash, or such other assets of equivalent value, which the Commission, or its representative, in its sole discretion may approve.

Respondents Weiss and Franklin shall maintain such amount in that account for as long as they continue to advertise, promote, offer for sale, sell, or distribute any weight-loss or weight-control product or program or any acupuncture device, directly or indirectly, to the general public, and for at least five (5)

years after they have ceased any such activity. Respondents Weiss and Franklin shall pay all costs associated with the creation, funding, operation, and administration of the escrow account. The Commission, or its representative, shall, in its sole discretion, select the escrow agent. The escrow agreement shall be in substantially the form attached to this Order as Exhibit A.

The performance bond or escrow agreement shall provide that the surety company or escrow agent, within thirty (30) days following receipt of notice that a final judgment or an order of the Commission against respondent Weiss and/or respondent Franklin for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that Weiss and/or Franklin has violated the terms of this Order or the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, shall pay to the Commission so much of the performance bond or funds of the escrow account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the surety company or escrow agent, *provided that*, if respondents have agreed to the entry of a court order or an order of the Commission, a specific finding that respondents violated the terms of this Order or the provisions of the Federal Trade Commission Act shall not be necessary. A copy of the notice provided for herein shall be mailed to respondent Weiss and/or respondent Franklin at their last known address.

Respondents Weiss and Franklin may not disclose the existence of the performance bond or escrow account to any consumer, or other purchaser or prospective purchaser, to whom a covered product, program, or device is advertised, promoted, offered for sale, sold, or distributed, without also disclosing at the same time and in a like manner that the performance bond or escrow account is required by order of the Federal Trade Commission in settlement of changes that respondents engaged in false and misleading representations.

#### VIII

*It is further ordered* That for five (5) years after the last date of dissemination of any representation covered by this Order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal

Trade Commission or its staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

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.

#### IX

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., shall:

A. Within thirty (30) days after service of this Order, provide a copy of this Order to each of respondents' current principals, officers, directors and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order; and

B. For a period of five (5) years from the date of issuance of this Order, provide a copy of this Order to each of respondents' future principals, officers, directors, and managers, and to all personnel, agents, and representatives having sales, advertising, or policy responsibility with respect to the subject matter of this Order who are associated with respondents or any subsidiary, successor, or assign, within three (3) days after the person assumes his or her position.

#### X

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or affiliates, the planned filing of a bankruptcy petition, or any other corporate change that may affect compliance obligations arising out of this Order.

#### XI

*It is further ordered* That respondents, Barry A. Weiss and Roger Franklin, shall, for a period of five (5) 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 respondents' 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.

#### XII

*It is further ordered* That respondents, Original Marketing, Inc. and Franklin & Joseph, Inc., corporations, their successors and assigns, and their officers; Barry A. Weiss, individually and as an officer and director of Original Marketing, Inc.; and Roger Franklin, individually and as an officer and director of Original Marketing, Inc. and Franklin & Joseph, Inc., shall, within sixty (60) days after 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.

#### Exhibit A

This Escrow Agreement, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_ (hereinafter "\_\_\_\_\_"); and the Federal Trade Commission, an agency of the Government of the United States of America, by and through \_\_\_\_\_ (hereinafter "FTC"); and \_\_\_\_\_ (hereinafter "Escrow Agent");

Witnesseth:

Whereas, the FTC and \_\_\_\_\_ have entered into an Agreement Containing Consent Order to Cease and Desist (hereinafter "Consent Order"), a copy of which is attached hereto as Exhibit A; and

Whereas, the Consent Order requires that \_\_\_\_\_ cease and desist from advertising, promoting, offering for sale, selling, or distributing any weight-loss or weight-control product or program or any acupuncture device to the general public unless \_\_\_\_\_ first establishes and maintains an escrow account, under the terms and conditions specified in the Consent Order;

Now, Wherefore, in accordance with the terms of the Consent Order, which are incorporated herein by reference, the parties covenant and agree as follows:

1. \_\_\_\_\_ shall establish an Escrow Account at \_\_\_\_\_, to be styled \_\_\_\_\_ Escrow Account, \_\_\_\_\_, Escrow Agent. \_\_\_\_\_ shall deposit into the Escrow Account an initial sum of at least three hundred thousand dollars (\$300,000.00) in cash, or other approved assets of equivalent value. Thereafter, \_\_\_\_\_ shall deposit such additional amounts into the Escrow Account as are

necessary to maintain the total amount in the Escrow Account at three hundred thousand dollars (\$300,000.00).

2. The Escrow Agent shall be the sole signatory on the Escrow Account and access to the funds held in that account shall be solely through the Escrow Agent. It is understood by the parties to this Escrow Agreement that upon the signing of this Agreement, \_\_\_\_\_ relinquishes to the Escrow Agent, all legal title to the escrow funds, except as to such amounts in the Escrow Account that are in excess of three hundred thousand dollars (\$300,000.00). Until and unless the Escrow Account is terminated as provided for herein, \_\_\_\_\_ agrees to make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise; and, in the event of bankruptcy, \_\_\_\_\_ acknowledges that the funds are not part of \_\_\_\_\_'s estate, nor does the estate have any claim or interest therein.

3. The Escrow Agent and the parties hereto agree that the escrow funds shall be held only in accordance with the terms of the Consent Order and the Escrow Agreement. \_\_\_\_\_ shall pay all costs associated with the creation, funding, operation, and administration of the Escrow Account as they become due. In the event that \_\_\_\_\_ fails to pay such costs as they become due, the Escrow Agent shall pay the costs from the interest earned on the escrow funds.

4. The Escrow Agent, within thirty days following receipt of notice that a final judgment or an order of the Commission against \_\_\_\_\_ for consumer redress or disgorgement in an action brought under the provisions of the Federal Trade Commission Act has been entered, or, in the case of an order of the Commission, has become final, finding that \_\_\_\_\_ has violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act, and determining the amount of consumer redress or disgorgement to be paid, which notice shall also be mailed to \_\_\_\_\_ at his last known address, shall pay to the Commission so much of the funds of the Escrow Account as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the Escrow Agent, *provided that*, If \_\_\_\_\_ has agreed to the entry of a court order or an order of the Commission, a specific finding that \_\_\_\_\_ violated the terms of the Consent Order or the provisions of the Federal Trade Commission Act shall not be necessary. The Escrow Agent shall have the power to convert to cash so

much of the Escrow Account assets as are necessary to satisfy the obligations of the judgment or order.

5. The Escrow Account shall continue until at least five years after \_\_\_\_\_ last advertises, promotes, offers for sale, sells, or distributes any product specified in the Consent Order, at which time, if there are no pending FTC investigations, legal or administrative actions by the FTC against \_\_\_\_\_, or unsatisfied obligations pursuant to a judgment or order described in paragraph 4 herein, for which a claim could be made against the escrow funds under the terms of the Consent Order, the FTC shall, upon \_\_\_\_\_'s request, instruct the Escrow Agent to terminate the Escrow Account and return the balance of the Escrow Account to \_\_\_\_\_. At such time, the Escrow Agent shall be fully and completely released from its agency as herein described. The legal title to the escrow funds shall vest in \_\_\_\_\_ at such time as the Escrow Agent, pursuant to instructions from the FTC, returns the funds to \_\_\_\_\_.

Witness the signatures of the parties, the day and year first above written.

Date:

Signatures

#### **Analysis of Proposed Consent Order to Aid Public Comment**

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from proposed respondents Original Marketing, Inc. d/b/a Acu-Stop 2000; Franklin & Joseph, Inc.; Barry A. Weiss; and Roger Franklin.

The proposed consent order has been placed on the public record for sixty (60) days for reception 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 the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns advertising related to the sale of an ear-mold acupressure device, marketed under the name Acu-Stop 2000, which nests in the ear. The Commission's Complaint charges that proposed respondents Original Marketing, Inc. d/b/a Acu-Stop 2000; Franklin & Joseph, Inc.; Barry A. Weiss; and Roger Franklin falsely represented that the Acu-Stop 2000: (1) Causes significant weight loss; (2) causes significant weight loss without the need to diet or exercise; and (3)

controls appetite or eliminates a person's craving for food.

The Complaint also alleges that proposed respondents falsely and misleadingly represented that they possessed and relied upon a reasonable basis when they made those claims. The Complaint further alleges that proposed respondents falsely represented that the Acu-Stop 2000 is scientifically proven to cause significant weight loss and control appetite. Finally, the Complaint alleges that proposed respondents falsely represented that testimonials from consumers appearing in advertisements for the Acu-Stop 2000 reflect the typical or ordinary experience of members of the public who have used the device.

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

Part I of the proposed order prohibits proposed respondents from representing that the Acu-Stop 2000 or any other acupressure device: (1) Causes significant weight loss; (2) causes significant weight loss without the need to diet or exercise; (3) controls appetite or eliminates a person's craving for food; or (4) is scientifically proven to cause significant weight loss and control appetite. The order defines "acupressure device" as "any product, program, or service that is intended to function by means of the principles of acupressure." Part II requires proposed respondents to possess competent and reliable scientific evidence before making representations regarding the performance, benefits, efficacy, or safety of any weight-loss or weight-control product or program or any acupressure device. Part III prohibits proposed respondents from falsely claiming that endorsements or testimonials for any weight-loss or weight-control product or program or any acupressure device represent the typical or ordinary experience of members of the public who use the product, program, or device. Part IV prohibits proposed respondents from misrepresenting the results of tests or studies for any weight-loss or weight-control product or program or any acupressure device.

Part V holds proposed respondents jointly and severally liable for, and requires them to pay, refunds to all purchasers of the Acu-Stop 2000 who return or have returned the device for a refund. Part V.A. requires respondents to deposit \$50,000 into an escrow account for payment of refunds to eligible consumers who purchased the device prior to January 1, 1995, and who previously have requested a refund or

do so within ninety days after the proposed order becomes final. Part V.B. requires proposed respondents to pay, out of their own funds, all refund requests from eligible consumers that exceed \$50,000 and all such requests for purchases made after January 1, 1995. Together, these two provisions require proposed respondents to pay all existing refund requests and future requests made up to ninety days after the proposed order becomes final. Part VI requires that proposed respondents maintain records demonstrating the manner and form of their compliance with the requirement that they make refunds.

Part VII requires that proposed respondents Weiss and Franklin post a bond or fund an escrow account in the amount of \$300,000 prior to the future marketing any weight-loss or weight-control product or program or any acupressure device.

Part VIII requires proposed respondents to maintain, for five (5) years, all materials that support, contradict, qualify, or call into question any representations they make which are covered by the proposed order. Part IX requires proposed respondents Original Marketing, Inc. and Franklin & Joseph, Inc. to distribute a copy of the order to current and future principals, officers, directors, and managers, as well as to any employees having sales, advertising, or policy responsibility with respect to the subject matter of the order. Under Part X of the proposed order, proposed respondents Original Marketing, Inc. and Franklin & Joseph, Inc. shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate structures that may affect compliance with the order's obligations. Part XI requires that proposed respondents Weiss and Franklin, for a period of five (5) years, notify the Commission of any change in their business or employment. Part XII obliges proposed respondents to file compliance reports with the Commission.

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

**Donald S. Clark,**

*Secretary.*

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