

Set Aside Order

120 F.T.C.

IN THE MATTER OF

MANNESMANN, A.G.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3378. Consent Order, Mar. 24, 1992--Set Aside Order, Oct. 11, 1995*

This order reopens a 1992 consent order--which required Mannesmann to divest the Buschman Co. and to obtain, for 10 years, Commission approval prior to acquiring any business that manufactures and sells certain conveyor systems--and sets aside the consent order pursuant to the Commission's Prior Approval Policy Statement. The order cites the availability of the premerger notification and waiting period requirements, and noted that under the Policy Statement, the Commission presumes that the public interest requires setting aside the prior approval requirement in paragraph V of the order.

ORDER SETTING ASIDE ORDER

On June 29, 1995, Mannesmann, A.G. ("Mannesmann"), filed its Petition To Reopen and Vacate or Modify Consent Order ("Petition") in this matter. Mannesmann asks that the Commission reopen and modify the 1992 consent order in this matter pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").¹ Mannesmann in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3378 or, in the alternative, reopen and modify the order by deleting the requirement in paragraph V that Mannesmann seek prior Commission approval for certain acquisitions. The Petition was on the public record for thirty days; no comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of premerger notification and waiting period requirements of Section 7A of the Clayton Act, 15

¹ 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, the Commission said, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

Narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3.

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph V of the order in Docket No. C-3378 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, suggests that exceptions described in the Prior Approval Policy Statement are warranted. The Commission has determined to reopen the proceeding in Docket C-3378 and set aside the order.²

² Mannesmann completed the divestiture required by the order in 1992; and the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting requirements.

Accordingly, It is hereby ordered, That this matter be, and it hereby is, reopened, and that the Commission's order issued on March 24, 1992, be, and it hereby is, set aside as of the effective date of this order.

IN THE MATTER OF

THE COUNCIL OF FASHION DESIGNERS OF AMERICA, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3621. Complaint, Oct. 17, 1995--Decision, Oct. 17, 1995.

This consent order prohibits, among other things, a New York corporation and a trade association of fashion designers from entering into, organizing, implementing or continuing any agreement to fix the price, terms or conditions of compensation for modeling or modeling agency services, and requires the respondents to send a letter, along with the Commission's complaint and order, to all members and officers of the organizations, as well as the specified modeling agencies and designer.

Appearances

For the Commission: *Michael E. Antalics, Karen Mills and William Baer.*

For the respondents: *Jack Hassid, Swerdlin & Hassid, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, Title 15, U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit 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 1412

Broadway, New York, New York. CFDA engages in activities in substantial part for the profit of its members.

PAR. 2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit 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 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

PAR. 3. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, members of CFDA and the members of 7th on Sixth have been, and are now, in competition among themselves and with others as purchasers of model and modeling agency services.

PAR. 5. On or about February 1, 1991, CFDA met and discussed a proposal of one of its members that CFDA should hire an Executive Director who could, among other things, address on their collective behalf the issue of prices paid for model services. On several occasions from February 1, 1991 to date, respondents discussed their desire to reduce competition among themselves for the services of models in order to achieve a reduction in the rates paid for the services of models.

PAR. 6. On or about July 14, 1993, CFDA met and formed, funded and facilitated 7th on Sixth, Inc. CFDA voted that its Executive Director should act as Executive Director of 7th on Sixth while in the employ of CFDA. A legitimate purpose of 7th on Sixth was to produce centralized fashion shows twice a year in New York City in Bryant Park. 7th on Sixth solicited bids from suppliers of various services necessary for the production of the fashion shows: sites, architectural design, production, tents, runway assembly, lighting design and installation, and security. 7th on Sixth selected suppliers, and contracted with them. 7th on Sixth resold the package of services that it had purchased from suppliers to designers interested in using 7th on Sixth venues for their shows, for a set fee that varied only depending on the particular venue chosen. 7th on Sixth did not solicit bids for the purchase of modeling services, did not purchase modeling services, and did not resell modeling services to designers.

PAR. 7. At the July 14, 1993 CFDA meeting, two members of the Board of Directors stated that they wanted to call a special meeting for designers with the heads of all the major modeling agencies to discuss models' fees in connection with the 7th on Sixth fashion shows.

PAR. 8. On or about September 1, 1993, the Executive Director of 7th on Sixth invited fashion designers interested in participating in the 7th on Sixth fashion shows to a meeting on September 14, 1993 to discuss, among other things, an agreement on modeling fees.

PAR. 9. On or about September 14, 1993, designers who were members of respondent CFDA and were interested in participating in the 7th on Sixth fashion shows and staff and counsel for respondents met to discuss various issues relating to the 7th on Sixth fashion shows, including modeling fees. During this meeting, respondents agreed not to compete for modeling services and agreed to determine modeling fees collectively, rather than allow prices to be determined in a competitive market. The Executive Director of CFDA and 7th on Sixth, on behalf of respondents, then invited the major modeling agencies to meet with representatives of the fashion designers the next day to present their collective position on fees.

PAR. 10. On or about September 15, 1993, respondents and their counsel met with representatives of the major modeling agencies. Respondents: (a) demanded that the modeling agencies agree to prices collectively determined by respondents, and (b) threatened to hire models through a collectively organized "open call" procedure which would have the effect of bypassing the modeling agencies and the models they represented. As a result of this threat, the agencies agreed to consider whether they should accommodate the respondents' collective demands.

PAR. 11. Respondents invited the modeling agencies to meet with respondents again on September 22, 1993, to hear whether the modeling agencies had decided to succumb to respondents' collective demands. On or about September 22, 1993, respondents and their counsel met again with representatives of the major modeling agencies. Upon hearing that the modeling agencies were not prepared to acquiesce to the respondents' collective demands, respondents repeated their collective demand regarding prices, and their threat to proceed with a collectively organized "open call." Confronted by this threat, the agencies agreed to negotiate with respondents.

PAR. 12. Between September 22, 1993 and October 12, 1993, respondents continued to press their demands regarding prices. During this time, respondents and their counsel continued to plan for an industry-wide open call so that designers could collectively refuse to deal with models and modeling agencies that refused to acquiesce to their demand regarding prices.

PAR. 13. In early October, 1993, the modeling agencies capitulated and agreed to the modeling fee proposal for the 7th on Sixth fashion shows made to them by respondents. On October 12, 1993, 7th on Sixth memorialized the final agreement on prices and other terms of compensation for modeling services in a letter sent to fashion designers and modeling agencies. Later in October 1993, 7th on Sixth issued a press release in which it claimed credit for reaching an agreement on prices.

PAR. 14. The respondents' agreement as to prices paid for model and model agency services was not ancillary to the legitimate purposes of creating centralized fashion shows, and respondents did not purchase modeling services jointly.

PAR. 15. By engaging in the acts and practices described in paragraph five and paragraphs seven through fourteen, respondents have acted as a combination of their members or conspiracy among their members to eliminate competition among themselves in order to fix prices.

PAR. 16. The acts and practices of the respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

- A. Restraining competition among purchasers of modeling and modeling agency services;
- B. Fixing or stabilizing the prices that are paid to models and modeling agencies; and
- C. Depriving consumers of access to a competitively determined price and quality of modeling and modeling agency services.

PAR. 17. The combination or conspiracy and the acts and practices of respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation or the effects thereof,

as herein alleged, are continuing and will continue or recur in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit 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 1412 Broadway, New York, New York. CFDA engages in activities in substantial part for the profit of its members.

2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit 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 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondents*" means the Council of Fashion Designers of America and 7th on Sixth, Inc.;

B. "*Person*" means any individual, partnership, association, company, or corporation;

C. "*CFDA*" means the Council of Fashion Designers of America, its directors, trustees, officers, members, representatives, committees, subcommittees, boards, divisions, agents, employees, successors and assigns;

D. "*7th on Sixth*" means 7th on Sixth, Inc., its directors, trustees, officers, members, representatives, committees, subcommittees, boards, divisions, agents, employees, successors and assigns.

II.

It is further ordered, That respondents CFDA and 7th on Sixth, directly or indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, forthwith cease and desist from entering into, attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, or continuing or attempting to continue, any combination, agreement, or understanding, express or implied, for the purpose or with the effect of:

A. Raising, lowering, fixing, maintaining or stabilizing the price, terms or other forms or conditions of compensation paid for modeling or modeling agency services; or

B. Encouraging, advising, pressuring, assisting, inducing, or attempting to induce any person to engage in any action prohibited by this order.

Provided, however, that it shall not be deemed a violation of this order for more than one member of CFDA and/or 7th on Sixth to employ or use the services of the same person where such employment or use is not otherwise in furtherance of any action prohibited by this order.

III.

It is further ordered, That respondents CFDA and 7th on Sixth each shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by certified U.S. first-class mail a copy of this order and the accompanying complaint, and the notice attached in Appendix A hereto, to:

1. Each of its members, officers, directors, and employees, and each fashion designer who has shown in the fashion shows organized by 7th on Sixth;

2. Each person to whom it has, at any time prior to the effective date of this order, communicated the benefits of membership in 7th on Sixth, or whom it has invited to join 7th on Sixth, as identified in Appendix B hereto;

3. The International Model Managers Association c/o David Blasband, Esq., Deutsch, Klagsbrun & Blasband, 800 Third Avenue, New York, New York;

4. Each of the modeling agencies listed in Appendix C attached hereto; and

B. For a period of five (5) years from the date this order becomes final, cause to be made minutes of all business meetings of its membership, its board of directors, its committees and subcommittees. Such minutes shall (i) identify all persons attending

such meeting, (ii) include a certification, signed by the presiding officer and secretary under penalty of perjury, that states whether prices, terms, or other forms or conditions of compensation paid for modeling or modeling agency services were discussed at the meeting, and (iii) summarize what was discussed at the meeting. If prices, terms, or other forms or conditions of compensation paid for modeling or modeling agency services were discussed at any business meeting subject to this order, then the minutes of such meeting shall identify the participants in the discussion and state in detail the substance of the discussion(s). Minutes and the required certifications shall be retained for a period of five (5) years from the date the minutes were created. Such minutes shall be provided to the Commission upon request.

C. Within sixty (60) days after the date on which this order becomes final, and annually thereafter for five (5) years, on or before the anniversary date of this order,

1. Communicate either orally or in writing to its officers, directors, employees and members concerning their obligations under this order;

2. Obtain from each of its officers, directors, and employees an annual written certification, that he or she (a) has read, understands and agrees to abide by the terms of this order, (b) is not aware of any violation of this order, and (c) has been advised and understands that failure of CFDA or 7th on Sixth, as defined in the order, to comply with this order may subject either or both of the respondents to penalties for violation of the order; and

3. Retain the certifications required by Section III.C.2. Such certifications shall be provided to the Commission upon request.

IV.

It is further ordered, That each respondent shall:

- A. Notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, bankruptcy, or any other change in the respondent which may affect compliance obligations under this order; and

B. File a written report with the Commission within sixty (60) days after the date the order becomes final, and annually thereafter for five (5) years on the anniversary of the date the order became final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which the respondent has complied and is complying with the order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, each respondent shall permit any duly authorized representative of the Commission:

A. Upon reasonable notice to respondent access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of each respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, employees, or agents of respondent, who may have counsel present.

VI.

It is further ordered, That this order shall terminate on October 17, 2015.

APPENDIX A

Dear :

[Respondent] has agreed, without admitting any violation of the law, to the entry of a consent order by the Federal Trade Commission prohibiting certain conduct. A copy of the order is enclosed.

The order spells out [respondent]'s obligations in greater detail, but we want you to know and understand the following:

The Council of Fashion Designers of America and 7th on Sixth, Inc. may not negotiate on behalf of fashion designers collectively with models or modeling agencies for modeling or modeling agency services, and may not enter into or continue any agreement or understanding, express or implied, for the purpose or with the effect of affecting the prices paid for modeling or modeling agency services.

Non-compliance with this order may subject [respondent] to penalties for violation of the order, and may be reported to the Federal Trade Commission.

Sincerely,

[respondent]

Enclosure

THE COUNCIL OF FASHION DESIGNERS OF AMERICA, ET AL. 827

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APPENDIX B

Mr. Victor Alfaro
130 Barrow Street, Suite 105
New York, N.Y. 10014

Mr. Robert Danes
488 Seventh Avenue
New York, N.Y. 10018

Ms. Gemma Kahng
550 Seventh Avenue
New York, N.Y. 10018

Ghost
c/o Showroom Seven
498 Seventh Avenue
New York, N.Y. 10018

Mr. Mark Eisen
214 West 39th Street
New York, N.Y. 10018

Mr. Byron Lars
29 West 57th Street
New York, N.Y. 10019

Ms. Mary McFadden
240 West 35th Street
New York, N.Y. 10001

Magaschioni, Inc.
499 Seventh Avenue
New York, N.Y. 10018

The Next Generation
242 West 38th Street
New York, N.Y. 10018

Mr. Mark Badgley
Badgley Mischka
525 Seventh Avenue
New York, N.Y. 10018

Mr. James Mischka
Badgley Mischka
525 Seventh Avenue
New York, N.Y. 10018

Ms. Jennifer George
Jennifer George, Inc.
530 Seventh Avenue
New York, N.Y. 10018

Mr. Fernando Sanchez
Fernando Sanchez Ltd.
5 West 19th Street
New York, N.Y. 10011

Ms. Joan Vass
Joan Vass NY
117 East 29th Street
New York, N.Y. 10016

Ms. Adrienne Vittadini
1441 Broadway
New York, N.Y. 10018

Mr. Byron Lars
29 West 57th Street
New York, N.Y. 10019

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APPENDIX C

Ms. Bethann Hardison
Bethann Management Co.
36 North Moore Street
New York, NY 10013

Boss Models
317 West Thirteenth Street
New York, NY 10014

Ms. Frances Grill, President
Click Model Management
881 7th Ave., Suite 1013
New York, NY 10019

Mr. Michael Flutie, President
Company Ltd.
270 Lafayette St., Suite 1400
New York, NY 10012

Ms. Monique Pillard, President
Elite Model Management
111 East 22nd Street
New York, NY 10010

Ms. Ellen Harth
Elite Runway
149 Madison Avenue
New York, NY 10016

Joseph Hunter, President
Ford Models, Inc.
344 East 59th Street
New York, NY 10022

Mr. Charles Bennett,
Senior Vice President
International Management Group
170 Fifth Avenue, 10th Floor
New York, NY 10010

Ms. Irene Marie, President
I'M New York
120 Wooster St.
New York, NY 10012

Ms. Irene Marie, President
Irene Marie, Inc.
728 Ocean Drive
Miami Beach, FL 33139

Ms. Milie Pellet, President
Next Management
23 Watts Street, 5th Floor
New York, NY 10013

Now Model Management
568 Broadway, Suite 504-A
New York, New York 10012

Pauline Bernatchez, President
Pauline's
379 West Broadway, 5th Floor
New York, NY 10012

Ms. Natasha Esch, President
Wilhelmina Models, Inc.
300 Park Avenue South, 2nd Floor
New York, NY 10010

Women Model Management
107 Greene Street
New York, NY 10012

Ms. Barbara Lantz, President
Zoli Management
3 West 18th Street
New York, NY 10011

IN THE MATTER OF

J. WALTER THOMPSON USA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3622. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

This consent order prohibits, among other things, a New York-based advertising agency, which prepared advertisements for Jenny Craig, Inc., from claiming that any weight-loss program is recommended, approved, or endorsed by any person, group, or other entity, unless it possesses and relies upon competent and reliable scientific evidence to substantiate the representation. In addition, the consent agreement prohibits the respondent from misrepresenting the existence, results, or interpretations of any test, study, or survey.

Appearances

For the Commission: *David M. Newman.*

For the respondent: *Stuart Fridel, Davis & Gilbert, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that J. Walter Thompson USA, Inc., a corporation ("JWT" or "respondent"), has 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, alleges:

PARAGRAPH 1. JWT is a corporation, organized, existing and doing business under and by virtue of the laws of Delaware, with its principal office or place of business at 466 Lexington Avenue, New York, New York.

PAR. 2. JWT is now, and at all times relevant to this complaint has been the advertising agency of Jenny Craig, Inc., and Jenny Craig International, Inc. ("Jenny Craig"). JWT has prepared and disseminated advertising material to promote the sale of the Jenny Craig Weight Loss Program.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. JWT has prepared and disseminated or has caused to be disseminated advertisements for the Jenny Craig Weight Loss Program, including but not necessarily limited to the attached Exhibits A-E. These advertisements contain the following statements:

(a) "9 out of 10 Clients Would Recommend Jenny Craig.... When we asked our clients if they would recommend our program to their friends they gave us a resounding 'Yes!' And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it." (Exhibit A)

(b) "86% liked the counseling ... 89% liked the program ... And 94% would recommend us to a friend. National Survey of Jenny Craig Clients Oct-Dec 1991. Now. What could be more impressive than that?" (Exhibit B)

(c) "The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking ... " (Exhibit C)

(d) "National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding
'completely satisfied' or 'very satisfied':

* With the overall Jenny Craig program	89%
* With the weekly personal counseling sessions	87%
* With the friendliness of the Jenny Craig staff	91%
* That would recommend the program to a friend	94%

YOU'RE PROBABLY WONDERING WHAT ELSE WE COULD
POSSIBLY DO TO IMPRESS YOU." (Exhibit D)

(e) "In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends." (Exhibit E)

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that competent and reliable studies or surveys show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 6. In truth and in fact, competent and reliable studies or surveys do not show that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 8. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-E, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraphs five and seven, respondent possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 9. In truth and in fact, at the time it made the representations set forth in paragraphs five and seven, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph eight was, and is, false and misleading.

PAR. 10. Respondent knew or should have known that the representations set forth in paragraphs five and eight were, and are, false and misleading.

PAR. 11. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.










Chairman Pitofsky recused.

Complaint

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EXHIBIT A

9 Out Of 10 Clients Would Recommend Jenny Craig. Who Did They Tell?

 "I told my hairdresser." Nancy Rajczak lost 25 lbs.	 "I told my coach." Gloria Ockers lost 100 lbs.	 "I told my husband." Laurie Sachman lost 30 lbs.
 "I told my secretary." Kathy Albrecht lost 22 lbs.	 "I told my best friend." Cynthia West lost 47 lbs.	 "I told my hair stylist." Hedy Rodriguez lost 26 lbs.
 "I told my doctor." Jeri Lavinichia lost 53 lbs.	 "I told everyone I know." Carol Pickett lost 100 lbs.	 "I told my best friend." Nelson Harvey lost 25 lbs.

When we asked our clients if they would recommend our program to their friends they gave us a resounding "Yes!" And we think that's the best advertising we could ever hope for. You probably know someone who's been successful on the Jenny Craig program. Call now and find out just how they did it.

CALL NOW 1-800-97-JENNY

JENNY CRAIG
Weight Loss Centers

Pay As You Go
\$6
A Week Program Fee

Jenny Craig® Cuisine additional • Individual results may vary • Maintenance/Products optional • Open Saturdays and evenings • © 1991 Jenny Craig International

Issaquah Press (Seattle)
9 Out of 10
Ad #102095, 3 col x 8"
3/17 Insertion

EXHIBIT A

Complaint

EXHIBIT B

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

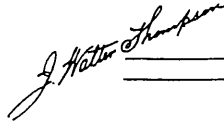
Job No.	JCI-GEN-422062	Title	Statistics/L5
Client	JENNY CRAIG	Status	<u>AS PRODUCED</u>
Product		Length	:30
ISCI No	YJCJ 0527	Date	4/16/92
	CORPORATE		

<p>VIDEO TITLE: WHAT TO YOU LIKE ABOUT LOSING WEIGHT WITH JENNY CRAIG? CUT TO MARIA GENOVESE CUT TO LAURA BECK TITLE: 86% LIKED THE COUNSELING NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUT TO MARIA GENOVESE CUT TO PHIL MCDERMOTT CUT TO LAURA BECK TITLE: 89% LIKED THE PROGRAM NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUT TO PHIL MCDERMOTT CUT TO MARIA GENOVESE CUT TO PHIL MCDERMOTT TITLE: 94% RECOMMEND TO A FRIEND NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991 CUTS OF MARIA, PHIL, AND LAURA TITLE: Lose all you want. \$39 Program Fee (LOGO) Jenny's Cuisine additional. TITLE: Get back a dollar a pound once you reach your goal weight. (LOGO) Some restrictions apply. TITLE: Get back a dollar a pound. 1-800-92-JENNY (LOGO) Some restrictions apply.</p>	<p>AUDIO AYQ: What do Jenny Craig clients like about Jenny Craig? MARIA: My Jenny Craig counselor is wonderful. LAURA: She was always encouraging. AYQ: 86% liked the counseling. MARIA: The Lifestyle classes are so important. PHIL: The food was great. LAURA: The Jenny Craig Program works in real life. AYQ: 89% liked the program. PHIL: If you want to lose weight. MARIA: Go to Jenny Craig. PHIL: Right away. AYQ: And 94% would recommend us to a friend. Now. What could be more impressive than that? Lose all you want for \$39. Then get back a dollar for every pound you lose. Call 1-800-92-JENNY. How much would you like to get back?</p>
---	--

Complaint

120 F.T.C.

EXHIBIT C



 R A D I O
 SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	732011	Title	"9 OUT OF 10/947"
Client	JENNY CRAIG	Status	AS PRODUCED
Product		Length	:45/:15
ISCI No.	YJCR2017	Date	3/24/93 2126/am

WOMAN:

The other day I saw a commercial that said nine out of ten Jenny Craig clients would recommend Jenny Craig to their friends. Nine out of ten. Which got me to thinking. If Jenny Craig helped me control my weight -- oh not my usual starve-stuff, give my scale a whiplash kind of control -- but *real* control, who would I tell? Well, not being one to gloat, I'd casually mention it to my mother and a few dear, dear friends. I'd drop a hint about Jenny to my boss. My dry cleaner. My plumber. My therapist. I'd tell my neighbor Fred who mows his lawn without a shirt. Geez! I'd run up forty floors to the top of my office building and shout "hey, you down there, look what Jenny did, I can manage my weight now." But before I hit the talk show circuit, do my book tour, gather awards and acclaim the world over, I better call Jenny Craig first.

LIVE ANNCR:

At Jenny Craig lose all the weight you want for just a \$1 a pound. Call 1-800-947-JENNY. 1-800-947-J-E-N-N-Y. Offer good at participating centres. Jenny's Cuisine additional.

EXHIBIT C

EXHIBIT D

National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding "completely satisfied" or "very satisfied":

- With the overall Jenny Craig program **89%**
- With the weekly personal counseling sessions **87%**
- With the friendliness of the Jenny Craig staff **91%**
- That would recommend the program to a friend **94%**

**YOU'RE PROBABLY WONDERING
WHAT ELSE WE COULD POSSIBLY
DO TO IMPRESS YOU.**

FREE PROGRAM FEE.
We're so sure you'll be satisfied with the Jenny Craig program, that when you bring this coupon in, we'll waive your program fee. Jenny's Cuisine is a required additional purchase.

JENNY CRAIG
Weight Loss Center
THE REAL LIFE ANSWER

DIAL DIRECT 1-800-92-JENNY

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122081 - 4 col x 15.75"

Statistics
42 11/22/91 1:00:10 PM

EXHIBIT D

Complaint

120 F.T.C.

EXHIBIT E-1



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No. JCI-GEN-432004
 Client JENNY CRAIG
 Product 9 OUT OF 10
 ISCI No YJCJ1822
 CORPORATE

Title "9 OUT OF 10/3"
 Status
 Length :30
 Date 2/16/93 2102/ms PAGE 1 OF 2

VIDEO

TITLE: IF YOU DISCOVERED A
 WAY TO CONTROL YOUR WEIGHT...

TITLE: WHO WOULD YOU TELL?

SUPER: DORI GREEN LOST 24 LBS. IN 6
 MONTHS

SUPER: SHELLY BENEDICT LOST 27
 LBS. IN 5 MONTHS

SUPER: LESLIE BALDWIN LOST 36 LBS.
 IN 8 MONTHS.

SUPER: MARK HACKBARTH LOST 66
 LBS. IN 13 MONTHS.

TITLE: THAT'S WHAT THESE
 SUCCESSFUL JENNY CRAIG
 CLIENTS DID.

SUPER: JOANNE WALTON LOST 32
 LBS. IN 10 MONTHS.

SUPER: NANJI PORTER LOST 31 LBS.
 IN 4 MONTHS

AUDIO

ANNCR VO: If you discovered a way to
 control your weight...

Who would you tell?

DORI: My mom and dad.

SHELLY: My doubles partner.

LESLIE: The guy at the doughnut shop.

SHELLY: Half the girls at the club.

MARK: My mechanic.

DORI: My daycare lady.

VO: That's what these successful Jenny
 Craig clients did.

JOANNE: My dog trainer.

DORI: My father.

NANJI: My aunt.

EXHIBIT E-1

EXHIBIT E-2

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No. JCI-GEN-432004
Client JENNY CRAIG
Product 9 OUT OF 10
ISCI No YJC1822
CORPORATE

Title "9 OUT OF 10/3"
Status
Length :30
Date 2/16/93 2102/ms PAGE 2 OF 2

VIDEO
TITLE: 9 OUT OF 10 JENNY CRAIG CLIENTS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.
TITLE: WOULD RECOMMEND JENNY CRAIG TO THEIR FRIENDS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.
TITLE: NEW PRICING POLICY PAY AS YOU GO
TITLE: \$6 A WEEK PROGRAM FEE JENNY'S CUISINE ADDITIONAL
TITLE: 1-800-92-JENNY (LOGO)

AUDIO
SHELLY: My chiropractor.
YO: In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends.
DORI: There are so many.
COUNSELOR: Get personal weight management at Jenny Craig.
Pay as you go for just \$6 a week.
Call 1-800-92-JENNY.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent J. Walter Thompson, USA, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this order, the term "diet-related food" shall mean any food (as that term is defined in 15 U. S. C. 55(b)) whose

labeling or advertising makes any claim regarding its weight loss or weight maintenance benefits.

I.

It is ordered, That respondent, J. Walter Thompson USA, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program, 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 such program is recommended, approved or endorsed by any person, group or other entity, unless, at the time of making any such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean those tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have 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.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know of an inadequacy of substantiation for the representation.

II.

It is further ordered, That respondent, J. Walter Thompson USA, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food, 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 existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey.

Provided, however, that it shall be a defense hereunder that the respondent neither knew nor had reason to know that the test, study or survey did not prove, demonstrate or confirm the representation.

III.

It is further ordered, That for five (5) years after the date of the last dissemination of the representation to which they pertain, respondent, or its 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 relied upon to substantiate any claim or representation covered by this order; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporation that may affect compliance obligations under this order, including but not limited to any change in corporate name or address, dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

V.

It is further ordered, That respondent shall, within ten (10) days from the date of service of this order upon it, distribute a copy of this order to each of its operating divisions, to each of its managerial employees, and to each of its officers, agents, representatives or employees engaged in the preparation, review or placement of advertising or other materials covered by this order, and shall secure

from each such person a signed statement acknowledging receipt of this order.

VI.

It is further ordered, That this order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade 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 paragraph in this order that terminates in less than twenty 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 paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the 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 paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order upon it, and at such other times as the Commission may require, file with the commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Pitofsky recused.

Concurring Statement

120 F.T.C.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I dissent from Part II of the consent order because the product coverage is too narrow. Part II would prohibit J. Walter Thompson from making deceptive establishment claims for any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food. Although the product coverage in this provision does go beyond the product with respect to which a violation has been alleged, given the particular facts of this case, I would impose even broader product coverage. In my view, J. Walter Thompson relied on a clearly flawed study in making its deceptive claims, and it continued to make claims based on this flawed study even after it had received contradictory results from a more reliable study that it had commissioned. J. Walter Thompson also readily could transfer deceptive test result claims to other products, as demonstrated by the fact that J. Walter Thompson has entered into three other consent agreements to settle allegations that it made deceptive claims concerning survey or test results for three disparate products.¹ Given that J. Walter Thompson's deception appears to have been deliberate and that its deception readily could be transferred to other products, *see* Stouffer Foods Corp., D. 9250, slip op. at 17 (Sept. 26, 1994), broader product coverage is appropriate.

CONCURRING STATEMENT OF COMMISSIONERS
ROSCOE B. STAREK, III AND CHRISTINE A. VARNEY

Although we have voted to accord final approval to the consent order negotiated with J. Walter Thompson USA, Inc. ("JWT") in this matter, we write to comment on the scope of the product coverage in Part II of the order. Part II addresses the false "establishment" claim challenged in paragraphs five and six of the complaint, *i.e.*, the claim that a valid study or survey showed that ninety percent or more of Jenny Craig Weight Loss Program customers would recommend the program to their friends. Part II of the order prohibits misrepresentations regarding the existence, contents, validity, results,

¹ *J. Walter Thompson Co.*, 97 FTC 323 (1981) (dental cleaning device); *J. Walter Thompson Co.*, 94 FTC 331 (1979) (dishwashers); *J. Walter Thompson Co.*, 84 FTC 736 (1974) (automobiles). Assuming the allegations in this and the previous cases to be true, it would appear that J. Walter Thompson has had difficulty comprehending that making deceptive establishment claims is conduct about which the Commission is concerned.

conclusions, or interpretations of any test, study, or survey, in connection with the promotion of any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food.

On three previous occasions JWT has signed consent orders settling allegations that it misrepresented the results of surveys or tests.¹ Because of the narrow scope of the product coverage applicable to the relevant order provisions, the Commission, on each occasion, had to pursue a new Section 5 case against the company, rather than being able to seek civil penalties for an order violation. Thus, the Commission's history with JWT raises the question of whether broader product coverage is warranted in this case.²

Extension of an order's product coverage beyond the product or service at issue in a complaint may be justified so long as the order bears a reasonable relationship to the unlawful practices alleged. *See* *Stouffer Foods Corp.*, D. 9250, slip op. at 17 (Sept. 26, 1994) (citing *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946)). The Commission generally considers three criteria to determine whether an order bears a reasonable relationship to a particular Section 5 violation: (1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations. *Stouffer*, slip op. at 17 (citing cases). All three elements need not be present to warrant fencing-in. *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982) ("In the final analysis, we look to the circumstances as a whole and not to the presence or absence of any single factor.").

Although we do not have the benefit of a litigated record, from the evidence presented so far, it appears that in this case, the first two, and arguably the third, elements weigh in favor of broad fencing-in.

¹ *J. Walter Thompson Co.*, 97 FTC 333 (1981) (complaint alleged that JWT misrepresented that "4 out of 5 dentists recommend" the Water Pik; consent order prohibits claims regarding surveys of professional groups unless the surveys were designed, executed, and analyzed in a competent and reliable manner); *J. Walter Thompson Co.*, 94 FTC 331 (1979) (complaint alleged that JWT misrepresented the results of tests of the cleaning effectiveness of Sears dishwashers; consent order prohibits, in advertising for major home appliances, misrepresenting the results of tests, studies, surveys, etc.); *J. Walter Thompson Co.*, 84 FTC 736 (1974) (complaint alleged that JWT misrepresented the results of studies on the safety of Ford automobiles; consent order prohibits, in advertising for automobiles, presenting the results of tests, experiments, or demonstrations unless competent and reliable to prove the claimed feature).

² It is true that this consent order has broader product coverage than the prior JWT orders and appears to cover the range of diet- and fitness-related products.

First, the alleged violations are both deliberate and serious. The survey from which the "nine out of ten" claim was derived was obviously and severely flawed. JWT, the largest ad agency in the country, surely must be deemed to have expertise in conducting consumer surveys. Any ignorance in this regard must have been cured by the Commission's earlier decision to hold it liable for the dissemination of misrepresentations about the results of surveys.

The evidence also suggests the violations were serious, as measured by the extent of dissemination. The ad campaign in question was a national one that ran for over a year, and the ads were given to franchisees to run in their areas. Furthermore, the great length of the campaigns dissemination schedule indicates the campaign must have been quite costly.

The second element, the ease with which the violative claims may be transferred to other products, also supports fencing-in. The results of surveys or studies are easily misrepresented, regardless of the type of product or service. The fairly obvious transferability of this type of claim is borne out by the prior consent orders, as those cases involved a diverse range of product categories (surveys of professionals, major home appliances, and automobiles).

The final element is the respondent's history of past violations. The question of whether consent orders may be used as evidence of past violations is at best unsettled. Compare *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222 n.23 (2d Cir. 1976) (because consent orders do not constitute an admission that the respondent has violated the law, the Commission may not rely on consent orders as evidence of additional illegal conduct when formulating cease and desist orders in other proceedings) with *Thompson Medical Co.*, 104 FTC 648, 833 n.78 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987) (while stating that a single consent order would not be used as a basis for concluding that the respondent has a history of past violations, the Commission expressly took no position on whether a pattern of consent orders would be a sufficient history of past violations to warrant fencing-in). Regardless of whether the prior consent orders may be considered evidence of past violations, they show that JWT was aware of the Commission's concern about this type of claim and of the requirements of the law with respect to claims involving surveys and tests.

Despite these concerns, for several reasons we believe that according final approval to the order is appropriate. For example,

broad product coverage arguably weighs more heavily on an ad agency such as JWT that handles accounts for a diverse assortment of products and services, than on a manufacturer or advertiser offering a limited range of products.³ In addition, litigation inevitably presents resource allocation questions.⁴ We write only to point out that in light of all the circumstances of this case, broad product coverage in Part II could have been justified as reasonably related to the violations alleged.

³ On the other hand, the potential burden of a broad order is partially mitigated by the fact that, as an ad agency, JWT's order contains a safe harbor insulating it from liability unless it knows or should know that the survey or test did not prove, demonstrate, or confirm the representation. In addition, it is not unusual for orders covering establishment claims to have broad product coverage because the type of claim covered -- the results or validity of tests or surveys -- is fairly discrete.

⁴ Even so, a litigated order could be beneficial for several reasons. First, in case of future similar violations by JWT, a litigated order clearly could be used as evidence of prior law violations. Second, while there is no guarantee that the Commission would obtain broader product coverage in litigation than is contained in this consent order, it seems unlikely that the Commission would do any worse, and the potential gain is great, both in terms of having JWT under a broader order and in terms of precedential value for other cases. Third, a litigated opinion might resolve some of the uncertainties concerning the precedential value of prior consent orders.

Complaint

120 F.T.C.

IN THE MATTER OF

SUMMIT COMMUNICATIONS GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3623. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

This consent order prohibits, among other things, Summit and seven Wometco Cable TV companies from agreeing, attempting to agree or carrying out an agreement with any cable television provider to allocate or divide markets, customers, contracts or territories for cable television service in the incorporated and unincorporated areas of the Georgia counties of Cobb, Bartow, Dekalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton and Cherokee. In addition, the consent order prohibits agreements to refrain from overbuilding any portion of any cable television system in these counties.

Appearances

For the Commission: *Jill M. Frumin.*

For the respondents: *Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. and A. Douglas Melamed and Robert A. Hammond, III, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents named in the caption hereof, all corporations subject to the jurisdiction of the Commission, have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Summit Communications Group, Inc. (hereinafter "Summit") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at

115 Perimeter Center Place, Suite 1150, Atlanta, Georgia. Time Warner Inc. (hereinafter "TWI") proposes to acquire Summit, at which time Summit will become a wholly-owned subsidiary of TWI.

PAR. 2. Respondent Wometco Cable TV of Georgia, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Conyers-Rockdale, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1361 Iris Drive, Conyers, Georgia.

Respondent Wometco Cable TV of Fayette County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 107 South Glynn Street, Fayetteville, Georgia.

Respondent Wometco Cable TV of Fulton County, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Jonesboro, Georgia.

PAR. 3. Respondents described in paragraph two will hereinafter be collectively referred to as "Wometco." On or about December 6, 1994, U S WEST, Inc. (hereinafter "USW"), through its wholly-owned subsidiary Multimedia Cable, Inc., a Delaware corporation, acquired Wometco.

PAR. 4. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of

Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Except to the extent that competition has been restrained as alleged herein, Summit and Wometco have been, and are now, in competition between themselves in parts of unincorporated Cobb County, Georgia as providers of cable television services.

PAR. 6. On or about March 16, 1990, Summit entered into a license agreement with Asbury Village/Summit Limited Partnership (hereinafter "Asbury Village") to provide cable television services to Asbury Village Apartments, an apartment complex in unincorporated Cobb County, Georgia. Asbury Village Apartments is located in an area of unincorporated Cobb County where both Summit and Wometco have franchise authority to provide cable television service (hereinafter "dual franchise area"). Pursuant to the license agreement, sometime after March 16, 1990, Summit began pre-wiring units of the Asbury Village Apartments. At or about the same time period, Wometco, which had cable television facilities nearby, also began pre-wiring units of the Asbury Village Apartments.

PAR. 7. On or about April 26, 1990, officials of Summit and Wometco had telephone conversations concerning which of the two companies would provide service to Asbury Village Apartments. During these conversations, Summit and Wometco agreed that Wometco would provide service to Asbury Village, and Summit would not. On or about May 24, 1990, Summit and Wometco entered into an agreement whereby Summit assigned to Wometco its contract to serve Asbury Village Apartments, and Summit sold to Wometco, at cost, its wires and other equipment that had already been installed in the apartment complex. Sometime thereafter, Wometco and Summit requested that Asbury Village consent to the assignment.

PAR. 8. On or about August 21, 1990, Asbury Village agreed to consent to the assignment of the Summit contract only if Wometco agreed to assume all of Summit's obligations under the contract and to perform faithfully each and every duty and covenant imposed on Summit by the contract.

PAR. 9. During the course of the telephone conversations on or about April 26, 1990, Summit and Wometco officials reached an understanding concerning how the two companies should handle future situations similar to that at Asbury Village Apartments, *i.e.*, where both companies were attempting to serve the same apartment

complex or housing subdivision in the dual franchise area. An understanding was reached concerning which of the two companies would serve apartment complexes and/or housing subdivisions in the dual franchise area. From late April of 1990 until at least March 24, 1993, this understanding between Summit and Wometco was in operation.

PAR. 10. On or about March 24, 1993, Summit wrote a letter to Wometco concerning both companies' efforts to serve a housing subdivision called Manor Oaks, in the dual franchise area. In this March 24, 1993, letter, Summit attempted to persuade Wometco to abandon Wometco's plans to serve Manor Oaks and to sell its equipment at cost to Summit. Summit specifically referenced the Asbury Village situation, stating that from April of 1990 until March 24, 1993, Summit had "honored the understanding" that they had reached at that time. Summit attempted to persuade Wometco not to overbuild Summit's facilities. Despite the letter, Wometco continued to build cable into Manor Oaks, and Summit withdrew from the subdivision.

PAR. 11. Sometime after August 16, 1993, pursuant to the understanding referred to in paragraphs six through nine above, Wometco sold to Summit, at cost, its cable television facilities in two housing subdivisions called Grand Manor and Elan, both in the dual franchise area. On or about August 16, 1993, Wometco sought to sell to Summit its investment in Grand Manor and Elan. In both Grand Manor and Elan, Wometco had installed cable wires before Summit had. Wometco acknowledged that in the Elan subdivision "Summit had plant existing at the entrance and should have the right to be the provider." Subsequently, Wometco sold out to Summit, at cost.

PAR. 12. By engaging in the acts and practices described in paragraphs six through eleven, respondents have agreed not to compete in the dual franchise area.

PAR. 13. The agreement not to compete and acts and practices of the respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. Restraining competition between providers of cable television services in parts of unincorporated Cobb County, Georgia;

B. Depriving cable television subscribers in parts of unincorporated Cobb County, Georgia, of access to a competitively determined price and quality of cable television services.

PAR. 14. The agreement not to compete and the acts and practices of respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Summit is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business at 115 Perimeter Center Place, Suite 1150, Atlanta, Georgia.

Respondent Wometco Cable TV of Georgia, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Conyers-Rockdale, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1361 Iris Drive, Conyers, Georgia.

Respondent Wometco Cable TV of Fayette County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 107 South Glynn Street, Fayetteville, Georgia.

Respondent Wometco Cable TV of Fulton County is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Summit*" means Summit Communications Group, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Summit, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

B. "*Wometco*" means Wometco Cable TV of Georgia, Inc., Wometco Cable TV of Cobb County, Inc., Wometco Cable TV of Clayton County, Inc., Wometco Cable TV of Conyers-Rockdale, Inc., Wometco Cable TV of Fayette County, Inc., Wometco Cable TV of Fulton County, Wometco Cable TV of Henry County, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their subsidiaries, divisions, groups and affiliates controlled by Wometco, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

C. "*TWI*" means Time Warner Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by TWI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

D. "*USW*" means U S WEST, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by USW, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

E. "*Commission*" means the Federal Trade Commission;

F. "*Cable operator*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more cable television systems; "cable operator" includes the partners, directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers,

employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary," "affiliate," and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

G. "*Cable television service*" means the delivery to the home of various entertainment and informational programming via a cable television system.

H. "*Cable television system*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community. The term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; or (b) a facility that serves only subscribers in one or more multiple dwelling units under common ownership, control, or management, unless such facility or facilities uses a public right-of-way.

I. "*Relevant geographic area*" means the incorporated and unincorporated areas of the counties of Cobb, Bartow, DeKalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton, and Cherokee, in the State of Georgia.

J. "*Overbuilding*" means instances in which two or more cable operators have the facilities to provide and are capable of providing cable television service to the same subscribers.

II.

It is further ordered, That Summit and Wometco each cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, combining or attempting to combine, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, carrying out or attempting to carry out, or soliciting or attempting to solicit, any combination, agreement, or understanding, either express or implied, with any cable operator or other provider or potential provider of cable television service in any part of the relevant geographic area:

