

Complaint

90 F.T.C.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9047. Complaint, July 29, 1975 — Final Order, Dec. 20, 1977*

This order, among other things, requires a St. Paul, Minn. distributor of non-prescription drugs, its Chicago, Ill. advertising agency, and a Seattle, Wash. drug store chain to cease making unsubstantiated claims or misrepresenting that products contain a unique ingredient, or that users of weight control products can achieve weight loss without restricting their caloric intake or limiting their choice of foods. Further, the firms are required to include prescribed disclosure statements in promotional materials for products containing certain ingredients, and to recall all advertising data disseminated during the past two years for X-11 tablets.

Appearances

For the Commission: *Dean A. Fournier* and *William H. Patton*.
For the respondents: *Albert A. Carretta*, Washington, D.C. and *Jerold W. Dorfman*, New York City for Porter & Dietsch, Inc., et al. and *Michael Rayton*, Seattle, Washington for Pay'n Save Corporation.

COMPLAINT

The Federal Trade Commission, having reason to believe that Porter & Dietsch, Inc., a corporation, and William H. Fraser, individually and as an officer of said corporation, and Kelly Ketting Furth, Inc., a corporation, and Joseph Furth, individually and as an officer of said corporation, and Pay'n Save Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Porter & Dietsch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 2453 University Ave., St. Paul, Minnesota. Respondent William H. Fraser is president of said corporation. He formulates, directs and controls the policies, acts and [2] practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Kelly Ketting Furth, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 400 North Michigan Ave., Chicago, Illinois. Respondent Joseph Furth is an officer of said corporation and formulates, directs and controls certain acts and practices of this corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Pay'n Save Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1511 Sixth Ave., Seattle, Washington.

PAR. 2. For purposes of this complaint, the term "commerce" shall mean commerce as defined in the Federal Trade Commission Act.

PAR. 3. Respondents Porter & Dietsch, Inc. and William H. Fraser are now and have been engaged in the packaging, advertising, offering for sale and sale of various products at wholesale and retail levels. Among such products is a non-prescription preparation which comes within the classification of "drug" (as that term is defined in the Federal Trade Commission Act) and which has the following designation, directions for use and active ingredients:

Designation: "X-11 Tablets"

Dosage:

One tablet three times daily, one-half hour before each meal.

Active Ingredients:

Vitamin A	1388.0 U.S.P. units
Vitamin B	0.5 mg.
Vitamin B ₂	0.5 mg.
Vitamin B ₆	1.0 mg.
Vitamin C	15.0 mg.
Calcium Pantothenate	1.0 mg.
[3]Niacinamide	5.0 mg.
Vitamin E	5.0 int. units
Vitamin B ₁₂	0.5 mg.
Phenylpropanolamine Hydrochloride	25.0 mg.
Methylcellulose	25.0 mg.
Caffeine	25.0 mg.

PAR. 4. Respondent Kelly Ketting Furth, Inc. is now and has been the advertising agency of Porter & Dietsch, Inc. Respondent Joseph Furth is now and has been the account executive in such agency responsible for advertising of products marketed by Porter & Dietsch, Inc. As such, these respondents have prepared and placed for publication advertising material, including but not limited to the advertising referred to herein, to promote the sale of the aforesaid preparation and other products. In the course and conduct of their business, and at all times mentioned herein, these respondents have been and are now in substantial competition, in or affecting commerce, with other corporations, firms and individuals in the advertising business.

PAR. 5. Respondent Pay'n Save Corporation operates a chain of drug and sundries stores in Washington, Oregon, Alaska, California, Hawaii, and Canada. Said respondent is now and has been engaged in the advertising, offering for sale and sale of various products including the aforesaid preparation.

PAR. 6. In the course and conduct of their business, respondents Porter & Dietsch, Inc. and William H. Fraser ship, distribute and cause to be shipped and distributed the aforesaid preparation from their place of business in the State of Minnesota to retail stores and purchasers located in various other States of the United States.

In the course and conduct of its business, respondent Pay'n Save Corporation operates retail stores and storage warehouses in several States of the United States. Said respondent causes the aforesaid preparation to be shipped from Minnesota to storage points and Pay'n Save stores located in various other states, for sale to the general public.

In the further course and conduct of their businesses, and using means and mechanisms of commerce, these respondents and respondents Kelly Ketting Furth, Inc. and Joseph Furth cause advertisements for said preparation to be published in media of interstate circulation. [4]

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in the aforesaid preparation and advertisements, in or affecting commerce.

PAR. 7. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparation by the United States mail and by various means in or having an effect upon commerce, including but not limited to advertisements inserted in newspapers, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated

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and caused the dissemination of advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in or having an effect upon commerce.

PAR. 8. Typical of the statements and representations in said advertisements, but not all inclusive thereof, are the following:

Eat well . . . and lose that fat! - without ever missing a meal . . .

* * * * *

You eat 3 satisfying balanced meals a day - plus snacks. You eat what you want . . .

* * * * *

You do not deny yourself.

* * * * *

. . . Laboratory Science has perfected a Tiny Tablet for EASY REDUCING . . . clinic-tested ingredients . . .

* * * * *

I lost 80 pounds! When I started on the X-11 Reducing Plan, I weighed 205 pounds. Now my weight is down to 125 pounds. I enjoy wearing dresses sizes 11 or 12's, rather than size 20 1/2 . . .

* * * * *

Part of the secret of this method is a unique ingredient . . . which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies.

USED TO WEIGH 160 LBS. NOW I'M DOWN TO 105



says Mrs. George Stowe
Canon, Georgia

"I started on the X-11 Plan and started losing weight almost right away. I am so grateful . . . I recommend the X-11 Plan to everyone I see. It's wonderful."

I LOST OVER 40 LBS.



says Mrs. Beverly Tollier
Chula Vista, California

"I used to weigh over 170 lbs. Now I'm less than 125 lbs. and going down. I have recommended your plan to a lot of people because they just couldn't believe the results."

Mrs. George Stowe says:
"I am 53 years old and here are my before and after measurements . . ."

	WAS	AM
WEIGHT	160 lbs.	105 lbs.
HEIGHT	5-2 1/2 in.	5-2 1/2 in.
DRESS SIZE	18	8
BUST	38 in.	34 in.
WAIST	29 in.	24 in.

...and I LOST OVER 40 LBS., TOO

says Mrs. Ken Schmidt
Norfolk, Nebraska

"When I started on the X-11 Reducing Plan, I weighed 180 lbs. Now I'm under 125. I enjoy wearing dresses sizes 11 - 12's rather than 20's. It's good to know there's a way to lose ugly fat and keep my weight at a level I dreamed of holding."

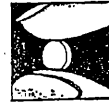


FROM GEORGIA TO NEBRASKA TO CALIFORNIA
AMERICAN WOMEN HAVE FOUND A WAY
THAT REALLY HELPS OFF THAT UGLY FAT

No Starvation Dieting - No Strenuous Exercise RESULTS ARE GUARANTEED - OR MONEY BACK

Here, at last, is that wonderful kind of plan that offers you a way to help get rid of 5, 10, 25 or more pounds of unsightly fat. Not by suffering thru starvation dieting hunger . . . not by sticking to boring reducing diets . . . not by extra-tiring exercises . . . not by any of the humdrum methods you have known and given up.

Now . . . Lose Ugly Fat . . . and don't go to bed hungry. The X-11 Plan is not a crash or starvation diet. That's because X-11 is the proved and sound method, used from one end of America to the other, to curb the appetite and still eat 3 satisfying, sensible meals a day.



Laboratory Science has perfected a low-calorie tablet with a special taste so you eat 3 satisfying meals a day. See "Lose Ugly Fat" booklet.

EAT WELL ...and lose that Fat.



42 Tablets
3.00
105 Tablets
5.00
OR MAIL COUPON:

You will eat, satisfying meals and snacks, but you won't be the prisoner of the overeating habit. If you aren't 100% delighted, return your first package for an immediate refund — no questions asked.

PAY 'n SAVE
AVAILABLE AT ALL STORES

Mail to: PAY 'n SAVE DRUGS — Dept. AD,
1811-8th AVE., SEATTLE, WASH. 98101
Please send me Packages of X-11
 42 Tablets at \$3.00 (plus 16¢ Sales Tax)
 105 Tablets at \$5.00 (plus 26¢ Sales Tax)

PLEASE PRINT YOUR NAME AND ADDRESS BELOW:

Name _____
Address _____
City _____ State _____ Zip _____

Cash enclosed Money Order Check enclosed
GUARANTEE — You must be 100% delighted with results of your first package or your money will be refunded — no questions asked.

[6] PAR. 9. Through the use of said advertisements and others similar thereto but not specifically set out herein, respondents have represented and are now representing, directly or by implication, that:

A. Users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice.

B. Respondents have a reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet contains a unique ingredient.

PAR. 10. In truth and in fact:

A. Users of X-11 tablets cannot lose weight without restricting their accustomed caloric intake nor while they continue to eat the foods of their choice. In fact, each X-11 package includes a diet highly restricted as to calories and choice of foods, which must be adhered to if weight loss is to be achieved.

B. Respondents have no reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight.

C. The X-11 tablet does not contain any unique ingredient.

PAR. 11. Several of the advertisements described and alluded to in Paragraph Eight hereof include testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the aforesaid preparation, when such stated results do not reflect the typical or ordinary experience of consumers with said preparation under circumstances similar to those depicted in the advertisements. These advertisements do not disclose or identify such typical or ordinary experience in any way. Thus, respondents have failed to disclose in their advertising a material fact which, if known to consumers, would be likely to affect their consideration of whether or not to purchase said preparation. [7]

PAR. 12. Respondents have marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use said preparation only as directed by a physician. Inasmuch as a substantial number of overweight persons are suffering from one or more of said physical conditions, respondents have failed to disclose in their advertising a material fact which, if known to such persons, would be likely to affect their consideration of whether or not to purchase said preparation.

PAR. 13. Respondents have marketed and advertised the "X-11 Reducing Plan" without disclosing in the advertising thereof that a

highly restricted caloric diet is an integral part of said plan. Such fact, if known to consumers, would be likely to affect their consideration of whether or not to purchase said product. Thus, respondents have failed to disclose a material fact in their advertising.

PAR. 14. The advertisements referred to in Paragraphs Eight, Eleven, Twelve and Thirteen were and are misleading in material respects, as alleged in Paragraphs Ten, Eleven, Twelve and Thirteen, and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, and the statements, representations and omissions described in Paragraphs Nine, Eleven, Twelve and Thirteen were and are misleading, deceptive and unfair acts or practices.

PAR. 15. The use by respondents of the aforesaid misleading, deceptive and unfair statements, representations, acts and practices, and the dissemination of the aforesaid "false advertisements," have had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of X-11 tablets by reason of said erroneous and mistaken belief.

PAR. 16. In the course and conduct of their businesses, and at all times mentioned herein, respondents Porter & Dietsch, Inc., William H. Fraser and Pay'n Save Corporation have been and now are in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of products and services for weight reduction. [8]

PAR. 17. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER MAYO J. THOMPSON

JULY 29, 1975

I share the majority's view that the principal distributor of an alleged weight-reducing pill ought to be able to substantiate the claims he makes for it and that, if it is in fact dangerous for people with heart disease, diabetes, high blood pressure, and other diseases

to take it, he ought to say so in his ads. But I cannot agree with my Brethren that a *retailer* with no involvement in the preparation of the ads in question should be subjected to liability here.

The advertisements in question are prepared by the distributor of these pills, Porter & Dietsch,¹ with the actual copy being written by its president and controlling owner, Mr. William H. Fraser. Advertising mats are prepared and sent out to the major regional and local drug chains, including Pay'n Save Corporation, a Seattle-based drug retailer with some 90 stores located in five (5) states. The distributor pays for approximately 90 percent of the cost of these ads, with the cooperating retailer paying the remaining 10 percent. Since the messages are directed to the ultimate consumer and generally exhort him to buy from the drug chain, it is the latter's name rather than that of the distributor which appears in the ads.

Why pick on Pay'n Save? Other drug chains have been similarly "involved," including Fred Meyer (Portland); Western Drug (Montana); Pay Less (Tacoma); Skaggs and Grand Central Stores (Boise); Tiffany [2] Drugstores (Eugene, Oregon); Drug Fair (Washington, D.C.); and Walgreens (Chicago). The staff explains the selection of Pay'n Save by simply noting that it is the largest of the participating chains in the Pacific Northwest. (The investigation was conducted by our Seattle regional office.) In other words, Pay'n Save was the most *convenient* retailer target.

It is conceded that Pay'n Save "had a significantly lower level of involvement" in the ads than Porter & Dietsch and its president, Mr. Fraser, but the staff believes this factor is more than outweighed by the need to establish a new legal precedent. An "important aspect of this case," the staff tells us, "is the inclusion of the advertising retailer, Pay'n Save Corporation, as a named respondent." A retailer who *uses* a deceptive ad, we're told, ought to be held just as liable as the fellow who created it in the first place. Had Pay'n Save made a "thoughtful" examination of the packages in question, including the disclosures on the package insert, it would have known something was wrong.

The problem, the staff reports to us, is that the country's retailers have been getting away with murder in this area. While "major general-merchandise retailers are frequently involved and/or specifically identified as the advertiser in highly questionable ads devoted to a single product, our research has disclosed no clearcut instances of such retailers being held responsible for manifestly deceptive product claims appearing in such ads. Subjection of Pay'n Save to

¹ Porter & Dietsch is the "exclusive national distributor" of this product, the "X-11" reducing pill.

the 'cease and desist' provisions of this order will help to reestablish this responsibility principle in the context of this type of advertising."

So there we have it. The staff wants to establish a new principle of trade regulation law. *Any retailer who runs an ad prepared by a supplier is legally liable for the truthfulness of everything in it.* Never mind that he didn't participate in the preparation of the ad and that it would be economically prohibitive for [3] him to maintain a staff of scientists and lawyers to screen all the supplier ads that a substantial retailer is confronted with in the course of a business year. In short, strict "no-fault" liability. Run the ad at your peril.

I think the Commission is embarking on an unwise, dangerous, and unnecessary course of action here. It is unwise because it defies common sense. It is dangerous because it imposes an intolerable cost burden on the nation's retailers that can only be passed on to the consumer in the form of still more inflated prices than those we now labor under. And it is unnecessary because a cease and desist order that stops the development of deceptive advertisements at the headwaters clearly makes it unnecessary to seine all the downstream tributaries.

I would dismiss Pay'n Save from this complaint.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE
LAW JUDGE

MAY 21, 1976

I

STATEMENT OF THE CASE

ALLEGATIONS OF COMPLAINT

The complaint in this proceeding charged respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., Joseph Furth and Pay'n Save Corporation with the dissemination of false advertisements and unfair, misleading and deceptive statements and representations in the advertising, promotion and sale of X-11 tablets in violation of Sections 5 and 12 of the Federal Trade Commission Act.¹ More specifically, the complaint alleged that respondents disseminated advertisements which misrepresented,

¹ Then Commissioner Thompson dissented from the naming of Pay'n Save Corporation, a large West Coast drug chain, as a respondent in this proceeding on the grounds, *inter alia*, that he could not agree that "a retailer with no involvement in the preparation of the ads in question should be subjected to liability here," and that Pay'n Save was being singled out among many drug store chains, as "the most convenient retailer target." See statement issued with the complaint.

directly or by implication, that “[u]sers of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice,” that respondents had a “reasonable basis from which to conclude that substantially all users of X-11 tablets will lose a significant amount of weight,” and that each “X-11 tablet contains a unique ingredient.”

The complaint further alleged that some of respondents’ advertisements included testimonials reciting weight reduction and other figure improvements purportedly attained by lay users of the “aforesaid preparation” which did not reflect the “typical” or “ordinary” experience of consumers “under circumstances [3] similar to those depicted in the advertisements.” Failure of the advertisements to disclose or identify the typical or ordinary experience of persons using the tablets was alleged to constitute a failure to disclose a material fact which, if known, would have affected the consumer’s consideration of “whether or not to purchase said preparation.”

The complaint also alleged that respondents “marketed and advertised X-11 tablets without disclosing in the advertising thereof that persons with high blood pressure, heart disease, diabetes or thyroid disease should use [them] only as directed by a physician,” and that in doing so respondents failed to disclose a material fact in such advertising. Finally, the complaint charged that the “X-11 Reducing Plan” was marketed and advertised without disclosing that “a highly restricted caloric diet [was] an integral part of said plan,” and that such constituted a failure to disclose a material fact.

RESPONDENTS’ ANSWERS

Respondents filed answers denying most of the substantive allegations of the complaint, and raising a number of affirmative defenses. Respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth denied that they ever marketed a product designated “X-11 Tablets,” contending that they were engaged in the sale of the “X-11 Reducing Plan” which “includes for ingestion tablets having the ingredients set forth in Paragraph Three of the Complaint.” The foregoing respondents also denied representing that “users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice,” and denied representing “that substantially all users of X-11 tablets [would] lose a significant amount of weight.” Respondents contended that they had advertised [4] only the “X-11 Reducing Plan,” not tablets and represented only that users of the “X-11 Reducing Plan” would lose some weight, and

that they had a reasonable basis for this assertion. Lack of public interest also was urged.

Respondent Pay'n Save maintained that it received the prepared X-11 advertisements from Porter & Dietsch, Inc., and therefore "cannot be held liable for the truthfulness of representations made therein by others."

Prior to the completion of evidentiary hearings respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc. and Joseph Furth filed an amended answer contending that the Federal Trade Commission is "precluded from bringing this proceeding . . . under the principles of collateral estoppel and/or stare decisis." Respondent Pay'n Save likewise filed an amended answer contending that "Complaint Counsel is precluded from bringing this proceeding under the principles of res judicata, collateral estoppel and/or stare decisis." According to respondents, three litigated decisions, *Alleghany Pharmacal Corporation*, 75 F.T.C. 990 (1969), *Hanover House* and *Romar Sales*, proceedings before the Postal Service,² preclude trial in this proceeding of issues relating to the "safety and efficacy of phenylpropanolamine as an appetite suppressant for weight reduction."

PROCEDURAL HISTORY

Complaint was served on the various respondents between the end of August and early September 1975. On September 10, the law judge issued an order directing counsel to attempt agreement on a timetable for completion of prehearing matters and a date and place for hearings on the merits. Thereafter, at the request of counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, a prehearing conference was held on October 7, 1975, [5] and a timetable was issued the following day setting hearings on the merits to commence January 6, 1976.

The parties disagreed as to the location of hearings. After considering all submissions, the law judge ordered that hearings be held in Seattle, Washington, where Pay'n Save Corporation and its counsel³ and a number of witnesses and complaint counsel were located, and in Washington, D.C., to take the testimony of East Coast witnesses. Hearings in Chicago, Illinois, to accommodate Porter &

² *Hanover House and Romar Sales Corp.*, P.S. Dkt. Nos. 2/143 and 2/149, decision of December 5, 1975.

³ Original counsel for Pay'n Save Corporation withdrew on October 2, and Albert A. Carretta, counsel for Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth, took over as counsel for all respondents. However, on October 28, Mr. Carretta withdrew as counsel for Pay'n Save Corporation because of a possible conflict of interest between that respondent and one or more of the other respondents. Original counsel for Pay'n Save Corporation then reentered the proceeding.

Dietsch, Inc., William H. Fraser, Kelly Ketting Furth and Joseph Furth were also offered if requested by those respondents.⁴

In the meantime, Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth moved on September 24, 1975, for a "Corrective News Release" and a stay of the date for filing an answer on the ground that the Commission's News Release failed to contain the usual caveat that the Commission issues a complaint when it has "reason to believe" that the law has been violated, and that such action did not imply adjudication of the matters alleged. This motion for a "Corrective News Release" was certified to the Commission recommending that it be granted, but the request for a stay of the date for filing an answer was denied. On October 17, 1975, the Commission granted the motion for such correction. [6]

Thereafter, discovery and various other pretrial proceedings continued. The law judge issued a number of subpoenas requiring the production of documents and information by respondents, directed the production of specified Commission materials, ordered the taking of certain depositions and disposed of a variety of motions. Included among the latter were a motion and supporting memorandum of Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth to "Dismiss Complaint Before Trial For Lack Of Public Interest Sufficient To Justify Issuance Of A Cease And Desist Order" and their motion and supporting memorandum for a "Supplementary Corrective News Release." The latter motion was certified to the Commission with a recommendation pursuant to §3.22 of the rules and was denied by the Commission on December 19, 1975.

Respondent Pay'n Save Corporation also filed a motion to "Dismiss Complaint Before Trial Or, In The Alternative, For Summary Decision" which was supported by a memorandum filed by Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth. This motion was denied by the law judge on December 30, 1976.

On December 23, 1975, all respondents filed an action in the U.S. District Court for the District of Columbia seeking a declaratory judgment and restraint of further proceedings in this matter. They alleged that a cease and desist order against them would not be in the public interest, that the Commission's News Releases were improper, and that the scheduling of hearings in Seattle and Washington, D.C., rather than in one location "convenient to all parties," violated the due process clause of the Fifth Amendment,

⁴ On December 29, 1975, counsel for respondents formally declined hearings in Chicago, Illinois, and evidentiary hearings were not held at this location.

the Administrative Procedure Act and the Commission's rules. On January 5, 1976, after hearing oral argument, the District Court denied respondents' motion for a preliminary injunction and thereafter dismissed the complaint. [7]

Hearings on the merits commenced in Seattle, Washington, on January 7 and concluded in Washington, D.C., on January 26, 1976, 8 actual hearing days having been utilized during that period. The record consisting of 220 exhibits, many of them multi-paged, and 1,405 pages of transcript was closed by order of the law judge on February 10. Twelve witnesses testified including the individual respondents and an official of Pay'n Save Corporation, and the testimony of three witnesses was entered in the record by stipulation. Complaint counsel called four medical or scientific experts, Drs. Margen, Drenick, Prout and Sorer, and respondents Porter & Dietsch, Inc., William H. Fraser, Kelly Ketting Furth, Inc., and Joseph Furth called three, Dr. Fineberg, a medical doctor, Dr. Silverman, a pharmacologist, and Dr. Hoebel, a specialist in physiological psychology.

At the conclusion of the case-in-chief respondents orally moved to dismiss on the ground that complaint counsel had not made out a prima facie case (Tr. 1038-97). Ruling was deferred by the law judge until decision on the entire case after all evidence had been received, and permission was granted to respondents to reduce their motion to writing supporting it with record references and legal authority. On March 29, 1976, respondents (except Pay'n Save) filed a comprehensive written motion to dismiss with a separately bound appendix in support. This motion will be referred to hereinafter as "Motion to Dismiss" and will be ruled upon in this Initial Decision in accordance with the findings, discussion and conclusions set forth.

This matter is now before the undersigned for decision based upon the allegations of the complaint, the answers, the evidence and the proposed findings of fact, conclusions and legal authority filed by all parties. All proposed findings of fact, conclusions and arguments, including those in the Motion to Dismiss, not specifically found or accepted herein, are rejected. The law judge, having considered the entire record, and all the contentions of the parties, makes the following findings and conclusions and issues the order set out at the end hereof: [8]

II

FINDINGS OF FACT

RESPONDENTS

1. Respondent Porter & Dietsch, Inc. (Porter & Dietsch), is a Minnesota corporation with its office and principal place of business in St. Paul. It is engaged in the packaging and sale of pharmaceutical products, principally by mail and through retail drug stores (Ans. P&D, ¶1; Fraser, Tr. 753-54). Porter & Dietsch has sold its X-11 tablets since 1967 (Ans. P&D, ¶3; Fraser, Tr. 769, 823) and, although a few other products are sold, the tablets are by far its largest volume item, amounting to over 80 percent of all sales (Fraser, Tr. 757-61).

2. Individual respondent William H. Fraser is the president and sole owner of Porter & Dietsch (Fraser, Tr. 753-54). As such, Mr. Fraser formulates, directs and controls the policies, acts and practices of corporate respondent Porter & Dietsch (Ans. P&D, ¶1).

3. In the course and conduct of their business, Porter & Dietsch and William H. Fraser have been and now are in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms and individuals in the sale of products and services for weight reduction (Ans. P&D, ¶16).

4. Respondent Kelly Ketting Furth, Inc. (Kelly Ketting Furth) is an advertising agency incorporated in Illinois, with its office and principal place of business in Chicago (Ans. P&D, ¶1). Since its organization in 1968, Kelly Ketting Furth has been, and is, the advertising agency for Porter & Dietsch in the marketing of X-11 tablets (Ans. P&D, ¶4; Fraser, Tr. 805; Furth, Tr. 927-32). [9]

5. Individual respondent Joseph Furth is a vice-president of Kelly Ketting Furth and is the advertising account executive for respondent Porter & Dietsch (Ans. P&D, ¶4; Furth, Tr. 927-36). Mr. Furth participates in the management of Kelly Ketting Furth and is among those responsible for the formulation, direction and control of its acts and practices, including those alleged in the complaint (Ans. P&D, ¶1).

6. In the course and conduct of their business Kelly Ketting Furth and Joseph Furth are now, and have been, throughout the period that Kelly Ketting Furth has been the advertising agency for Porter & Dietsch, in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with

other corporations, firms and individuals in the advertising business (Ans. P&D, ¶4).

7. Pay'n Save Corporation is a Washington corporation with its headquarters located in Seattle. It is a major chain of retail drug and sundry stores with outlets located principally in the Northwest and in northern California with some stores in Alaska and Hawaii (Ans. P&D, ¶¶ 1 and 5). Gross sales volume for the 12-month period ending November 1, 1975, was approximately \$290,000,000 (Stipulation, Tr. 435). Porter & Dietsch's X-11 tablets have been sold by Pay'n Save since 1969 (Ans. P&D, ¶5; Palmer, Tr. 507-08).

8. In the course and conduct of its business and throughout the period of its marketing and/or advertising of Porter & Dietsch's X-11 tablets, Pay'n Save has been and now is in substantial competition in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act) with other corporations, firms or individuals in the sale of various products, including products sold as aids in weight reduction (Ans. P&S, ¶¶ 2, 4, 5). [10]

X-11 TABLETS

1. *Nature and sales*

9. Porter & Dietsch purchase the X-11 tablets they market from the manufacturer in polyethylene pouches containing 21 tablets each. These pouches are then packaged in cartons of two sizes - one box containing two (2) pouches totaling 42 tablets and a larger size containing five (5) pouches totaling 105 tablets (Fraser, Tr. 769-70). The smaller box is normally sold at retail for \$3.00 and the larger size for \$5.00 (Adm. P&D, No. 9b; CX 36, 39, and 62). In addition to the tablets, each box contains a leaflet providing directions for the purchaser in using the tablets and some advice about obesity, a rudimentary low-calorie diet for a 5-week period, a "calorie value chart" for a limited number of foods, a weight chart and a "warning" against use by individuals with certain physical conditions unless medically supervised (CX 37 and 40). The outside of the box containing the X-11 tablets features in bold lettering "X-11 Reducing Plan" and the headline "EAT WELL!! — and LOSE THAT FAT" (CX 36, 38, 39 and 41). The ingredients, the "adult dose," and a "Caution" (warning) are also provided.

10. X-11 tablets were, and are, advertised and marketed extensively throughout the United States as a reducing aid or preparation for the obese, and for those who wish to shed what they consider to be excess body weight. Approximately 80 percent of all retail chain stores in the nation sell X-11 tablets (Fraser, Tr. 783), and annual

sales for the year ending April 30, 1975, were in the area of \$1,789,000 (Fraser, Tr. 759-61). Each X-11 tablet contains 25 milligrams of phenylpropanolamine, 25 milligrams each of methylcellulose and caffeine and vitamins A (1388 U S P units), B₁ (0.5 mg), B₂ (0.5 mg), B₆ (1 mg), C (15 mg), calcium pantothenate (1 mg), niacinamide (5 mg), E (5 int. units), and B₁₂ (0.5 mcg) (Ans. P&D, ¶3). The ingredients in the X-11 tablets allegedly conducive to weight loss are phenylpropanolamine and methylcellulose. The former is an [11] amphetamine-related compound, which is claimed to act as an appetite suppressant. The characteristics of phenylpropanolamine will be considered in subsequent findings dealing with the representations contained in respondents' advertising. Methylcellulose is also represented in the marketing of X-11 tablets as an aid to weight loss, and the characteristics of this substance will also be considered.

11. The promotional approach of respondents with respect to phenylpropanolamine and methylcellulose in marketing X-11 tablets is illustrated by statements in an advertisement given wide circulation in *TV Guide* for October 18 through 24, 1975, which stated under a picture of two fingers holding a pill adjacent to the headline "WHAT EACH TABLET CONTAINS" (CX 13):

25mg METHYLCELLULOSE A pure vegetable extract which expands and is intended to give one a feeling of being fuller.

25mg PHENYLPROPANALOMINE [sic] An appetite depressant intended to help give one the feeling of a restricted appetite.

(See also CX 69-73 and 90-91.) Other advertisements hold out the effects purportedly attributable to methylcellulose and phenylpropanolamine, i.e., a feeling of fullness and depressed appetite, without specifically identifying these substances (CX 4-8, 10, 14-15, 43, 46-47, 50, 52-56, 59, 61, 63-64, 67-68, 74, 77-80, 82-85 and 87-88).

2. *Respondents were engaged in the advertising and sale of diet tablets*

12. Respondents place great emphasis on their contention that they neither marketed nor advertised "tablets" but, rather, a "plan." Insofar as this [12] contention involves a defense that representations were not made to the public in respondents' advertisements as to the characteristics and qualities of the X-11 tablets, and the weight losses achievable from their use, it is contrary to the evidence and is rejected. Respondents' advertisements, directly and by implication, conveyed the net impression to the public that a

“wonder” preparation for easy weight reduction - the X-11 tablets - was available. The advertisement in the *Seattle Times* September 10, 1972, reprinted herein, is illustrative (CX 18). This advertisement begins with the banner headline “x-11 is HERE!” and then tells readers who are overweight and want to reduce that they can “EAT WELL. . .AND LOSE THAT FAT! - without ever missing a meal.” Weight losses of 5, 10, 25 or more pounds are represented, “GET RID OF 5, 10, 25 OR MORE POUNDS!” as achievable with X-11 tablets. A picture of an attractive and trim lady is given prominence who is quoted as saying “I LOST 80 LBS!” The advertisement announces to the overweight reader that you “satisfy your appetite while you take off pounds and inches” without “strenuous exercises” and “without starvation dieting hunger,” that “[Y]ou do not deny yourself,” and that “you lose weight. . .while you eat well.” How is all this accomplished? The advertisement answers: “here’s why” — a *tablet* which:

1. COUNTERACTS HUNGER

Take one of these tablets a half-hour or so before your regular meals. It combines a pure vegetable extract that has no calories, and quickly starts acting to provide the feeling of a fuller, satisfied, contented stomach. You eat 3 satisfying balanced meals a day - plus snacks. You eat what you want, but eat less because you don’t feel so hungry throughout the day.

I USED TO WEIGH 160 LBS. NOW I'M DOWN TO 105



says Mrs. George Stevens
Canon, Georgia

"I started on the X-11 Plan and started losing weight almost right away. I am so grateful . . . I recommend the X-11 Plan to everyone I see. It's wonderful."

I LOST OVER 40 LBS.



says Mrs. Evelyn Tallier
Chico, Virginia
California

"I used to weigh over 160 lbs. Now I weigh less than 110 lbs. and I feel better. I have lost over 40 lbs. in 10 weeks. I am so glad to have found a way to lose weight. I can't believe what a difference it has made in my life."

Mrs. George Stevens says:

"I lost 55 lbs. and my measurements are as follows:

	WAS	AM
WEIGHT	160 lbs.	105 lbs.
HEIGHT	5-2 1/2 in.	5-2 1/2 in.
DRESS SIZE	18	8
BUST	38 in.	34 in.
WAIST	28 in.	24 in.

...and I LOST OVER 40 LBS., TOO

says Mrs. Ken Schmidt
Norfolk, Nebraska

"When I started on the X-11 Plan I weighed 180 lbs. Now I weigh 125 lbs. wearing dresses sizes 11-12's rather than 20's. It's good to know there's a way to lose ugly fat and keep my weight at a level I dreamed of holding."



FROM GEORGIA TO NEBRASKA TO CALIFORNIA
American Women Have Found A Way That Really Helps Off THAT UGLY FAT

No Starvation Dieting - No Strenuous Exercise RESULTS ARE GUARANTEED - OR MONEY BACK

Here, at last, is that wonderful kind of plan that offers you a way to help get rid of 5, 10, 25 or more pounds of unsightly fat. Not by suffering thru starvation dieting, hunger, and by sticking to boring, fooding diets. Not by extra strenuous exercises. . . not by any of the humdrum methods you have known and given up.

Now . . . Lose Ugly Fat . . . and Don't go to bed hungry. The X-11 Plan is not a crash or starvation diet. That's because X-11 is the proved and sound method, used from one end of America to the other, to curb the appetite and still eat 3 satisfying, sensible meals a day.

EAT WELL . . . and lose that Fat.

You will eat, satisfying meals and snacks, but you won't be the prisoner of the overeating habit. If you aren't 100% delighted, return your first package for an immediate refund - no questions asked.



PAY 'n SAVE

AVAILABLE AT ALL STORES

- 42 Tablets \$3.00
- 105 Tablets \$5.00

OR MAIL COUPON:

Mail to: PAY 'n SAVE DRUGS—Dept. AD
1515 1/2 AVENUE, SEATTLE, WASH. 98101

Please send me Packages of X-11
 42 tablets at \$3.00 105 tablets at \$5.00
 (10% off Cash Price) (10% off Cash Price)

PLEASE PRINT YOUR NAME AND ADDRESS ON THE FOLLOWING LINE

Name _____
 Address _____
 City _____ State _____ Zip _____

Cash enclosed Money Order Check enclosed

GUARANTEE You must be 100% delighted with the results of your first package or your money will be refunded.

Questions asked

087 8-14-74
19
10-20-78

9/9
Sept. 9, 1973

The Idaho Statesman 5

Eat Well... and Lose That Fat!



AN EFFECTIVE PLAN TO LOSE UGLY FAT

NOW... LABORATORY SCIENCE HAS PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE



This unique formula—now in easy-to-use tablet form—with the X-11 Reducing Plan helps lose excessive weight, reduce inches. Don't go hungry. Eat 3 specially prepared meals a day while you slim down!



So you want to lose 5, 10, 25 or more pounds of excessive weight? . . . Here now is an extraordinary easy figure-slimming Plan that offers you a way to get rid of unsightly, superfluous fat you're carrying—without strenuous exercises . . . and, most important of all, without missing a meal.

EAT AND LOSE THAT EXCESSIVE WEIGHT. You can satisfy your appetite and peel off those extra pounds, too. Now, with the X-11 Plan, you can remove pounds and inches from thighs, neck, legs, waist — all OVER — without ever going hungry — and stabilize reduced weight at a level you've always dreamed of holding as you follow the Plan. While you eat satisfying meals, no longer will you be the prisoner of the overeating habit, because with the X-11 Plan, you eat less and want less. So you lose weight . . . while you eat well.

NO EASIER REDUCING METHOD EVER DEVELOPED

1. COUNTERACTS HUNGER

Take one of these tablets a half-hour or so before your regular meals. It combines a pure vegetable extract that has no calories, and quickly starts acting to provide the feeling of a fuller, satisfied, contented stomach. You eat 3 satisfying balanced meals—eat what you want, but eat less.

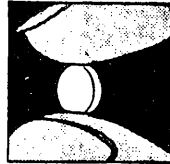
2. ACTS AS APPETITE APPEASER

Part of the secret of this method is a unique ingredient that acts as a beneficial appetite appeaser, which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies, High-Fat/High-Calorie foods—everything. It helps

you conduct a kind of psychological warfare with yourself as you break some bad old eating habits you probably thought you were stuck with forever.

3. FORTIFIED WITH VITAMINS, MINERALS

Important to those who feel it their lot to feel jumpy, jittery, or fagged out when dieting. Your daily supply now combines a whole spectrum of vitamins and minerals, including: Vitamin A, Vitamin B1, Vitamin B2, Vitamin B6, Vitamin C, Niacinamide, Vitamin E, Vitamin B12 — all so important to helping prevent these nutritional deficiencies.



SATISFACTION GUARANTEED OR MONEY BACK

42 TABLETS **2.98**

105 TABLETS **4.98**

OBTAINED BY Exhibitor EXHIBIT 28
BY 8-14 1974
ATTORNEY: Dean Ferrin

Grand Central
FAMILY SAVINGS STORE

FILE NO. 122-2187

GUARANTEED MONEY BACK
 Don't miss out! Take advantage of this special offer. Buy 42 or 105 tablets of this money saving plan today. You must be completely satisfied after the 14-day trial of the X-11 Reducing Plan or your money refunded without questions.

42 TABLETS \$2.00
 105 TABLETS \$5.00

If Your Drug or Department Store has run out of stock
FOR QUICK ACTION USE THIS COUPON TO ORDER BY MAIL

Fill out coupon below — place in envelope MAIL TODAY!

If your store is out of stock — fill out and mail this coupon for your

QUICK-MAIL-SUPPLY

Just place this coupon in an envelope and enclose your money. On guarantee of satisfaction — we'll give you your money back. Your order will be shipped same day if it is received.

GUARANTEE
 You must be 100% delighted with results of your first package or your money will be refunded. No questions asked.

PLEASE PRINT YOUR NAME AND ADDRESS BELOW
 MAIL TO: WALGREENS
 Box 635
 Berkeley, Ill. 60163

My store is out of stock. Please rush supply checked below
 42 tablets for \$3.00 105 tablets for \$5.00

Name _____
 Address _____
 City _____ State _____ Zip _____

Cash enclosed Money Order Check enclosed

Illinois residents: please add 5% sales tax.

Advertising Supplement to **Chicago Tribune** Sunday, February 11, 1973 Section 3-A

EAT WELL...and Get Rid of 5, 10, 25 or More Pounds!

LOSE the ugly fat
 with This Amazingly Easy Reducing Plan!



Eat 3 Sensible Meals a Day — and SLIM DOWN!

■ Today, thousands of women throughout America are discovering an extraordinary simple Plan that helps them lose 5, 10, 25 or even more pounds and stabilize achieved weight. It's the "dreamed of" holding as you follow this simple Plan.

■ Not by starving thru starvation dieting hunger not by sticking to boring reducing diets... not by using methods not by any of the humdrum methods so many women have tried, and given up in despair.

Now you can EAT and LOSE WEIGHT! You can satisfy your appetite and remove pounds and inches... at thighs, neck, legs, waistline...
 ...and you can enjoy your life!

■ So why carry around needless excess weight when it's so easy to follow the X-11 Reducing Plan to lose ugly fat?

■ Just take one of these specialized tablets 1 hour before your regular meal. Its unusual combination of ingredients helps give you the feeling of a fuller, contented stomach. It also helps prevent those nagging cravings for "between meal" snacks; and provides a range of vitamins and minerals to help prevent these nutritional deficiencies.

MONEY BACK GUARANTEE

Enjoy eating the foods you love. Lose weight. Lose ugly fat. Get on the X-11 Reducing Plan. Guarantee of satisfaction — or your money back.

770

Initial Decision

IF YOUR STORE HAS RUN OUT OF X-11 TABLETS HURRY!!!

Fill out and mail this coupon for your supply

Lose Ugly Fat - or Your Money Back

Just fill out coupon below Place in envelope **MAIL TODAY!**

Mail This Coupon Today for Your Supply of X-11 Tablets if your store has run out of stock

GUARANTEE
The X-11 Reducing Plan has been made available at all Walgreens and other drug stores. If because of the demand your store runs out of the supply of X-11 Tablets, just tear off this card, fill in your reference to the package or bottle of X-11 Tablets, and mail to:
Walgreens
Box 695
Bryn Mawr, Pa. 19003

Please Print Your Name and Address
Name _____
Address _____
City _____
State _____
Zip _____

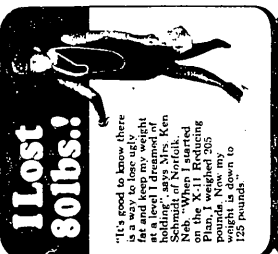
X-11 IS HERE!

an effective Plan to Lose Ugly Fat -

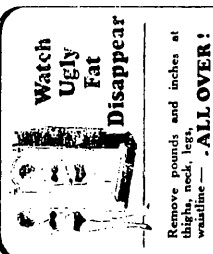
without ever missing a meal!
Now you can satisfy your appetite and peel off that excessive weight

Here is that unique new figure dieting Plan which now offers you a way at last to get rid of 5, 10, 25 or more pounds of extra weight. This Plan helps you enjoy three appetizing, sensible meals a day without missing a meal. You'll never feel hungry or diet because you feel hungry or diet because you're dieting. The X-11 Reducing Plan can help you to lose weight more easily than any other dieting plan.

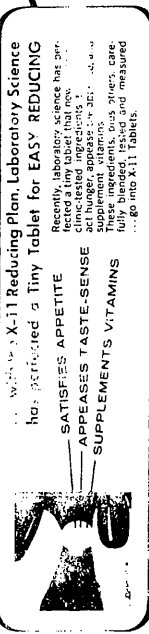
Enjoy eating 3 sensible meals a day... while you take off unsightly fat...
The new X-11 Reducing Plan helps you control your appetite in a way that is natural and healthy. You won't feel hungry or diet because you're dieting. You'll find yourself saving, greed-free, no second thoughts, no "cheating" on your natural cravings for delicious meals a day.



I Lost 80lbs.!
It's good to know there is a way to lose fat and keep my weight at a level I dreamed of. I'm Ken Schmitt of New York, N.Y. When I started on the X-11 Reducing Plan, I lost 80 pounds. Now my weight is down to 125 pounds.



Watch Ugly Fat Disappear
Remove pounds and inches at dieting time. Fat disappears! **- ALL OVER!**



X-11 Reducing Plan, Laboratory Science has perfected a Tiny Tablet for EASY REDUCING
Recently, laboratory science has perfected a tiny tablet that provides all the benefits of a dieting supplement without the side effects of a dieting supplement. These ingredients, our strictest care, have been carefully selected and measured to go into X-11 Tablets.

SATISFIES APPETITE
APPEASES TASTE-SENSE
SUPPLEMENTS VITAMINS

NOW AT Walgreens AND OTHER FINE DRUG STORES

Don't Delay!
IF YOUR STORE HAS RUN OUT OF STOCK, MAIL ATTACHED COUPON FOR QUICK ACTION!

CX 49

7/14/54

7/14/54

[15] 2. ACTS AS AN APPETITE APPEASER

Part of the secret of this method is a unique ingredient that acts as a beneficial appetite appeaser, which puts a "brake" on your cravings for sweets, candy, pastries, rich gravies. High-Fat/High-Calorie foods - everything. It helps you conduct a kind of psychological warfare with yourself as you break some bad old eating habits you probably thought you were stuck with forever. Thus, your appetite is appeased while you take off fat.

13. The advertisement appearing in the *Seattle Times*, July 8, 1973, also reprinted, emphasizes testimonials of ladies reporting very substantial weight losses (CX 19). It also contains a picture of two fingers holding the X-11 tablet, and advises the reader that if not 100 percent delighted, the "first package" of either 42 tablets or 105 tablets may be returned for an immediate refund.

14. The advertisement in *The Idaho Statesman*, September 9, 1973, likewise reprinted, contains two pictures of the X-11 tablet (CX 48). The first features the picture of a young lady holding up an X-11 tablet and states:

NOW . . . LABORATORY SCIENCE HAS PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE

The bottom half of this advertisement emphasizes the X-11 tablet by a much larger picture of two fingers holding the tablet with adjacent paragraphs entitled "COUNTERACTS HUNGER," "ACTS AS APPETITE APPEASER," containing the same text referred to in Finding 12, and "FORTIFIED WITH VITAMINS, MINERALS." The advertisement concludes by announcing "42 Tablets 2.98," "105 Tablets 4.98." [19]

15. The elaborate advertising supplement distributed in the *Chicago-Tribune*, February 11, 1973, although varying in language, is similar in its message and representations to the foregoing advertisements (CX 49). A post card for mailing to the Walgreen drug chain is printed within the advertisement with the admonition to prospective purchasers: "IF YOUR STORE HAS RUN OUT OF X-11 TABLETS HURRY!!!" "FILL OUT AND MAIL THIS COUPON FOR YOUR SUPPLY." This advertisement is headlined "X-11 IS HERE" and gives prominence to the picture of a tablet being held between two fingers, telling Chicago-area readers that ". . . Laboratory Science has perfected a Tiny Tablet for EASY REDUCING."

16. Some of respondents' smaller advertisements designed for insertion in newspaper columns, or in fractions of pages in periodicals, condense the representations contained in the larger advertisements and refer to X-11 simply as a "tiny tablet." The following is an example (CX 42):

(Advertisement)

**GET RID OF
UGLY FAT**

Enjoy eating the foods you choose while you lose excess, ugly fat. X-11 Reducing Plan can help you slim down. X-11 is a tiny tablet, easily swallowed, that combines ingredients to combat hunger, appease appetite, supplement vitamins. No dangerous drugs. No strenuous exercise. Over 500 million of X-11 tablets used all over America. Company founded in 1928. X-11 Reducing Plan costs \$3 — large economy size .5. Get X-11 now. Your money refunded by your druggist if you don't lose pounds — no questions asked.

(See also CX 5-7 and 77.)

[20] 17. Other advertisements told members of the public that they could “LOSE THAT FAT” but “EAT SUFFICIENTLY” by taking “a pre-meal X-11 Tablet before meals” (CX 51) and that “today” there is “an amazing new reducing plan with X-11 Tablets” (CX 52, 61 and 84). Still other advertisements were again specific in telling the public “WHAT EACH TABLET CONTAINS” (CX 13, 69-73, 90 and 91). Occasional advertisements stated “NO PRESCRIPTION NEEDED” (CX 12, 57 and 65), and some told the public to “[A]sk the pharmacist for a 42 tablet pack of X-11 Reducing Aid” (CX 53 and 66).

18. With few exceptions, respondents' advertisements concluded with a coupon or statement offering *tablets* to the public, usually 42 for \$3.00 and 105 for \$5.00 (see *e.g.*, CX 18-19 and 49 reprinted in this decision).

19. The ladies whose testimonials are prominently displayed in the *Seattle Times* advertisement (CX 19), and published in other newspapers (CX 1, 16, and 76), perceived the advertisements as promoting pills or tablets. Mrs. George Stowe in her initial letter to Porter & Dietsch refers to taking “X-11 tablets” (CX 149). Mrs. Beverly Tellier begins by stating “I am a user of your X-11 diet pills” (CX 148; see also CX 184(2)), and Mrs. Ken Schmidt states to Porter & Dietsch that “I talked with you from Walgreen Drug here in Norfolk, Nebraska, last week, about your X-11 diet pills” (CX 147). In publishing these testimonials respondents changed all such product

references to read "X-11 Plan" or "X-11 Reducing Plan," rather than "tablets" or "diet pills."

20. Other members of the public writing to Porter & Dietsch also looked upon what was marketed and advertised as "tablets," "pills" or "reducing pills." Their perceptions of the product are evidenced by the following statements: "I started on your X-11 Tablets. . ." (CX 185); "I called up Saturday for an order of 2 boxes of diet X-11 pills" (CX 186); "We are wondering if we [21] couldn't buy these pills directly from you . . ." (CX 187); ". . . I need these pills" (CX 188); "I received your letter regarding getting X-11 tablets in Sutter Creek" (CX 189); "On occasion my husband has the use of your X-11 diet pills" (CX 190); "X-11 is the only diet pill I have found that works" (CX 191); "I have tried your X-11 tablets for reducing. . ." (CX 192); "I have been taking your reducing tablet for 4 months. . ." (CX 193); "I was on vacation . . . and saw your pills (105)/(X-11) reducing pills so I bought a box. . ." (CX 194); "I used your diet pills about four years ago. . .", "P.S. The name of the diet pills are X-11 reducing plan" (CX 195); "Please send me another box of 42 X-11 Reducing pills. . ." (CX 196); "X-11 is the best reducing tablet sold" (CX 199); "Will you please let me know if there is a place . . . where I can purchase the X-11 reducing Plan pills" (CX 201); "So I tried X-11 and got down to 130 pounds on the first box of pills" (CX 202); ". . . send me some X-11 Reducing Plan Tablets. . . I try some of the other kind of Tablets, but I got sick from them . . ." (CX 203); "In past years I have taken several kinds of reducing pills (from Doctors). All they did was make me nervous . . . But on X-11 there is no after effects" (CX 204); ". . . [i] ordered \$5.00 worth of diet pills from you . . ." (CX 206); and, "I would like for you to send me X-11 reducing tablets" (CX 207).

21. The purpose behind the repeated use of the word "plan" in the advertising copy for X-11 tablets, and the use of "X-11 Reducing Plan" as Porter & Dietsch's designation for its product is evident in the letter dated September 13, 1973, to Mr. Fraser, Porter & Dietsch's president, from Mr. Furth, vice-president of respondent Kelly Ketting Furth and the account executive for X-11 tablet advertising (CX 164): [22]

Dear Bill:

* * * * *

Appedrine is flirting with danger. It is the same kind of danger that hit us in the head in the insurance business.

Appedrine and Hungrex (even Odrinex) put emphasis on the tablets. That's murder, because the pills will not reduce weight an iota.

770

Initial Decision

It is the "Plan" that will keep us out of hot water.

I've said it before. If you want me to put the same kind of "punch" into the advertising, so be it. But we've been getting along swell, without it.

Let them make their claims, we'll make ours. But I'm afraid we're all going to get into hot water because of Appedrine, Hungrex and Odrinex.

Because Hungrex won its case at one time, doesn't mean the sore cannot be reopened.

I've seen it happen in the mail order insurance business.

[23] I don't know if the new 42 line ad will work. That's what tests are for. Ads like Appedrine (from a copy standpoint) may work, but it may put us out of business faster.

* * * * *

Cordially,

Joseph Furth
Vice President

22. Labeling the box of tablets the "X-11 Reducing Plan" and including within the tablet box a leaflet (CX 37 and 40) containing a low-calorie diet, a calorie value chart, a table of desirable weights and advice, *inter alia*, that in most cases "obesity is caused strictly by overeating and indiscretions of diet," that "weight loss is only accomplished when a minimum of calories are consumed," that the purchaser must not "expect a miracle overnight" but "must practice a little 'self-denial' — plus, a will power to get thin," and that if the X-11 tablets are taken one-half hour before each meal *and* the "Plan, or any other low-calorie diet" is followed, he or she "should lose weight," does not transform the advertising of "diet pills" into the promotion of a reducing "Plan" so as to mean that no representations were made to the public about X-11 tablets.

23. Respondents were engaged in the advertising, marketing and sale of X-11 tablets. The representations to the public in respondents' advertisements were about X-11 tablets and their efficacy in facilitating weight loss.⁵ Such representations were made for the sole purpose of promoting and inducing the sale of X-11 tablets. [24]

ADVERTISING OF X-11 TABLETS

24. Although the pictures, language and format varied, essentially similar statements and themes pervaded respondents' advertisements of X-11 tablets. Respondents agree that "from 1969 to date, the advertising of the 'X-11 Reducing Plan' had remained substantially unchanged" (*see* Memorandum In Support of Motion to

⁵ All advertising slicks or mats in the record (CX 50 through 91) were published by respondents in some media (Fraser, Tr. 804 and 883).

Dismiss, etc., filed October 30, 1975, p. 11; *see also* Furth, Tr. 952, 968-69 and 978-80).

25. Porter & Dietsch's advertising expenditures for X-11 tablets were as follows (CX 179):

<i>Year (Ending April 30)</i>	<i>Dollars</i>
1975	\$882,570
1974	1,082,396
1973	862,986
1972	781,566
1971	593,723
1970	460,902

26. The record contains a large number of advertisements published in various media, predominately newspapers, promoting the X-11 tablets. As noted earlier, five examples have been reprinted in this decision, four large ads and a small one (CX 18-19, 42, 48 and 49), and have already been discussed to some degree. Major metropolitan dailies such as the *Seattle Post-Intelligencer* (CX 1-4), the *Seattle Times* (CX 19), the *Washington Post* (CX 47), the *Baltimore Sun* (CX 46), the *Chicago Tribune* (CX 49) were utilized, as well as smaller circulation newspapers such as the *Anchorage Daily Times* (CX 33), the *Longview Daily News* (CX 21), the *Greensboro Daily News* (CX 74), and the *Peoria Journal-Star* (CX 83). Specialized publications such as *TV Guide* (CX 10-13) were also employed in the dissemination of X-11 advertisements.

27. Ads occupying a small portion of a newspaper or periodical page (CX 5-7, 9, 17, 20-34, 42-43, 51, 54, 64, 77, and 89), as well as very large and prominent advertisements, were published (CX 1-4, 8, 10, 13-16, 18, 35, 44-48, [25] 50, 52-53, 66-76, 78-88, 90-91). Some of the large advertisements were elaborate color inserts known as "free standing stuffers" in the advertising trade (Furth, Tr. 930-33). These were placed in the Sunday editions of the nation's leading newspapers. CX 46 was inserted in the *Baltimore Sun* for Sunday, April 20, 1969, CX 47 in the *Washington Post* on the same date, and CX 49 in the *Chicago Tribune* on February 11, 1973.

REPRESENTATIONS CONVEYED TO THE PUBLIC BY RESPONDENTS'
ADVERTISEMENTS FOR X-11 TABLETS

1. *Representation that users of X-11 tablets can lose weight without restricting their accustomed caloric intake and while they continue to eat the foods of their choice*

28. The advertisement published in the *Seattle Times*, September

10, 1972 (CX 18), as indicated, told prospective users that "X-11 is here" and they could "EAT WELL . . . AND LOSE THAT FAT—without ever missing a meal," that they could "satisfy [their] appetite" while taking off "pounds," that they could lose "5, 10, 25 or more pounds" without denying themselves, without dieting hunger, that they would "eat what [they] want," but would eat less because they would not "be the prisoner of the overeating habit."

29. The advertisement published in the *Seattle Times*, July 8, 1973 (CX 19), also told prospective users of the X-11 tablets that they could "EAT WELL . . . AND LOSE THAT FAT." The ad advised that "NO STARVATION DIETING" was required, that unsightly fat could be lost without "suffering through starvation dieting hunger" or following "boring reducing diets," or any of the "humdrum methods you have known and given up." The advertisement told prospective purchasers of X-11 tablets that they could eat "satisfying meals and snacks," that they would not "go to bed hungry," that the "X-11 Plan" was "not a crash or starvation diet" but a "proved and sound method" "to curb the appetite and still eat 3 satisfying, sensible meals [26] a day," and that laboratory science had perfected a "tiny pre-meal tablet" which "lets you eat three sensible meals a day plus 'tween meal snacks."

30. The advertisement published June 24, 1973, in the *Seattle Post-Intelligencer* TV Section (CX 2) likewise featured in black, prominent type "Eat Well . . . Lose That Fat!" The advertisement referred to the "X-11 Plan" as "an extraordinary easy figure-slimming Plan" that offered a way to "get rid of unsightly, superfluous fat" without "missing a meal," and told the prospective X-11 tablet user that she or he could "Satisfy your appetite and peel off those excess, extra pounds, too."

31. The advertisement in the same newspaper on June 25, 1974 (CX 3), was again headed in boldtype "Eat Well . . . And Lose Ugly Fat." This advertisement continued the theme of the earlier ads that X-11 tablet users could "EAT AND LOSE THAT EXCESSIVE WEIGHT," could "satisfy" their appetites and yet "peel off extra pounds" and could remove excessive weight "without ever going hungry." An identical ad was published in the *Seattle Post-Intelligencer* TV Section January 1, 1975 (CX 4).

32. The advertisement in the *Anchorage Daily Times* of March 29, 1974 (CX 8) repeated the statements "Eat Well . . . and Lose That Fat!", that laboratory science had "PERFECTED A TINY PRE-MEAL TABLET WITH A PLAN THAT LETS YOU ENJOY FOODS YOU CHOOSE," that X-11 users could "EAT AND LOSE THAT EXCESSIVE WEIGHT," and could "satisfy" their appetites and "peel off those extra pounds" "without

ever going hungry." Users were promised "you will lose weight . . . while you eat well."

33. The full page advertisement in the *Spokane Spokesman-Review* Sunday Magazine, October 22, 1972 (CX 15), similarly announced "EAT WELL . . . AND LOSE THAT FAT!" "WITHOUT EVER MISSING A MEAL," and "You do not deny yourself." [27]

34. A large advertisement in the *Seattle Times*, February 3, 1974 (CX 45), was headlined "NOW EAT WELL" and "LOSE UGLY FAT!" The text continued this theme with the statement "So enjoy eating that satisfies your appetite as you peel off those extra pounds. You lose weight . . . while you eat well."

35. The elaborate "free standing stuffer" in the Sunday *Baltimore Sun* on April 20, 1969 (CX 46) featured banner headlines which read "Lose Ugly Fat" with an "Amazingly Easy Reducing Plan." The text promised that fat would be lost without "starvation dieting hunger," "boring reducing diets" or "humdrum methods so many women have tried, and given up in despair." Readers were assured that users of X-11 tablets could "now" "EAT AND LOSE WEIGHT," could "satisfy" their appetites yet "remove pounds and inches," could "peel off that excessive weight," and could "Enjoy eating the foods" they chose while they lost "unsightly, superfluous fat." Readers were told in heavy letter type "X-11 IS HERE," and that they could "LOSE UGLY FAT . . . without ever missing a meal!" An identical "free standing stuffer" was inserted in the *Washington Post* on the same Sunday (CX 47).

36. Another advertisement disseminated by respondents announced "Are you on a diet? Or planning to go on one? WHY STARVE YOURSELF WHILE YOU REDUCE? EAT . . . AND LOSE THAT FAT!" (CX 57) Other advertisements told the public "TAKE OFF UGLY FAT WITH AN 'EAT WELL' EATING PLAN" (CX 64). Still others stated "Enjoy eating the foods you choose while you lose excess, ugly fat" (CX 77).

37. The "free standing stuffer" inserted in *The Greensboro Record*, January 26, 1969 (CX 74), featured "EAT WHAT YOU WANT - AND SLIM DOWN," as did the large insert of January 12, 1969, in the *Wisconsin State Journal* (CX 75), and the insert of July 28, 1968, in the *Peoria Journal Star* (CX 83). Other advertisements communicated similar representations, with occasional minor changes in emphasis. See CX 5-7, 9-35, 42-45, and 47-91. [28]

38. Respondents' advertising told the public that with the X-11 tablets people could "EAT WELL AND LOSE THAT UGLY FAT" (CX 2), that X-11 tablets put "enjoyment into eating" while "unsightly, superfluous fat" was lost (CX 52), that overweight persons could take off ugly fat with an "EAT WELL" eating plan (CX 50), and that people

