

Section 5), 15 U.S.C. § 45).

4. Defendants' activities are "in or affecting commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
5. In its Complaint, the United States charged that Defendants violated the Federal Trade Commission's ("FTC" or "Commission") Decision and Order in FTC Docket No. C-3765 (1997) ("1997 Commission Order").
6. Defendants waive any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order, and agree to bear their own costs and attorneys' fees.
7. Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendants admit the facts necessary to establish jurisdiction.
8. The parties waive all rights to appeal or otherwise challenge or contest the validity of this Order.

I. CIVIL PENALTY JUDGMENT

IT IS ORDERED that judgment in the amount of three million dollars (\$3,000,000) is hereby entered against Defendants as a civil penalty pursuant to Section 5) of the FTC Act, 15 U.S.C. § 45).

- A. Within thirty (30) days of entry of this Order, Defendants shall transfer a civil penalty payment of two million and nine hundred thousand dollars (\$2,900,000) in the form of an electronic fund transfer in accordance with the procedures specified by a representative of the Commission. Defendants shall electronically

transfer the remaining civil penalty payment of one hundred thousand dollars (\$100,000) within forty five (45) days of entry of this Order.

- B. In the event of any default in payment of the entire unpaid amount, together with interest, as computed pursuant to 28 U.S.C. 1961 from the date of default to the date of payment, shall immediately become due and payable.
- C. Defendants relinquish all dominion, control and title to the funds paid to the fullest extent permitted by law. Defendants shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.
- D. Defendants agree that the facts as alleged in the Complaint filed in this action shall be taken as true, without further proof in any subsequent civil litigation filed by, or on behalf of, the FTC to enforce its rights to any payment or money judgment pursuant to this Order.

II. PROHIBITION AGAINST VIOLATING NEW FTC ORDER

IT IS FURTHER ORDERED that Defendants, their successors and assigns, and their officers, agents, representatives, and employees, and persons in active concert or participation with any one or more of them who receive actual notice of this Order by personal service or otherwise, are hereby permanently enjoined from violating, directly or through any corporation, subsidiary, division, or other device, any provision of the new FTC Order issued pursuant to Section III and set forth herein.

III. NEW FTC ORDER

IT IS FURTHER ORDERED that Defendants, their successors and assigns, shall consent to: (i) reopening of the proceeding in FTC Docket No. C-3765) waiver of their rights under the show cause procedures set forth in Section 3.72(b) of the FTC Rules of Practice, 16

C.F.R. § 3.72(b); (iii) vacating the 1997 Commission Order; and (iv) issuing a new FTC Order providing as follows:

Defendants having consented to vacating the order issued in Docket No. C-3765 in 1997 as to them and to issuing a new order ~~below~~, the Commission hereby issues the following order:

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. "Clearly and prominently" means
 - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 - B. In communications made through 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 communication. In any communication presented solely through visual or audio means the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or

online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and location, for an ordinary consumer to notice, read and comprehend it; and

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
2. "Close proximity" means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
 3. "Commerce" shall mean as defined in Section 4 of the Federal Trade

scientific evidence, to substantiate that the representation is true. Such testing shall be randomized and be conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and documents generally accepted by experts in the relevant field as relevant to an assessment of such testing, as set forth in Part III of this Order, must be available for inspection and production to the Commission.

5. "Endorsement" or "testimonial" shall mean as defined in 16 C.F.R. § 255.0(b)-(c).
6. "Product" shall mean any exercise equipment.
7. "Reliably Reported," for a human clinical test or study ("test"), means a report of the test has been published in a peer-reviewed journal, and such published report provides sufficient

an expert in the relevant field

ness, Inc. ("ICON"), HF Holdings, Inc. ("HF Holdings"), IHF

ldings, Inc. ("IHF Holdings"), and IHF Capital, Inc. ("IHF

pital"), their successors and assigns and their officers, agents,

representatives, and employees. ICON is a wholly owned subsidiary

HF Holdings.

Part I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. About the relative, comparative, or absolute;
 - 1. rate at which users burn calories, or the number of calories users burn, through use of such Product, or
 - 2. weight, body inches, or clothing size lost through use of such Product;
 - 3. amount of fat or fat calories users burn through use of such Product; or
- B. About the benefits, performance, efficacy of such Product with respect to calorie burning, fat burning, weight loss, body inches lost, or clothing size reductions,

unless at the time the representation is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Part II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale,

or distribution of any Product or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the Product represents the typical or ordinary experience of members of the public who use the Product, unless, at the time it is made:

- B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;
- C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;
- D. All documents referring or relating to any statistical analysis of any test data, including, but not limited to, any pretest analysis or between-group analysis performed on any test data; and
- E. All documents referring or relating to the sponsorship of the test, including all communications and contracts, between any sponsor and the test's researchers.

Provided however, the preceding preservation requirement shall not apply to a Reliably Reported test, unless the test was conducted, controlled, or sponsored, in whole or in part (1) by any Respondent, or any person or entity affiliated with or acting on behalf of any Respondent, including officers, agents, representatives or employees, or by any other person or entity in active concert or participation with any Respondent ("Respondents' affiliates"), or (2) by the supplier or manufacturer of the Product at issue.

For any test conducted, controlled, sponsored, in whole or in part, by Respondents, Respondents establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures shall be documented in writing and shall contain administrative, technical, and physical safeguards appropriate to Respondents' size and complexity, nature and scope of Respondents' activities, and the sensitivity of the personal information collected from or about the participants.

Part IV.

This Order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the Department of Justice or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that a Respondent did not violate any provision of the Order, and the

dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had 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 su

V. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

- A. One hundred eighty (180) days after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury. Each defendant must: (a) designate at least one telephone number and an email, physical, and postal address as points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the products and services offered, the means of advertising, marketing, and sales; (d) describe in detail whether and how Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.
- B. For 20 years following entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following: (a) any designated point of contact; or (b) the structure of any entity that Defendant has any ownership interest in or directly or indirectly controls that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

- C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or any similar proceeding by or against such Defendant within 14 days of its filing.
- D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s name, title (if applicable), and signature.
- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, DC 20580. The subject line must begin: FTC v. ICON Health and Fitness, et al., [insert civil docket number].

VI. RECORDKEEPING

- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's name, addresses, and telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;
- C. Complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;
- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and
- E. A copy of each advertisement or other marketing material.

VII. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring compliance with this

Order:

- A. Within 14 days of receipt of a written request from a representative of the Commission, Defendant(s) must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents, for inspection and copying. TPTs, foe0.0004 Tc -.1
- B. aittsfcoancrning this(Order, the)TJ 0.0005 Tc -0.0005 Tw-15.55 0 Td [(C

- C. The Commission may use all other lawful means, including posing, through its representatives, as consumers, suppliers, or other individuals or entities, to

SO STIPULATED AND AGREED:


FOR PLAINTIFFS
UNITED STATES OF AMERICA:


JOYCE R. BRANDA
Acting Assistant Attorney General

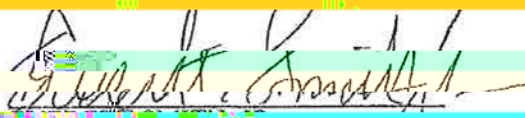
JONATHAN OLIN
Deputy Assistant Attorney General
CIVIL DIVISION

MICHAEL S. BLUME
Director


AND
Assistant


CHRISTOPHER WILEY
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7010
(202) 719-7010 (fax)


JAMES W. HARLOW
Trial Attorney
Consumer Protection Branch
450 Fifth Street, NW
Room 600 - South
Washington, DC 20001
(202) 514-6786
(202) 514-0427 (fax)
James.w.harlow@usdoj.gov


on behalf of
HF Holdings, Inc., IHF
HF Capital, Inc.

FEDERAL TRADE COMMISSION:


GREGORY J. MADDEN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Mail Drop CC-0529
Washington, DC 20580
(202) 326-2426
(202) 320-3191 (fax)
gmadden@ftc.gov