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BY FEDERAL EXPRESS

Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Attention: Donald S. Clark, Esq., Secretary

**Re: Advisory Opinion Request of MJJ Brilliant Jewelers, Inc.
Marking/Advertising of Precious Metal Jewelry**

Dear Secretary Clark:

On behalf of our client MJJ Brilliant Jewelers, Inc., New York, New York ("MJJ" or the "Company"), and as discussed with Federal Trade Commission Counsel via telephone conference, []

In light of the expected solicitation of public comments governing proposed revisions to the Jewelry Guides, the Company believes it will be more beneficial to address these general issues in concert with the comments of other interested parties. The Company does, however, seek guidance on its proposed marking and advertising of certain products to ensure that its procedures are within the letter and intent of the existing Jewelry Guides. This request is appropriate under the Commission's Rules of Practice because the proposed marketing and/or advertising claims involve a novel question of fact or law for which there is no clear Commission or court precedent.

Product

The escalating cost of precious metals, notably gold, coupled with increasing demand, has resulted in an industry demand for more reasonably priced alternatives. MJJ has invested

significant resources in developing an alternative alloy formulation that preserves the appearance and functionality of gold at a more reasonable cost to consumers. The proprietary alloy, identified as [] (hereinafter, the "MJJ Alloy"), and is composed of []% gold (periodic element Au), []% silver (periodic element Ag), []% palladium (periodic element Pa), and []% base metals.

Law

The issue herein is whether MJJ Brilliant's proposed use of the term "gold" as part of its attempt to accurately identify the specific composition of the MJJ Alloy in jewelry is proper under Section 5 of the FTC Act, which declares "unfair" or "deceptive acts or practices" unlawful. The Commission's Policy Statement on Deception¹ states that the Commission analyzes deceptive business practices under the following rubric:

1. There must be a representation, omission or practice that is likely to mislead the consumer. This includes the "use of bait and switch techniques."
2. The practice is examined from the perspective of a reasonable person in the circumstances. If the practice "is directed primarily to a particular group," such as Internet users, "the Commission examines reasonableness from the perspective of that group."
3. The representation, omission or practice must be a material one, i.e., it is likely to affect the consumer's conduct or decision regarding the produce or service.

Thus, an advertisement is "deceptive" if it includes material information that is false or that is likely to mislead a consumer acting reasonably under the circumstances. Likewise, an advertisement is deceptive if it omits material information, and that omission is likely to mislead a consumer acting reasonably under the circumstances.² Requiring accurate disclosure of material terms allows consumers to compare similar services offered by one or multiple providers and weigh the different terms being offered in making decisions about what services to purchase.

The Commission has formulated guides for various industry products, which set forth the Commission's "current thinking" about claims for certain products. The Jewelry Guides, which

¹ Federal Trade Comm'n, Policy Statement on Deception (Oct. 14, 1983)

² Cliffdale Assocs., 103 F.T.C. at 175 (appending FTC Policy Statement on Deception).

are found at 19 C.F.R. Part 23 ("Jewelry Guides"), are administrative interpretations of Section 5 of the FTC Act prohibiting "unfair or deceptive" statements or claims in a product's marketing if that marketing misrepresents a product's true composition. The underlying intent of these policy statements is to ensure that the representations in advertising "will put consumers on notice that the product contains certain precious metals, thereby putting them in a position to inquire of the jeweler as to the relevant value of the different metals and the overall value of the product."³

Section 23.1 of the Jewelry Guides expressly states that "It is unfair or deceptive to misrepresent the type, kind, grade, quality, quantity, metallic content, size, weight...or any other material aspect of an industry product." Note 2 to § 23.1 further provides that "To prevent deception, any qualifications or disclosures...should be sufficiently clear and prominent." The clear intent of the Jewelry Guides is to avoid deception of, or confusion among, consumer purchasers of finished articles of jewelry by prohibiting use of the term "gold" as an adjective for finished jewelry. They cannot be read to preclude advertisers from using truthful and accurate statements of product content, nor can they be interpreted in a way that prohibits the use of new materials developed and recognized throughout the industry subsequent to implementation of the Jewelry Guides.

Industry Standard and Practice

Precious metal alloys have become common in the jewelry trade over the past several years due to the escalating price of precious metals. The industry is replete with examples of advertising, marketing and labeling to such an extent that consumers now require greater content detail and clarification of the items they are purchasing. Attached are examples of current advertisements that evidence this trend. None of these identify the finished item of jewelry as an article of "gold," but rather provide content information to the consumer to avoid confusion and deception. We believe the truthful, accurate and complete description of product contents not only meets the requirements and intent of the Jewelry Guides, but is mandated by it. The failure to disclose this information is inherently deceptive as the broad range and use of precious metal alloys in the jewelry trade afford consumers no basis to assess the value of purchased merchandise.

³ Guides for the Jewelry, Precious Metals, and Pewter Industries, 62 Fed. Reg. 16,673, 16,674 (Apr. 8, 1997).

Moreover, many of these products are the same color as 10kt., 14kt. and 18kt. gold. The similar color, coupled with the high price point of these products, imply a precious metal content. Prohibiting a truthful disclosure of the actual precious metal content serves only to exacerbate consumer confusion by creating an inability to distinguish between gold alloys of between 1kt and 10 kt. This is clearly an unintended consequence, and a violation of at least the intent of the Jewelry Guides.

The Jewelry Guides were originally designed, in part, to prevent consumer deception and confusion when purchasing finished articles of gold jewelry. A standard was implemented to provide a threshold for which a consumer can be assured of obtaining a known value. The 10 kt. minimum standard was implemented as the basis for identifying a finished product as "gold." Products consisting of less than 10 kt. cannot, absent more, be identified as gold. The Jewelry Guides do not, however, relate to, restrict or limit the use of gold in the construction of finished jewelry. In fact, in light of the introduction of new alloys which appear indistinguishable to the consumer in terms of look, color and feel, the Jewelry Guides must be read to permit accurate and truthful content information.

In addition, The FTC has previously acknowledged the value of harmonization of U.S. and Canadian regulations applicable to trading partners in both jurisdictions. This stems from FTC comments on the Canadian Guide to the *Precious Metals Marking Act* and Regulations. The U.S. and Canadian Guides are strikingly similar, both prohibiting a dealer from selling, importing or advertising any precious metal article in a manner which is false or misleading as to the precious metal content. The Canadian Guides do not restrict the use of the term "gold," or prohibit providing an assay report to identify the contents of a gold alloy article, if used in a non-deceptive and non-misleading manner. We believe the U.S. jewelry guides can be read consistently with the Canadian guides in allowing MJJ's proposed marketing and advertising, as set forth below.

MJJ Proposed Marketing and Product Stamping

MJJ is aware that it cannot stamp or market its gold alloy jewelry with the traditional karat marking standard as the alloy is admittedly less than 10 karat fineness. The articles are, however, constructed of an alloy consisting of the precious metal elements gold, silver and palladium, with the appearance and feel of gold. Due to its unique new name and content, the composition of the MJJ Alloy is not yet understood within the industry or the public based on

name alone. As with other trademarked or newly created products, market recognition and/or customer understanding of the product is based primarily upon information supplied by the trademark/patent owner or producer of the goods. Without such efforts, the consumer would be unable to make a well-informed decision as to the product. Our reading of the Jewelry Guides mandates the accurate identification of the specific composition of the precious and non-precious metals contained within the MJJ Alloy.

As discussed, MJJ proposes to market its gold alloy jewelry by fully declaring the contents. By doing so it is not describing the item as a gold product, but identifying the contents in an accurate, truthful, non-deceptive manner. Specifically, MJJ proposes use of the following in advertising and marketing materials, and requests confirmation that each is acceptable:

- (1) use of the term: consisting of a proprietary alloy of gold, silver, and platinum.
- (2) a link to a third party assay report identifying the precious metal content of the finished article. A representative report is attached.
- (3) identification of the specific percentage content of all precious metals in the finished article.
- (4) stamping its merchandise with the company's [] trademark.

All of the above are in compliance with the Jewelry Guides as they do not misrepresent the advertised articles as gold and non-deceptively describe the items in a way that enables consumers to evaluate and compare the items against similar jewelry widely marketed and distributed to the public. As set forth above, we believe the proposed language eliminates consumer confusion.

Conclusion

In light of the Commission's clear jurisdiction and its enforcement activity in this area, MJJ has exercised due care in seeking advance direction from the Commission on proposed advertising of its jewelry. Based on the foregoing, and in accordance with Section 1.3(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 1.3(c), we respectfully request that the Commission or FTC Staff issue an advisory opinion confirming that the marketing language is in accordance with existing law, agency regulations and applicable guidelines governing

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precious metal jewelry, as the proposed qualifying statements are accurate, truthful, and complete, providing consumers with non-deceptive information regarding the construction and value of our client's merchandise. Moreover, the proposed language does not mis-identify the wholesale and retail products as gold, nor does it in any way misrepresent the constituent materials.

Should you have any questions or require additional information, please do not hesitate to contact our office.

Sincerely,

C.J. Erickson

cc: MJJ Brilliant Jewelers