IN THE MATTER OF

BEYLEN TELECOM, LTD., ET AL.

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

Docket C-3782. Complaint, Jan. 23, 1998--Decision, Jan. 23, 1998

This consent order prohibits, among other things, two companies and an officer from falsely advertising that using their special "viewer" would be "free" and from disconnecting consumers from their local Internet service provider and reconnecting them to international numbers assigned to the country of Moldova. The consent order requires that the proposed settlement include the payment of redress funds to AT&T and MCI, which will issue credits to their customers who were billed for the calls, and to the FTC, which will issue refunds to customers of other long-distance carriers who were billed for the calls.

Appearances

For the Commission: *Paul Luehr* and *Eileen Harrington.*
For the respondents: *Joel R. Dichter, Klein, Zelman & Rothermel*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beylen Telecom, Ltd. and NiteLine Media, Inc., corporations, and Ron Tan, individually and as an officer of NiteLine Media, Inc. ("the respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Beylen Telecom, Ltd., ("BTL") is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

2. NiteLine Media, Inc. ("NiteLine") is a corporation doing business under and by virtue of the laws of the State of New York with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

3. Ron Tan a/k/a Roeun Tan ("Tan") is an officer and shareholder of corporate respondent NiteLine Media, Inc. Individually or in concert with others, he has formulated, directed, controlled or participated in the acts or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of NiteLine Media, Inc.

4. At all times relevant to this complaint, the respondents have maintained a substantial course of trade, advertising, offering for sale and selling computer-stored images via both the Internet and international and interstate telephone lines, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

COURSE OF BUSINESS

5. From at least December 1996 through January 1997, the respondents Tan and NiteLine posted messages to newsgroups and operated and promoted one or more World Wide Web sites, including the web sites located at "www.erotic2000.com" and "www.erotica2000.com." Through newsgroup messages and these web sites, respondents Tan and NiteLine represented, expressly or by implication, that consumers could view "adult" images for free at sites on the Internet. A newsgroup is a collection of electronic messages, purportedly about a given topic, that consumers may read on the Internet. The World Wide Web or Web is a system used on the Internet for cross-referencing and retrieving information. A web site is a set of electronic documents, usually a home page and subordinate pages, readily viewable on computer by anyone with access to the Web, standard software, and knowledge of the web site's location or address.

6. At one or more of the web sites operated by respondents Tan and NiteLine and in one or more of their newsgroup messages, respondents Tan and NiteLine stated that they offered "FREE XXX Images" for viewing at "FREE ADULT SITES." In addition, at one or more of their web sites, the respondents Tan and NiteLine stated that the international sites they offered entailed:

NO MEMBERSHIP FEES!
NO CREDIT CARDS NEEDED!
NO 900# CHARGES!

7. Web sites operated by respondents Tan and NiteLine instructed consumers that to view the "adult" images offered, the consumer had

to first "download a special image viewer." This "image viewer" was a software program, which was identified as "david.exe," or "david7.exe," or other similar names.

8. Contrary to the clear implication of the term "image viewer" that respondents Tan and NiteLine used on their web sites to describe this software program, the "david.exe" (or similarly named software) was not merely a means for reading computer data and converting such data into visual images. Instead, this software, if downloaded, installed, and activated, would, without any explanations or adequate disclosures: (a) automatically terminate the consumer's computer modem connection to the consumer's local Internet service provider while maintaining the appearance that the computer modem remained connected to such local Internet service provider; (b) automatically direct the consumer's computer modem to dial an international telephone number to re-connect to the Internet; (c) maintain the international long distance telephone connection thus established unless and until the consumer turned off the power switch to his computer or modem, or took other unusual action to terminate the telephone connection; and (d) caused the consumer to incur international long distance telephone charges on his telephone bill at rates in excess of $2.00 per minute for as long as the international long distance telephone connection was maintained. One of the techniques that this software employed to maintain the appearance that the computer modem remained connected to the consumer's local Internet service provider was to automatically turn off the speaker on the consumer's modem before dialing, thus preventing the consumer from hearing the sound of the international number being automatically dialed.

9. Prior to about January 23, 1997, respondents Tan and NiteLine, at one or more of their web sites and in newsgroup messages, failed to disclose any of the events, described above in paragraph eight, that automatically followed if one downloaded, installed and activated the purported "viewer" software.

10. Respondents Tan and NiteLine changed one or more of their web sites on or about January 23, 1997. Nevertheless, after that date, their web sites and newsgroup messages continued to fail to disclose that once a consumer downloaded, installed and activated the "viewer" software, it caused consumers to incur international long distance telephone charges at rates in excess of $2.00 per minute. In addition, web sites and news group messages posted by respondents

Tan and NiteLine continued to fail to disclose that the consumer's computer modem would maintain the international long distance telephone connection unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

11. After about January 10, 1997, one or more of respondents' web sites stated if consumers downloaded their "viewer" software, the consumers' computer modems would be connected to a site in Moldova, a former constituent state of the now-defunct Soviet Union. However, the computer modems of consumers who downloaded the software were not connected to a site located in Moldova, but rather were connected to a site located in Canada. Thus, even though the automatic telephone call generated by the "viewer" software went to Canada, the consumer was charged at the comparatively much higher per-minute rates for a call to Moldova.

12. Once a consumer had downloaded, installed and activated the purported "viewer" software offered by respondents Tan and NiteLine, the consumer continued to incur international long distance telephone charges for as long as his computer modem was connected to the international long distance number and even after the consumer had exited respondents Tan and NiteLine's "adult" sites.

13. Respondents Tan and NiteLine's promises of "free" Internet viewing of computer- stored images lured consumers from the U.S. and foreign countries into incurring hundreds of thousands of dollars in international long distance telephone charges.

14. Respondent BTL is a service bureau that provides telecommunications and other services to entities that promote international pay-per-call programs. In that capacity, respondent BTL assigned Moldovan telephone numbers to respondent NiteLine, as well as to Internet Girls, Inc. -- a defendant in the federal court action, *FTC v. Audiotex Connection, Inc.* CV-97 0726 (DRH) (E.D.N.Y. filed Feb. 13, 1997). Directly or indirectly, respondent BTL also provided NiteLine and Internet Girls with the following services: (a) daily telephone traffic and billing reports; (b) the "david.exe" (or similarly named software) program and technical support for this "viewer" software program described above; (c) text or graphics to use in soliciting consumers on the Internet, including information that Tan or NiteLine incorporated into newsgroup messages or that Tan, NiteLine, or Audiotex defendants William Gannon or Internet Girls incorporated into the web sites "www.erotic2000.com,"

"www.erotica2000.com," "www.sexygirls.com," "www.1adult.com," or "www.beavisbutthead.com"; and (d) a termination point for audiotext calls, namely a site in Canada containing computer images for viewing.

15. A foreign telephone carrier contracted to pay respondent BTL a portion of the revenues received from consumers for calls placed to specific international telephone numbers. Respondent BTL, in turn, contracted to pay respondent NiteLine a per-minute rate for calls they generated to those specific international telephone numbers. (Respondent BTL contracted to pay defendant Internet Girls on a similar basis). Thus, respondents BTL, Tan, and NiteLine were to receive a portion of the amount of international telephone charges incurred by consumers.

VIEWING COST

16. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images without cost by downloading, installing and activating purported "viewer" software.

17. In truth and in fact, once a consumer downloaded, installed and activated the purported "viewer" software to view computer-stored images located at Internet sites, the consumer incurred costs for an international long distance telephone call.

18. Therefore, the representations of respondents Tan and NiteLine, as set forth in paragraph sixteen, above, were false and deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

SOFTWARE FOR DOWNLOADING

19. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents Tan and NiteLine represented to consumers, expressly or by implication, that consumers could view the images by downloading, installing and activating purported "viewer" software.

20. In numerous instances, respondents Tan and NiteLine failed to disclose or disclose adequately to consumers the material facts that, by downloading, installing, and activating the purported "viewer" software, the following would result:

a. The consumer's computer would terminate its modem connection to the consumer's usual local Internet service provider;

b. The consumer's modem would dial an international long distance telephone number and establish a long-distance telephone connection with an Internet service provider at some remote location outside the United States;

c. The consumer would likely incur international long distance telephone charges at rates in excess of $2.00 per minute for as long as the long-distance telephone connection with the remote Internet service provider was maintained; and

d. The consumer's computer modem would not terminate the international long distance telephone connection to the remote Internet service provider unless and until the consumer turned off the power switch to his computer or modem or took other unusual action to terminate the telephone connection.

21. In view of representations by respondents Tan and NiteLine that consumers could view certain images located at Internet sites by downloading, installing and activating purported "viewer" software, as set forth in paragraph nineteen, above, respondents Tan and NiteLine's failure to disclose or disclose adequately the material information set forth in paragraph twenty, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

22. By providing respondent NiteLine (and defendant Internet Girls) with telephone numbers, and by directly or indirectly providing the "viewer" software, text or graphics, or other goods or services described in paragraphs fourteen and fifteen, above, for the purpose of inducing consumers to call international telephone numbers, respondent BTL provided the means and instrumentalities to others, and thereby acted in concert with others or knowingly and substantially assisted others, to engage in the deceptive acts and practices alleged in paragraphs sixteen through twenty-one, above, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

TELEPHONE BILLING

23. In numerous instances, in the course of advertising, offering, offering for sale, or selling certain computer-stored images located at Internet sites, respondents directly or through an intermediary caused charges for long distance calls to Moldova to appear on the telephone

billing statements of consumers who downloaded, installed and activated respondents' purported "viewer" software.

24. In truth and in fact, the call that a consumer's computer modem dialed when the consumer downloaded, installed and activated respondents' purported "viewer" software did not go to Moldova, which has high per-minute long distance telephone rates for calls from the United States, but instead went to Canada, which has comparatively much lower long distance rates for calls from the United States.

25. Therefore, respondents' practice of causing charges for long distance calls to Moldova to appear on the telephone billing statements of consumers who had downloaded, installed and activated respondents' purported "viewer" software, as set forth in paragraph twenty-three, above, was deceptive, in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

26. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

Commissioner Thompson and Commissioner Swindle not participating.

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 complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents for purposes of the order 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 prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1a. Respondent Beylen Telecom, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the Cayman Islands with its principal office or place of business at Genesis Building, PS Box 2097, Grand Cayman, Cayman Islands, British West Indies.

1b. Respondent NiteLine Media, Inc. is a New York corporation with its principal office or place of business at 7302 19th Avenue, Brooklyn, New York.

1c. Respondent Ron Tan is an individual residing within the State of New York and is an officer and shareholder of NiteLine Media, Inc. Individually or in concert with others he formulates, direct, or controls the policies, acts, or practices of NiteLine Media. His principal office or place of business is the same as that of NiteLine Media, Inc.

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

DEFINITIONS

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

1. *"Beylen"* means Beylen Telecom, Ltd. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

2. *"NiteLine"* means NiteLine Media, Inc. and its successors, assigns, shareholders, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

3. *"Ron Tan"* means Ron Tan a/k/a Roeun Tan, individually, and in his capacity as an officer and shareholder of NiteLine Media, Inc., and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, whether acting through any corporation, subsidiary, division, or other device.

4. Unless otherwise specified, *"respondents"* shall mean Beylen and NiteLine, corporations, their successors and their officers; Ron Tan, individually and as an officer of NiteLine; and each of the above's agents, representatives and employees. Unless otherwise specified, "respondent" shall mean NiteLine, Ron Tan or Beylen.

5. *"Commerce"* shall mean "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

6. *"Clearly and conspicuously"* shall mean as follows:
In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. Provided, however, that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation. The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement.

7. *"Document"* is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from

which information can be obtained. A draft or non-identical copy is a separate document within the meaning of the term.

8. *"David.exe"* means a software program that, as alleged in the Commission's draft complaint, a respondent has promoted, offered, distributed, or provided on web sites as a "viewer," which consumers may download, install, and execute, and which dials an international long-distance telephone number for which a fee is charged.

9. *"Eligible consumer"* means a telephone subscriber that was billed for international long distance calls to Moldova from December, 1996 through February, 1997 to one of the telephone numbers listed in Schedule A, annexed hereto.

10. *"Relevant charges"* means the dollar amount billed by AT&T, MCI, Sprint or another long distance carrier to an eligible consumer for international long distance calls to Moldova from December 1996 through February 1997, to one of the telephone numbers listed in Schedule A, annexed hereto.

I.

It is therefore ordered, That, in connection with using the Internet to place international long distance telephone calls, each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by:

A. Representing, either directly or by implication, that consumers may download, install, activate or use a computer software program to view computer-stored images without cost, unless there are no costs to consumers arising from such activity.

B. Representing, either directly or by implication, that a consumer may view computer-stored images by downloading, installing and activating a software program known as "David.exe" or any other substantially similar software, unless such respondent clearly and conspicuously discloses, in close proximity to the representation, any material facts concerning costs and consequences to a consumer that result from downloading, installing, and activating such software, including, but not limited to, the following:

1. That the consumer's computer will terminate its modem connection to the consumer's usual Internet service provider;

2. That the consumer's modem will dial an international long-distance telephone number and establish a long-distance telephone connection with some remote location outside the United States;

3. (a) A statement that "International long distance telephone charges to [insert country of call termination] apply"; and

(b) Either:

(i) A statement that "This call may cost you as much as [insert the maximum estimate of possible per-minute tariffed charge available through one of the three largest U.S. long-distance carriers (*e.g.* MCI, Sprint or AT&T; hereafter "a major U.S. carrier")] per minute"; or

(ii) A stated range of possible costs per-minute for the call, where the maximum possible per-minute charge available through a major U.S. carrier is disclosed at least as prominently as any lower estimate of possible charges, and the lower estimate is based on a non-promotional standard tariffed charge available through a major carrier, and there is a clear and conspicuous disclosure of the following statement: "To determine your exact per-minute charges, contact your long distance carrier."; and,

4. That, once connected, the consumer's computer modem will not terminate the international long-distance telephone connection to the remote service provider unless and until: (a) the consumer terminates the connection by using a "disconnect" feature that is displayed on the screen throughout the connection; OR (b) the call is terminated automatically after some specific, stated period of time (*e.g.* after 5 minutes); OR (c) the consumer turns off the power switch to his computer or modem, or takes other drastic and unusual action to terminate the telephone connection, if neither (a) nor (b) above are applicable.

II.

It is further ordered, That:

A. Each respondent shall not violate Section 5(a) of the FTC Act, 15 U.S.C. 45(a) by directly causing international long-distance charges to appear on the telephone billing statement of any consumer when such call does not, in fact, go to the international destination for which charges are assessed; and

B. Each respondent, when contracting with any entity for international call charges to appear on any consumer's telephone bill, shall include written terms in such contract requiring calls to go to the destination for which charges are assessed on a consumer's telephone bill. If, at the time of the entry of this order, a respondent has an

existing contract with another entity that arranges call charges to appear on any consumer's telephone bill, the respondent may satisfy the requirements of this Section by obtaining from that entity a letter or other written assurance that calls go to the destination for which charges are assessed on a consumer's telephone bill.

III.

It is further ordered, That:

A. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY) ("the Consent Decree"), and after the entry of such Consent Decree, eligible consumers charged by AT&T or MCI for telephone calls involving David.exe shall, to the extent possible, receive a credit on their monthly telephone bill equal to the amount of the relevant charges. To the extent an eligible consumer has already been credited such an amount in full, no additional credit shall be extended. To the extent an eligible consumer has received a partial credit, only the remaining balance of the original relevant charge shall be credited. The process for issuing the credits to eligible consumers will be administered by AT&T and MCI, respectively, and monitored and/or audited by the FTC. The reasonable costs of the two carriers arising from the issuance of credits for the relevant charges and from such administration of credits shall be reimbursed by the escrow agent by deducting and paying to AT&T and MCI, respectively, the amounts stated below.

B. Pursuant to the Consent Decree and Order proposed in *FTC v. Audiotex Connection, Inc.*, CV-97 0726 (DRH) (EDNY), and after the entry of such Consent Decree, a Redress Escrow Account shall be established at a bank with a branch located in the State of New York, and Joel Dichter, Esq., shall be designated as the sole escrow agent and signatory to this Redress Escrow Account. In addition to the funds deposited by the defendants in *FTC v. Audiotex Connection, Inc.*, the respondents shall deposit sufficient funds into the Redress Escrow Account as are necessary to enable the escrow agent to distribute the funds, consisting of a total deposit of all sums provided by Section IIIB(1) and (2), below, contemporaneously with a deposit of the $60,000 provided by Section IIIB(3), in the following manner:

1.AT&T shall be distributed the sum of $660,000 toward the cost of administering the credit to consumers provided by Section IIIA,

above, and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

2. MCI shall be distributed the sum of $99,302.57 toward the cost of administering the credit to consumers provided by Section IIIA above and toward reimbursement of out-of-pocket expenses associated with calls to the Moldova telephone numbers;

3. Forty Thousand Dollars ($40,000) shall be distributed to the Federal Trade Commission and shall be used, where practicable, to provide redress to eligible consumers charged by an international long-distance carrier other than AT&T or MCI (hereinafter referred to as "Eligible Non-AT&T/MCI Consumers"). The Commission, in its sole discretion, may use a designated agent to administer redress for Eligible Non-AT&T/MCI Consumers. If the Commission, in its sole discretion, determines that redress to consumers is wholly or partially impractical, any funds up to Forty Thousand Dollars ($40,000.00) not so used shall be paid to the United States Treasury. The respondents shall be notified as to how such funds are disbursed, but shall have no right to contest the manner of distribution. Eligible Non-AT&T/MCI Consumers shall have 90 days from the Court's entry of the Consent Decree to request a refund. If the Commission or its designated agent determine within 120 days from the entry of the Consent Decree that the cost of issuing and administering refunds to Eligible Non-AT&T/MCI Consumers exceeds Forty Thousand Dollars ($40,000.00), the Commission or its designated agent shall so notify the escrow agent, and an additional sum of money not to exceed Twenty Thousand Dollars ($20,000.00) shall be distributed by the escrow agent to the Commission for redress to Eligible Non-AT&T/MCI Consumers. To the extent that the escrow agent is not notified in writing by the Commission within such 120 day period that all or a portion of the additional Twenty Thousand Dollars ($20,000.00) is required by the Commission for redress purposes, the $20,000.00 or remaining portion thereof not required by the Commission for redress purposes shall be released from the Redress Escrow Account and distributed promptly by the escrow agent to any contributing defendant in *FTC v. Audiotex Connection, Inc.* and/or any contributing respondent.

C. If, during the 60-day comment period before the issuance of this order, the respondents distributed funds to the Redress Escrow Account in amounts sufficient to commence the redress program under the Consent Decree in *FTC v. Audiotex Connection, Inc.*, such

payment fulfills the respondents' redress obligations under Section IIIB above.

IV.

It is further ordered, That for a period of three years after the date of entry of this order, each respondent shall maintain, and make available to the FTC upon reasonable notice, documents that, in reasonable detail, accurately, fairly, and completely reflect such respondent's activities related to using the Internet to place international long distance telephone calls including:

A. 1. Representative written and, if distributed in audio format, audiotaped copies of all solicitations, advertisements, or other marketing materials actually used;

2. The number, frequency, and average duration of calls to any international, tolled telephone numbers advertised or promoted directly or indirectly by such respondent, as well as the payments received and payments made for such calls;

3. The portion of the contract or the other written assurance referenced in Section IIB of this order; and,

B. Records that reflect, for every consumer complaint or refund request received from any consumer to whom such respondent has sold, billed or sent any goods or services, or from whom such respondent accepted money for such goods or services, whether received directly or indirectly or through any third party:

1. The consumer's name, address, telephone number and the dollar amount paid by the consumer;
2. The written complaint or refund request, if any, and the date of the complaint or refund request;
3. The basis of the complaint and the nature and result of any investigation conducted concerning the validity of the complaint;
4. Each response from the respondent(s) and the date of the response;
5. Any final resolution and the date of the resolution; and
6. In the event of a denial of a refund request, the reason for such denial.

V.

It is further ordered, That, to enable the Commission to monitor compliance with the provisions of this order, for a period of three years after the date of entry of this order:

A. Each corporate respondent shall notify the FTC in writing, within thirty (30) days of: (1) any reorganization, name change, dissolution, change in majority ownership, or any corporate change that may affect compliance obligations arising under this order; and (2) any affiliation with any new business entity (including but not limited to, any partnership, limited partnership, joint venture, sole proprietorship or corporation) in connection with using the Internet to place international long distance telephone calls, such notification to include: (a) the name of the business entity; (b) the address and telephone number of the business entity; (c) the names of the business entity's officers, directors, principals and managers; and (d) a summary description of the business entity's intended activities; and

B. Each individual respondent shall notify the FTC in writing, within thirty (30) days of the discontinuance of his current business affiliation or employment with a corporate respondent, or of his affiliation or employment with any new business entity (including but not limited to, any partnership, limited partnership, joint venture, sole proprietorship or corporation) in connection with using the Internet to place international long distance telephone calls, in the latter case such notification to include: (a) the name of the business entity; (b) the address and telephone number of the business entity; (c) the names of the business entity's officers, directors, principals and managers; and (d) a summary description of the business entity's intended activities; and

C. Each respondent shall designate its counsel as authorized to accept service of all documents related to this order.

VI.

It is further ordered, That each respondent shall not provide or distribute to any person, except for a court, counsel for the respondents, counsel's consultants, agents of the Commission or other law enforcement authorities, or others as ordered by a court of competent jurisdiction, copies of "David.exe" or "david7.exe" or any substantially similar software.

VII.

It is further ordered, That for a period of three years after the date of entry of this order, each respondent shall in connection with any business using the Internet to place international long distance telephone calls:

A. Provide a copy of this order once to, and obtain a signed and dated acknowledgment of receipt of the same from, each affiliate, subsidiary, division, sales entity, successor, officer, director, shareholder, employee, agent or representative of such respondent; and

B. Maintain, and upon reasonable notice make available to representatives of the Commission, the original and dated acknowledgments of the receipts of copies of this order required by Section VIIA above.

VIII.

It is further ordered, That where required by this order, written notice to:

A. The Commission shall be effected by serving papers, by personal delivery or certified mail, addressed to: Associate Director, Federal Trade Commission, Division of Marketing Practices, Sixth Street and Pennsylvania Avenue, N.W., Room 238, Washington, DC; and

B. The respondents shall be effected by serving papers, by personal delivery or certified mail, addressed to: Joel R. Dichter, Klein, Zelman, Rothermel & Dichter, L.L.P., 485 Madison Avenue, New York, NY.

IX.

It is further ordered, That each respondent shall, within 180 days after the date of entry to this order, file with the Commission a report, in writing, setting forth the manner and form of compliance with this order.

X.

It is further ordered, That, to the extent that this order may conflict with any federal law or regulation which is later enacted or amended, such law and not this order shall apply where such a

conflict exists. For the purposes of this order, a conflict exists if the conduct prohibited by this order is required by such federal law or if conduct required by this order is prohibited by such federal law.

Commissioner Thompson and Commissioner Swindle not participating.

ATTACHMENT A

List of Moldova Phone Numbers

373-955-1100
373-955-1111
373-955-1200
373-955-1300
373-955-1400
373-955-1500
373-955-1600
373-955-2000
373-955-2010
373-955-2020
373-955-2030
373-955-2222
373-955-2400
373-955-2401
373-955-2402
373-955-2403
373-955-2404
373-955-2405
373-955-2406
373-955-2407
373-955-2408
373-955-2409
373-955-2410
373-955-2411
373-955-2419

IN THE MATTER OF

INSILCO CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3783. Complaint, Jan. 27, 1998--Decision, Jan. 27, 1998

This consent order requires, among other things, the Ohio-based company to divest two of the Helima aluminum tube mills and associated assets to a Commission-approved buyer and prohibits the respondent from obtaining or providing the type of sensitive information -- such as price and cost information, pricing plans, strategies or policies relating to competition -- to others that it obtained before consummating the acquisition of Helima.

Appearances

For the Commission: *Casey Triggs, Nicholas Koberstein, Katherine Funk, Ann Malester* and *William Baer.*

For the respondent: *Linda R. Blumkin, Fried, Frank, Harris, Shriver & Jacobson*, New York, N.Y.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Insilco Corporation ("Insilco"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired certain assets of Helmut Lingemann, GmbH, ("Lingemann") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

For purposes of this complaint the following definitions apply:

1. *"Welded Aluminum Tubes"*, including welded aluminum tubes with diameters of 50 millimeters or greater ("Large Welded Aluminum Tubes") and welded aluminum tubes with diameters less than 50 millimeters ("Small Welded Aluminum Tubes"), means thin wall welded-seam aluminum tubes used in the manufacture of heat

exchangers, which are devices that transfer heat from one fluid or gas to another medium, generally air

2. *"Non-Aggregated, Customer-Specific Information"* means information about a product's cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.

II. THE RESPONDENT

3. Respondent Insilco is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 425 Metro Place N, Box 7196, Dublin, Ohio.

4. Insilco is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

5. Helima-Helvetion, Inc. ("Helima") was a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal place of business having been located at Duncan, South Carolina.

6. Helima, at all times relevant herein, was engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and was a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITIONS

7. On or about July 10, 1996, Insilco purchased from Lingemann for $12.8 million the assets of Helima ("Helima Acquisition"); for $17 million, the stock of Lingemann's European manufacturer of welded aluminum heat exchanger tubes, ARUP Alu-Rohr und Profil, GmbH; and the option to purchase Maschinenbau, GmbH, a Lingemann subsidiary in Germany that manufactures mills used in the production of aluminum tubes (together, the "Acquisitions").

8. Prior to the consummation of the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information all of which is the type of information that

would likely have been detrimental to competition in the relevant markets if the Acquisition had not been consummated.

9. The Non-Aggregated, Customer-Specific Information transferred from Helima to Insilco included descriptions of prior customer negotiations; detailed customer-by-customer price quotes; current pricing policies and strategies; and detailed, customer-by-customer future pricing strategies.

V. THE RELEVANT MARKETS

10. For purposes of this complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Large Welded Aluminum Tubes.

11. For purposes of this complaint, a relevant line of commerce in which to analyze the Helima Acquisition is the market for Small Welded Aluminum Tubes.

12. For purposes of this complaint, the relevant geographic market for both relevant lines of commerce is North America.

13. Each of the relevant markets is highly concentrated. As a result of the Helima Acquisition, Insilco is currently the only supplier of Large Welded Aluminum Tubes with 100% of the market, and one of only two suppliers of Small Welded Aluminum Tubes, with a market share of over 90%.

14. There has been no entry into the market for Large Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Because the cost of entering and producing Large Welded Aluminum Tubes is relatively high compared to the limited potential sales revenues available to an entrant, entry into this market is not likely to be profitable. Consequently, entry into the Large Welded Aluminum Tube market is not likely to occur in a timely manner and counteract the additional anticompetitive effects likely to result from the Helima Acquisition. Entry into this relevant market is difficult and unlikely.

15. There has been no entry into the market for Small Welded Aluminum Tubes since the time of the Acquisitions, and the threat of entry has not deterred anticompetitive effects resulting from the Helima Acquisition. Additional anticompetitive effects resulting from the Helima Acquisition are likely and will continue until such time as actual and sufficient entry occurs.

16. Prior to the Acquisitions, Insilco and Helima were actual competitors in the relevant markets.

VI. EFFECTS OF THE ACQUISITION

17. The Acquisitions have substantially lessened or may substantially lessen competition in the following ways:

a. They have eliminated Helima as a substantial independent competitor in the relevant markets;
b. They have eliminated actual, direct, and substantial competition between Insilco and Helima in the relevant markets;
c. They have increased the level of concentration in the already highly concentrated relevant markets;
d. They have led, or may lead, to increases in prices in the relevant markets;
e. They have led, or may lead, to a reduction in service in the relevant markets;
f. They have led, or may lead, to the reduction in quality in the relevant markets;
g. They have led, or may lead, to a reduction in technological improvements in the relevant markets;
h. They have increased barriers to entry into the relevant markets; and
i. They have given Insilco market power in the relevant markets.

VII. EFFECTS OF INFORMATION TRANSFER

18. Insilco received from Lingemann competitively sensitive information prior to the consummation of the Acquisitions, that, but for the consummation of the Acquisitions, may have detrimentally affected competition in the relevant markets.

VIII. VIOLATIONS CHARGED

19. The effects of the Acquisitions may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45.

20. Insilco, through the Acquisitions, has engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

21. Prior to the Acquisitions, Insilco requested and received from Lingemann Non-Aggregated, Customer-Specific Information about customers for which they both competed in the relevant product markets in violation of Section 5 of the FTC Act, 15 U.S.C. 45.

Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of the assets of Helima-Helvetion International, Inc. ("Helima"), and of all the capital stock of ARUP Alu-Rohr und Profil GmbH ("ARUP") from Helmut Lingemann GmbH & Co. by respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 Acts, 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, and having duly considered the comment received, 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 Insilco 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 425 Metro Place N., Dublin, Ohio.

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

I.

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

A. *"Respondent"* means Insilco Corporation ("Insilco"), its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Insilco; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. *"Lingemann"* means Helmut Lingemann GmbH & Co., its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Lingemann; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. *"Maschinenbau"* means Helmut Lingemann Maschinenbau GmbH, its directors, officers, employees, agents, and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Maschinenbau; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. *"Commission"* means the Federal Trade Commission.

E. *"Helima Acquisition"* means the acquisition of the assets of Helima-Helvetion International, Inc. and of all the capital stock of ARUP Alu-Rohr und Profil GmbH from Lingemann by Insilco.

F. "*Thin-Wall Welded-Seam Aluminum Tubes*" means welded-seam aluminum heat exchanger tubes with wall thickness less than 0.65 millimeters used in the manufacture of heat exchangers, which are devices that transfer heat from one fluid or gas to another medium, generally air. These heat exchangers generally are used in

automotive applications. Thin-Wall Welded-Seam Aluminum Tubes does not include tubes used as spacers between thermal pane windows, condenser headers, or manifolds.

G. *"Welded Tube Mill"* means a high frequency welding machine capable of producing Thin-Wall Welded-Seam Aluminum Tubes.

H. *"Lingemann Mill"* means a Welded Tube Mill manufactured by Lingemann and operated by Helima-Helvetion International, Inc., or ARUP Alu-Rohr und Profil GmbH prior to the Helima Acquisition.

I. *"Marketability, viability, and competitiveness"* means that the specified assets, when used in conjunction with the assets of the acquirer, are capable of operating in substantially the same manner, quality, and efficiency employed or achieved by the respondent prior to divestiture.

J. *"Non-Aggregated, Customer-Specific Information"* means information about a product's cost and/or price that is in such a form that the cost and/or price of a product for an identifiable individual customer can be identified.

K. *"Strategies or policies related to competition"* means information relating to a company's approach to negotiating with specific customers, targeting specific customers, identifying or in any other manner attempting to win specific customers, retaining specific customers, or risk of loss of specific customers, including, but not limited to, all sales personnel call reports, market studies, forecasts, and surveys which contain such information.

L. *"Analyses or formulas used to determine costs or prices"* means a method, study, test, program, examination, tool, or other type of logical reasoning used to determine a product's cost and/or price for an identifiable individual customer.

M. *"Person"* means any natural person, corporate entity, partnership, association, joint venture, or trust.

N. *"Independent agent"* means a person not regularly employed by the company that does not have and will not have direct or indirect responsibility for prices or pricing or the ability to influence prices or pricing or an attorney regularly employed by the company that does not have and will not have direct or indirect responsibility for prices or pricing or the ability to influence prices or pricing.

O. *"Assets To Be Divested"* include the following:

(a) One (1) fully functioning and operational Lingemann Mill, consisting of a high frequency welder, a rollforming base, a cutoff saw, a finished product drop table, a stock reel decoder, a vacuum coil lifter, and control cabinets, capable of producing Thin-Wall Welded-Seam Aluminum Tubes with a diameter of less than forty (40) millimeters;

(b) One (1) fully functioning and operational Lingemann Mill, consisting of a high frequency welder, a rollforming base, a cutoff saw, a finished product drop table, a stock reel decoder, a vacuum coil lifter, and control cabinets, capable of producing Thin-Wall Welded-Seam Aluminum Tubes with a diameter of greater than seventy-five (75) millimeters; and

(c) One (1) set of tooling capable of operating on both mills.

P. "*Technology and know-how*" means all of respondent's drawings, patents, specifications, tests, and other documentation, and all information contained therein or available to respondent's personnel relating to the design, and the production methods, processes, and systems used in the production of Thin-Wall Welded-Seam Aluminum Tubes utilizing Lingemann Mills or the operation and maintenance of Lingemann Mills for use in the production of Thin-Wall Welded-Seam Aluminum Tubes. Technology and know-how does not include the drawings, patents, specifications, tests, and other documentation, and all information not acquired by respondent in the Helima Acquisition and not developed by respondent following the Helima Acquisition specifically relating to the design, and the production methods, processes, and systems used in the production of Thin-Wall Welded-Seam Aluminum Tubes utilizing Lingemann Mills or the operation and maintenance of Lingemann Mills for use in the production of Thin-Wall Welded-Seam Aluminum Tubes.

Q. *"Sole Source Replacement Parts"* means all parts needed to operate and maintain the Assets To Be Divested that are not readily available from a source other than respondent.

R. *"Helima Assets"* means all Welded Tube Mills, including machinery, fixtures, equipment, and tooling used in the maintenance or operation of such mills, acquired by Insilco in its acquisition of the assets of Helima-Helvetion International, Inc., from Lingemann.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, no later than four (4) months after the date on which this order becomes final, the Assets To Be Divested.

B. The divestiture shall be made to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the same business in which the Assets To Be Divested are presently engaged, and to remedy the lessening of competition resulting from the Helima Acquisition as alleged in the Commission's complaint.

C. Respondent shall also divest to the acquirer such additional ancillary assets that are not readily available from a source other than respondent, including, but not limited to, machinery, fixtures, equipment, and software, used in the maintenance or operation of the Assets To Be Divested as are necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested.

D. Respondent shall grant to the acquirer a perpetual, non-exclusive royalty-free license of any and all technology and know-how necessary to assure the marketability, viability, and competitiveness of the Assets To Be Divested. Such license shall be effective only in connection with the operation of the Assets To Be Divested by the acquirer, any successor to the acquirer, or any subsequent owner of the Lingemann Mills included in the Assets To Be Divested. The acquirer shall also have the right to sublicense the technology and know-how encompassed within its license for use on other assets or equipment physically located in North America.

E. A condition of approval by the Commission of the divestiture shall be the submission by the acquirer to the Commission of an acceptable five-year business plan for the Assets To Be Divested demonstrating that the acquirer will establish the Assets To Be Divested as a viable and competitive business in North America.

F. On reasonable notice to respondent from the acquirer of the Assets To Be Divested, respondent shall provide assistance and training to the acquirer to enable the acquirer to design, manufacture, and produce Thin-Wall Welded-Seam Aluminum Tubes at a comparable cost in substantially the same manner and quality employed or achieved by the respondent with the Assets To Be

Divested prior to divestiture. Such assistance and training shall include, without limitation, consultation with employees of Insilco knowledgeable about Lingemann Mills and training at the North American manufacturing facilities of Insilco utilizing Lingemann Mills. If training at the North American manufacturing facilities of Insilco utilizing Lingemann Mills is not possible, respondent shall provide training at any manufacturing facility of Insilco utilizing Lingemann Mills. Respondent shall charge no more than its own direct costs incurred in providing such assistance and training, including reimbursement (commensurate with the salary and benefits of Insilco personnel involved) for the time plus expenses of Insilco personnel providing assistance and training. Respondent shall continue to provide such assistance and training until the acquirer of the Assets To Be Divested is satisfied in its reasonable business judgement that it is capable of producing Thin-Wall Welded-Seam Aluminum Tubes utilizing the Assets To Be Divested at a comparable cost in substantially the same manner and quality achieved by respondent prior to divestiture with the Assets To Be Divested; provided, however, respondent shall not be required to continue providing such technical assistance and training for more than one (1) year after the date on which the divestiture required by this order is made if the acquirer of the Assets To Be Divested is a manufacturer of Thin-Wall Welded-Seam Aluminum Tubes with sales of Thin-Wall Welded-Seam Aluminum Tubes greater than one million dollars ($1,000,000) in the fiscal year prior to the date of divestiture. If the acquirer of the Assets To Be Divested is not a manufacturer of Thin-Wall Welded-Seam Aluminum Tubes with sales of Thin-Wall Welded-Seam Aluminum Tubes greater than one million dollars ($1,000,000) in the fiscal year prior to the date of divestiture, respondent shall be required to provide such technical assistance and training for a period not longer than three (3) years after the date on which the divestiture required by this order is made.

G. On reasonable notice to respondent from the acquirer of the Assets To Be Divested, respondent shall provide Sole Source Replacement Parts to the acquirer. Respondent shall charge no more than its own direct costs incurred in providing such Sole Source Replacement Parts. Respondent shall not be required to continue providing such Sole Source Replacement Parts for more than two (2) years after the date on which the divestiture required by this order is made.

H. The Assets To Be Divested shall be supplied as completely wired and piped systems, requiring only the placement and bolting together of the sub-bases, the reconnection of the electrical wires at numbered terminal block junctions, and the connection of the piping to the union joints.

I. Qualification, performance, and the acquirer's acceptance of the Assets To Be Divested shall be performed at the facility of the acquirer in a manner to ensure that the Assets To Be Divested are capable of producing Thin-Wall Welded-Seam Aluminum Tubes in substantially the same manner and quality employed or achieved by the respondent with the Assets To Be Divested prior to divestiture.

J. On reasonable notice to respondent by a customer, respondent shall provide the approved acquirer tooling owned by, assigned to, or licensed to the respondent, which was produced prior to the date this order becomes final and not included in the Assets To Be Divested, and which was manufactured specifically for and used solely for that customer's products. Respondent may charge the reasonable costs incurred in the manufacture of the tooling.

K. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are reasonably necessary to maintain the marketability, viability, and competitiveness of the Assets To Be Divested and to prevent the destruction, removal, wasting, deterioration, or impairment of the Assets To Be Divested.

L. Pending divestiture of the Assets To Be Divested, respondent shall take such actions as are reasonably necessary to maintain the marketability, viability, and competitiveness of the Helima Assets to prevent the destruction, removal, wasting, deterioration, or impairment of the Helima Assets.

III.

It is further ordered, That:

A. If respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within four (4) months of the date this order becomes final, then the Commission may appoint a trustee to divest the Helima Assets and effect such additional arrangements as are necessary, in order to assure the marketability, viability, and competitiveness of the Helima Assets. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the

Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief (including, but not limited to, a court-appointed trustee) pursuant to the Federal Trade Commission Act or any other statute, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III(A) of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposition, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Helima Assets and effect such additional arrangements as are necessary, in order to assure the marketability, viability, and competitiveness of the Helima Assets.

3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission (and, in the case of a court-appointed trustee, of the court), transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture of the Helima Assets and effect such additional arrangements as are necessary to assure the marketability, viability, and competitiveness of the Helima Assets, in order to expeditiously accomplish the remedial purposes of this order.

4. The trustee shall have twelve (12) months to accomplish the divestiture required by this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission (or, in the case of a court-appointed trustee, by the court); provided, however,

the Commission may extend this period for no more than two (2) additional times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Helima Assets or to any other relevant information necessary to permit the trustee to effect the divestiture of the Helima Assets, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission (or, in the case of a court-appointed trustee, by the court).

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner, and to the acquirer or acquirers, as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission approves more than one such acquiring entity, then the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission (and, in the case of a court-appointed trustee, by the court), of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondent and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a

commission arrangement contingent on the trustee's accomplishing the divestiture required by this order.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, recklessness, willful or wanton acts, or bad faith by the trustee or his or her agent or representative.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III(A) of this order.

10. The Commission (or, in the case of a court-appointed trustee, the court) may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Helima Assets.

12. The trustee shall report in writing to respondent and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That respondent shall not enforce beyond one (1) year any contract for the sale of Thin-Wall Welded-Seam Aluminum Tubes with a term greater than one (1) year entered into after the consummation of the Helima Acquisition and prior to the divestiture of the Assets To Be Divested.

V.

It is further ordered, That:

A. For a period of twenty (20) years from the date this order becomes final, respondent shall not, in any proposed acquisition of stock, share of capital, or production assets of any person that is a competitor of respondent in the design, manufacture, or sale of Thin-Wall Welded-Seam Aluminum Tubes, to which respondent is a party, prior to consummating the acquisition, obtain, seek, provide, or agree to obtain, seek, or provide the following types of information with

respect to Thin-Wall Welded-Seam Aluminum Tubes except to the extent that such information is publicly available: (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices.

B. For a period of ten (10) years from the date this order becomes final, respondent shall not, in any proposed acquisition of stock, share of capital, or production assets of any person that is a competitor of respondent in the design, manufacture, or sale of any product or service, to which respondent is a party, prior to consummating the acquisition, obtain, seek, provide, or agree to obtain, seek, or provide the following types of information with respect to any competing product or service except to the extent that such information is publicly available: (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices.

C. Nothing contained in paragraphs V(A) or V(B) of this order shall prohibit respondent or any other person from obtaining, seeking or providing, or agreeing to obtain, seek or provide (1) current or future Non-Aggregated, Customer-Specific Information; (2) current or future pricing plans; (3) current or future strategies or policies related to competition; and (4) analyses or formulas used to determine costs or prices, if such information is provided to an independent agent. Information received by an independent agent pursuant to paragraph V of this order may be provided to respondent or any other person by such independent agent if such information is converted into a form that would not be in violation of paragraph V of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission:

(a) Directly or indirectly acquire any production assets of Maschinenbau if the cumulative value of all such acquisitions in the prior twelve (12) months exceeds $1 million; and

(b) Directly or indirectly acquire any stock, share of capital, or production assets, other than assets acquired in the ordinary course of business, of any person engaged in the design, manufacture, or sale of Welded Tube Mills or any person engaged in the design, manufacture, or sale of Thin-Wall Welded-Seam Aluminum Tubes in North America; provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, respondent will hold no more than five (5) percent of the outstanding shares of any class of securities of such person and provided further that an acquisition of assets will be exempt from the requirements of this paragraph if the acquisition price is less than one (1) million dollars.

VII.

It is further ordered, That the prior notifications required by paragraph VI of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph VI of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VIII.

It is further ordered, That within thirty (30) days after the date this order becomes final, and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order, respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties that have contacted respondent or that have been contacted by respondent. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

IX.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs IV, V, VI, and VII of this order.

X.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent that may affect compliance obligations arising out of the order, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

XI.

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

A. 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 respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondent, and without restraint or interference, to interview officers, employees, or agents of respondent.

Commissioner Swindle not participating.

IN THE MATTER OF

JITNEY-JUNGLE STORES OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3784. Complaint, Jan. 28, 1998--Decision, Jan. 28, 1998

This consent order requires, among other things, the corporations to divest a total of 10 supermarkets to Supervalu, Inc. Supervalu may in turn divest the stores to R & M Foods, Inc. and Southeast Foods, Inc.

Appearances

For the Commission: *James Fishkin, Phillip Broyles* and *William Baer.*

For the respondents: *Stephen Stack, Dechert, Price & Rhoads*, Philadelphia, PA. *R. Barry Cannada, Butler, Snow, O'Mara, Steven & Cannada*, Jackson, MS. *Howard Sinor* and *Katy Kimbell, Jones, Walker, Waechter, Poitevent, Carrere & Denegre*, New Orleans, LA.

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 respondent Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), a corporation of which a majority of the voting securities are owned by respondent Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckmann"), a limited partnership, and respondent Delta Acquisition Corporation ("Delta"), a wholly-owned subsidiary of respondent Jitney-Jungle, have entered into an agreement to acquire the outstanding shares of respondent Delchamps, Inc. ("Delchamps"), a corporation, all subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITION

1. For the purposes of this complaint:

"Supermarket" means a full-line retail grocery store with annual sales of at least two million dollars that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

JITNEY-JUNGLE STORES OF AMERICA, INC.

2. Respondent Jitney-Jungle Stores of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi. Jitney-Jungle had sales of approximately $1.13 billion at its supermarkets, and total sales of $1.28 billion, in its 1997 fiscal year.

3. Respondent Jitney-Jungle is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Arkansas, Florida, Louisiana, Mississippi, and Tennessee.

4. Respondent Jitney-Jungle is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

BRUCKMANN, ROSSER, SHERRILL & CO., L.P.

5. Respondent Bruckmann, Rosser, Sherrill & Co., L.P. is a limited partnership 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 126 East 56th Street, 29th Floor, New York, New York.

6. Respondent Bruckmann is, and at all times relevant herein has been, the owner of a majority of the voting securities of Jitney-Jungle.

7. Respondent Bruckmann is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

DELTA ACQUISITION CORPORATION

8. Respondent Delta Acquisition Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

9. Respondent Delta is, and at all times relevant herein has been, a wholly-owned subsidiary of Jitney-Jungle established to acquire the outstanding shares of Delchamps.

10. Respondent Delta is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

DELCHAMPS, INC.

11. Respondent Delchamps, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 305 Delchamps Drive, Mobile, Alabama. Delchamps had sales of approximately $1.08 billion at its supermarkets, and total sales of $1.1 billion, in its 1997 fiscal year.

12. Respondent Delchamps is, and at all times relevant herein has been, engaged in the operation of supermarkets in Alabama, Florida, Louisiana, and Mississippi.

13. Respondent Delchamps is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

ACQUISITION

14. On or about July 8, 1997, Jitney-Jungle and Delta entered into a cash tender offer agreement with Delchamps to acquire all of the outstanding common stock of Delchamps for $30 per share. The total value of the proposed acquisition is approximately $228 million.

TRADE AND COMMERCE

15. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

16. Stores other than supermarkets do not have a significant price-constraining effect on food and grocery products sold at supermarkets. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets. In addition, supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not typically change their food and grocery prices in response to prices at other types of stores.

17. Food stores other than supermarkets, such as convenience stores, "mom & pop" stores, and specialty food stores (*e.g.*, seafood markets, bakeries, etc.), are not in the relevant market because they typically offer far fewer items than the average supermarket and charge higher prices for many of the same or similar items. Other types of stores that sell some food and grocery products, such as large drug stores and mass merchandisers, offer only a limited number of items sold in the typical supermarket. The small number of membership club stores, which offer only a limited number of food and grocery products primarily in bulk sizes, do not have a significant effect on market concentration.

18. Military commissaries are also not in the relevant product market. Military commissaries, which are not open to the public, operate as supermarkets for eligible military personnel and their families with retail prices substantially below the average retail prices at supermarkets for the same or similar items. Retail prices at military commissaries are not advertised and are uniform throughout the country based on the actual cost of the item plus a nationwide uniform surcharge determined by rules established by the Secretary of Defense. Retail prices at military commissaries are not based on local market conditions. Supermarkets do not price-check food and

grocery products sold at military commissaries and do not base their prices on the retail prices at the military commissaries.

19. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the following:

a. The Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Waveland/Bay Saint Louis, Gulfport, north Gulfport, and Biloxi/D'Iberville;

b. Pensacola, Florida, and narrower markets contained therein;

c. Hattiesburg, Mississippi and the area immediately west of Hattiesburg; and

d. Vicksburg, Mississippi.

MARKET STRUCTURE

20. The retail sale of food and grocery products in supermarkets in each of the relevant sections of the country is concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would significantly increase the HHIs in each of the already highly concentrated markets.

ENTRY CONDITIONS

21. Entry into the retail sale of food and grocery products in supermarkets in the relevant sections of the country is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

ACTUAL COMPETITION

22. Jitney-Jungle and Delchamps are actual competitors in the relevant line of commerce and sections of the country.

EFFECTS

23. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal

Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition between supermarkets owned or controlled by Jitney-Jungle and supermarkets owned or controlled by Delchamps;

b. By increasing the likelihood that Jitney-Jungle will unilaterally exercise market power; or

c. By increasing the likelihood of, or facilitating, collusion or coordinated interaction, each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

VIOLATIONS CHARGED

24. The proposed acquisition by Jitney-Jungle, Bruckmann, and Delta of all of the outstanding stock of Delchamps violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of Delchamps, Inc. ("Delchamps") by Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckmann"), and Delta Acquisition Corporation ("Delta") (collectively, "respondents"), and respondents having been furnished with a copy of a draft complaint that 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, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

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 Acts, and that 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, and having duly considered the comment received, 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 Jitney-Jungle Stores of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

2. Respondent Bruckmann, Rosser, Sherrill & Co., L.P. is a limited partnership 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 126 East 56th Street, 29th Floor, New York, New York.

3. Respondent Delta Acquisition Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi.

4. Respondent Delchamps, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 305 Delchamps Drive, Mobile, Alabama.

5. 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. *"Jitney-Jungle"* means Jitney-Jungle Stores of America, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Jitney-Jungle, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. Jitney-Jungle, after consummation of the Acquisition, includes Delchamps. A majority of the voting securities of Jitney-Jungle are owned by Bruckmann.

B. *"Bruckmann"* means Bruckmann, Rosser, Sherrill & Co., L.P., its predecessors, successors and assigns, subsidiaries, divisions, groups and affiliates controlled by Bruckmann and their respective general partners, officers, employees, agents, and representatives, and the respective successors and assigns of each. Bruckmann owns a majority of the voting securities of Jitney-Jungle.

C. *"Delta"* means Delta Acquisition Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Delta, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each. Delta is a wholly-owned subsidiary of Jitney-Jungle.

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

E. *"Respondents"* means Jitney-Jungle, Bruckmann, Delta, and Delchamps.

F. *"Commission"* means the Federal Trade Commission.

G. *"Acquisition"* means Jitney-Jungle's, Bruckmann's and Delta's proposed acquisition of all of the outstanding voting securities of and merger with Delchamps pursuant to the Agreement and Plan of Merger dated July 8, 1997.

H. *"Assets To Be Divested"* shall consist of the supermarkets identified in Schedule A of this order and all assets, leases, properties, permits (to the extent transferable), customer lists, businesses and

goodwill, tangible and intangible, related to or utilized in the supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the respondents' trade marks, trade dress, service marks, or trade names.

I. *"Supermarket"* means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

J. *"Supervalu"* means Supervalu Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota; and Supervalu Holdings, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 11840 Valley View Road, Eden Prairie, Minnesota. Supervalu Holdings, Inc. is a wholly-owned subsidiary of Supervalu Inc.

K. *"R & M Foods"* means R & M Foods, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 1612 Adeline Street, Hattiesburg, Mississippi.

L. *"Southeast Foods"* means Southeast Foods, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal place of business located at 1001 North 11th Street, Monroe, Louisiana.

M. *"Supervalu Agreement"* means the Purchase Agreement between Supervalu and Jitney-Jungle executed on August 29, 1997, and all subsequent amendments thereto, for the divestiture by respondents to Supervalu of the Assets To Be Divested.

N. *"Acquirer(s)"* means Supervalu, R & M Foods, Southeast Foods, and/or the entity or entities approved by the Commission to acquire the Assets To Be Divested pursuant to this order.

O. *"Landlord Consents"* means all consents from all landlords that are necessary to effect the complete transfer to the Acquirer(s) of the assets required to be divested pursuant to this order.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Assets To Be Divested to:

1. Supervalu, in accordance with the Supervalu Agreement (which agreement shall not be construed to vary or contradict the terms of this order or the Asset Maintenance Agreement) dated August 29, 1997, no later than,

a. One (1) month after the date on which this order becomes final, or
b. Five (5) months after acceptance of the agreement containing consent order by the Commission,

whichever is later; or

2. An Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within three (3) months after the date on which this order becomes final;

provided that the closing date of the Supervalu Agreement or any other agreement pursuant to which the Assets To Be Divested are divested to an Acquirer shall not occur until after respondents have obtained all required Landlord Consents.

B. If respondents divest the Assets To Be Divested pursuant to the terms of paragraph II.A.1, Supervalu may sell, within three (3) months of the date on which this order becomes final, any of the supermarkets constituting the Assets To Be Divested to R & M Foods or Southeast Foods, but only in a manner that receives the prior approval of the Commission. Respondents shall use their best efforts to assist Supervalu in the sale of the Assets To Be Divested pursuant to this paragraph in accordance with the terms of this order.

C. A condition of approval by the Commission of the divestiture transaction described in paragraph II.A.1 shall be a written agreement by Supervalu that it will not sell the Assets To Be Divested, other than as provided in paragraph II.B, for a period of three (3) years

from the date on which this order becomes final, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission.

D. The purpose of the divestitures is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents fail to divest absolutely and in good faith the Assets To Be Divested pursuant to paragraph II.A of this order, the Commission may appoint a trustee to divest the Assets To Be Divested.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

C. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.

3. Within ten (10) days after appointment of the trustee, respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this order.

4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in paragraph III.C.3 to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for each divestiture only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to make each divestiture required by this order at no minimum price. Each divestiture shall be made in the manner consistent with the terms of this order; provided, however, if the trustee receives *bona fide* offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest

such asset to the acquiring entity or entities selected by respondents from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this order.

11. The trustee may also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Assets To Be Divested.

12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.

13. The trustee shall report in writing to respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish each divestiture required by this order.

IV.

It is further ordered, That:

A. Pending divestiture of the Assets To Be Divested pursuant to this order, respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of Assets To Be Divested except for ordinary wear and tear.

B. Respondents shall comply with all the terms of the Asset Maintenance Agreement attached to this order and made a part hereof as Appendix I. The Asset Maintenance Agreement shall continue in effect until such time as all Assets To Be Divested have been divested as required by this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months of the date of such proposed acquisition in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any supermarket or owned any interest in or operated any supermarket within six (6) months of such proposed acquisition in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

Provided, however, that advance written notification shall not apply to the construction of new facilities by respondents or the acquisition of or leasing of a facility that has not operated as a

supermarket within six (6) months of respondents' offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That, for a period of ten (10) years commencing on the date this order becomes final:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. 12(a)) that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after July 1, 1997, to operate a supermarket at that site if such supermarket was formerly owned or operated by respondents in Hancock, Harrison, Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida.

B. Respondents shall not remove any equipment from a supermarket owned or operated by respondents in Hancock, Harrison,

Jackson, Lamar, Forrest, and Warren counties in Mississippi, and Escambia County, Florida, prior to a sale, sublease, assignment, or change in occupancy, except for replacement or relocation of such equipment in or to any other supermarket owned or operated by respondents in the ordinary course of business, or except as part of any negotiation for a sale, sublease, assignment, or change in occupancy of such supermarket.

VII.

It is further ordered, That:

A. Within thirty (30) days after the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II or III of this order, respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in respondents that may affect compliance obligations arising out of the order.

IX.

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

A. 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 respondents relating to any matters contained in this order; and

B. Upon five (5) days' notice to respondents and without restraint or interference from respondents, to interview respondents or officers, directors, or employees of respondents in the presence of counsel.

Commissioner Azcuenaga not participating.

SCHEDULE A

1. The following supermarket located in Hancock County, Mississippi:

a. Delchamps store no. 64 operating under the "Delchamps" trade name, which is located at Choctaw Plaza Shopping Center, 318 Highway 90, Waveland, MS;

2. The following supermarkets located in Harrison County, Mississippi:

a. Jitney-Jungle store no. 33 operating under the "Jitney-Jungle" trade name, which is located at 917 Division St., Biloxi, MS;

b. Jitney-Jungle store no. 32 operating under the "Jitney-Jungle" trade name, which is located at 1225 Pass Road, Gulfport, MS;

c. Jitney-Jungle store no. 42 operating under the "Jitney-Jungle" trade name, which is located at Handsboro Square Shopping Center, 1345 East Pass Road, Gulfport, MS; and

d. Delchamps store no. 364 operating under the "Delchamps" trade name, which is located at 11240-A Highway 49 North, Gulfport, MS;

3. The following supermarkets located in Escambia County, Florida:

a. Jitney-Jungle store no. 54 operating under the "Jitney-Jungle" trade name, which is located at 4081-A East Olive Road, Pensacola, FL.

b. Jitney-Jungle store no. 52 operating under the "Sack & Save" trade name, which is located at Brent Oaks Mall, East Brent Lane, Pensacola, FL.

4. The following supermarket located in Lamar County, Mississippi:

a. Delchamps store no. 67 operating under the "Delchamps" trade name, which is located at Oak Grove Plaza Shopping Center, 4600 West Hardy Street, Hattiesburg, MS.

5. The following supermarket located in Forrest County, Mississippi:

a. Delchamps store no. 9 operating under the "Delchamps" trade name, which is located at 601 Broadway Street, Hattiesburg, MS.

6. The following supermarket located in Warren County, Mississippi:

a. Delchamps store no. 115 operating under the "Delchamps" trade name, which is located at Delchamps Plaza, 3046-D Indiana Avenue, Vicksburg, MS.

APPENDIX I

ASSET MAINTENANCE AGREEMENT

This Asset Maintenance Agreement ("Agreement") is by and between Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi; Bruckmann, Rosser, Sherrill & Co., L.P. ("Bruckman"), a limited partnership 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 Two Greenwich Plaza, Greenwich, Connecticut; Delta Acquisition Corporation ("Delta"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at c/o Jitney-Jungle Stores of America, Inc., 1770 Ellis Avenue, Suite 200, Jackson, Mississippi; Delchamps, Inc. ("Delchamps"), a corporation

organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 305 Delchamps Drive, Mobile, Alabama (collectively "proposed respondents"); and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively "the Parties").

PREMISES

Whereas, Jitney-Jungle, of which a majority of the voting securities are owned by Bruckmann, and Delta, a wholly-owned subsidiary of Jitney-Jungle, pursuant to an Agreement and Plan of Merger dated July 8, 1997, agreed to acquire all of the outstanding stock of Delchamps (hereinafter "the proposed Acquisition"); and

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order ("Consent Order"), the Commission is required to place it on the public record for a period of sixty (60) days for public comment and may subsequently either withdraw such acceptance or issue and serve its Complaint and its Decision and final Order in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an agreement is not reached preserving the *status quo ante* of the Assets To Be Divested as defined in the attached Consent Order (hereinafter referred to as "Assets" or "Supermarket(s)") during the period prior to their divestiture, any divestiture resulting from the Consent Order or from any other administrative proceeding challenging the legality of the Acquisition might not be possible, or might produce a less than effective remedy; and

Whereas, the purpose of this Agreement and of the Consent Order is to preserve the Assets pending their divestiture pursuant to the terms of the Consent Order, in order to remedy any anticompetitive effects of the proposed Acquisition; and

Whereas, proposed respondents entering into this Agreement shall in no way be construed as an admission by proposed respondents that the proposed Acquisition is illegal; and

Whereas, proposed respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, in consideration of the Commission's agreement that at the time it accepts the Consent Order for public comment it will grant early termination of the Hart-Scott-Rodino waiting period, the Parties agree as follows:

TERMS OF AGREEMENT

1. Proposed respondents agree to execute, and upon its issuance to be bound by, the attached Consent Order. The Parties further agree that each term defined in the attached Consent Order shall have the same meaning in this Agreement.

2. Proposed respondents agree that from the date proposed respondents sign this Agreement until the earlier of the dates listed in subparagraphs 2.a and 2.b, proposed respondents will comply with the provisions of this Agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Order pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date all of the divestitures required by the Consent Order have been completed.

3. Proposed respondents shall maintain the viability, marketability, and competitiveness of the Assets, and shall not cause the wasting or deterioration of the Assets, nor shall they cause the Assets to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the marketability, viability, or competitiveness of the Assets. Proposed respondents shall conduct or cause to be conducted the business of the Supermarkets in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with each Supermarket's suppliers, customers, employees and others having business relations with the Supermarkets, in the ordinary course of the Supermarkets' business and in accordance with past practice. Proposed respondents shall not terminate the operation of any Supermarket. Proposed respondents

shall continue to maintain the inventory of each Supermarket at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such proposed respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Proposed respondents shall use best efforts to keep the organization and properties of each of the Supermarkets intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with each Supermarket. Included in the above obligations, proposed respondents shall, without limitation:

a. Maintain operations and departments and shall not reduce hours at each Supermarket;

b. Not transfer inventory from any Supermarket other than in the ordinary course of business consistent with past practice;

c. Make any payment required to be paid under any contract or lease when due, and otherwise shall pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;

d. Maintain each Supermarket's books and records;

e. Not display any signs or conduct any advertising (including direct mailing, point-of-purchase coupons, etc.), that indicates that any proposed respondent is moving its operations to another location, or that indicates a Supermarket will close;

f. Not conduct any "going out of business," "close-out," "liquidation" or similar sales or promotions at or relating to any Supermarket;

g. Not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket, other than changes in the ordinary course of business consistent with past practice for supermarkets of the proposed respondents not being closed or relocated; or

h. Not transfer any of the proposed respondents' on-site employees employed at any Supermarket on the date of this Agreement to any other supermarket or location owned or operated by any proposed respondent other than transfers in the ordinary course of business consistent with past practice.

4. Should the Commission seek in any proceeding to compel proposed respondents to divest themselves of the Assets or to seek any other injunctive or equitable relief, proposed respondents shall not raise any objection based upon the expiration of the applicable

Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has not sought to enjoin the Acquisition. Proposed respondents also waive all rights to contest the validity of this Agreement.

5. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with five (5) days' notice to proposed respondents and to their principal office(s), proposed respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of proposed respondents, 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 proposed respondents relating to compliance with this Agreement; and

b. To interview officers or employees of proposed respondents, who may have counsel present, regarding any such matters.

6. This Agreement shall not be binding on the Commission until approved by the Commission.

IN THE MATTER OF

JENNY CRAIG, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9260. Amended Complaint, Feb. 19, 1998--Decision, Feb. 19, 1998

This consent order prohibits, among other things, the California-based corporations from making unsubstantiated claims about the weight loss, weight loss maintenance, price and safety of the diet program, as well as from using deceptive consumer testimonials and endorsements. The consent order sets out the types of evidence needed to support Jenny Craig's future weight loss and weight loss maintenance claims. In addition, it requires disclosures concerning the actual maintenance experience of the customers or a statement of the generally expected success for program participants or a statement that the dieters should not expect to experience similar results.

Appearances

For the Commission: *Matthew Gold, Kerry O'Brien, David Newman, Laura Fremont* and *Jeffrey Klurfeld.*

For the respondents: *Patricia P. Bailey, Squire, Sanders & Dempsey*, Washington, D.C. and *Warren L. Dennis* and *James P. Holloway, Proskauer, Rose, Goetz & Mendelsohn*, Washington, D.C.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Jenny Craig, Inc., a corporation, and Jenny Craig International, Inc., a corporation ("Jenny Craig" or "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, alleges:

PARAGRAPH 1. Respondent Jenny Craig International, Inc., a California Corporation, is a wholly-owned subsidiary of respondent Jenny Craig, Inc., a Delaware Corporation. Jenny Craig, Inc. dominates and controls the acts and practices of Jenny Craig International, Inc. Both corporations maintain their offices and principal places of business at 445 Marine View Avenue, #300, Del Mar, California.

PAR. 2. Respondents have advertised, offered for sale, and sold weight loss and weight maintenance services and products, including

1000 to 1500 calorie-a-day weight loss programs which they make available to consumers at numerous company-owned and franchised "Jenny Craig Weight Loss Centres" nationwide. These products also include "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents 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. Respondents have disseminated or have caused to be disseminated advertisements for the Jenny Craig Weight Loss Program, including but not necessarily limited to the attached Exhibits A through V.

SUCCESS CLAIMS

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits A through I and Exhibit N, contain the following statements:

(a) "Jeanne-Mer Garcia lost 81 lbs." (Exhibit A)
(b) "Maggie Cardoza lost 105 lbs." (Exhibit B)
(c) "Toni Todd lost 32 lbs." (Exhibit C)
(d) "Carol Puckett lost 100 lbs." (Exhibit D)
(e) "Faith Shipp lost 95 lbs." (Exhibits E and N)
(f) "[Claudine St. Clair] lost 18 lbs." (Exhibit F)
(g) "Evelyn Moore lost 52 lbs." (Exhibit G)
(h) "Jaynie Qualls lost 71 lbs." (Exhibit H)
(i) "Kathy Chamblin lost 73 lbs." (Exhibit I)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-I and N, respondents have represented, directly or by implication, that Jenny Craig customers typically are successful in reaching their weight loss goals.

PAR. 7. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-I and N, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph six, respondents possessed and relied upon a reasonable basis that substantiated the representation.

PAR. 8. In truth and in fact, at the time they made the representation set forth in paragraph six, respondents did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit B and Exhibits D through M, contain the following statements:

(a) "I'd tried a million other weight loss programs, but I'd always gain the weight back." (Exhibit D)

(b) "I lost 95 pounds in just over six months. And, I've kept the weight off for nearly one year!" (Exhibit E)

(c) "I lost eighteen pounds in only six weeks. And I've kept the weight off for over a year." (Exhibit F)

(d) "My weight slowly crept up over the years. I joined Jenny Craig because I wanted to lose those extra pounds -- permanently." (Exhibit G)

(e) "I've been overweight so long that I just felt like I was destined to be fat. And now look at me. . . What I learned from Jenny Craig is moderation. Anyone can lose weight. But the key is to learn how to keep it off. And that's what the Lifestyle Classes do." (Exhibit H)

(f) "I used to dream that one day I'd wake up and be slim. Thanks to Jenny Craig, it happened. I tried other programs, but the second I'd go off, I'd gain everything back and then some. While they helped me lose weight, they never taught me how to eat in the real world and keep it off." (Exhibit I)

(g) "And most importantly, I've learned how to maintain my weight. That's key." "Y lo más importante es que he aprendido a mantener mi peso. Eso es la clave." (Exhibits B and J)

(h) "I've kept [89 pounds] off nearly two years." (Exhibit K)

(i) "If you discovered a way to control your weight, who would you tell? 'My Mom and Dad' 'My doubles partner' . . . That's what these successful Jenny Craig clients did." (Exhibit L)

(j) "You know, I [Jenny Craig] get so many letters from people. Sometimes they, they write to me even after they've had their weight off for maybe two or three years. . . I never get tired of hearing about the successes." (Exhibit M)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-M, respondents have represented, directly or by implication, that:

(a) Overweight or obese Jenny Craig customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently, and

(b) Jenny Craig customers typically are successful in maintaining their weight loss achieved under the Jenny Craig Weight Loss Program.

PAR. 11. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits B and D-M, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph ten, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 12. In truth and in fact, at the time respondents made the representations set forth in paragraph ten, they did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation as set forth in paragraph eleven was, and is, false and misleading.

PROJECTION OF WEIGHT LOSS CLAIM

PAR. 13. In the routine course and conduct of their business, respondents state, during the initial sales presentation, that consumers typically will reach their desired weight loss goal within the time frame set by respondents' "PD Presentation" computer program.

PAR. 14. In truth and in fact, consumers typically will not reach their desired weight loss goal within the time frame set by respondents' "PD Presentation" computer program. Therefore, the representation set forth in paragraph thirteen was, and is, false and misleading.

PAR. 15. Through the use of the statements described in paragraph thirteen, respondents have represented, directly or by implication, that at the time they made the representation set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis for the representation.

PAR. 16. In truth and in fact, at the time respondents made the representation set forth in paragraph thirteen, they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph fifteen was, and is, false and misleading.

PRICE CLAIMS

PAR. 17. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit L and Exhibits N through R, contain the following statements:

(a) "Pay as you go for just $9 a week, or lose all you want for just $49." (Exhibit L)

(b) "Lose all the weight you want for only a $185 service fee." (Exhibit N)

(c) "Jenny Craig was different. It didn't have any gimmicks. It's one set price. There wasn't any adding. It was honest. This was the truth. And I've checked every place." (Exhibit O)

(d) "Call the wrong weight loss program and you end up playing 'Let's Make a Deal.' Some have hidden charges. Others, high administrative fees. And some even charge you by the pound. It's like they punish you just because you have to lose weight. At Jenny Craig, we charge you one low fee to lose all the weight you want. No gimmicks. No hidden charges. Jenny Craig. Where weight loss means losing weight. Not your bank account." (Exhibit P)

(e) "Most weight loss programs spend more time on their figures than yours. They figure out ways to hit you with administrative fees. Hidden charges. Some even charge you by the pound. It's like they're punishing you for losing weight. At Jenny Craig you can lose all the weight you want for one low service fee. No gimmicks. No hidden costs. Jenny Craig. Where you get thin. And your wallet doesn't." (Exhibit Q)

(f) "Our price is guaranteed. At Jenny Craig, we fervently adhere to one, often overlooked principle: Honesty. That's why our price is exactly what we say it is. No hidden costs. No deal-of-the-day. It's just one set price. And we'll even tell it to you over the phone. If all that doesn't sound too remarkable, try calling other programs and compare for yourself. Chances are you'll be very surprised at what they tell you. Or more likely, what they don't tell you." (Exhibit R)

PAR. 18. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the statements in the advertisements attached as Exhibits L and N-R, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the Jenny Craig Weight Loss Program.

PAR. 19. In truth and in fact, the advertised price is not the only cost associated with losing weight on the Jenny Craig Weight Loss Program. There are substantial additional mandatory expenses associated with participation in the Jenny Craig program that far exceed the advertised price. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

PAR. 20. In their advertising and sale of the Jenny Craig Weight Loss Program, respondents have represented, directly or by

implication, that the advertised price is the only cost associated with losing weight on the Jenny Craig Weight Loss Program. Respondents have failed to disclose adequately to consumers the existence and amount of all mandatory expenses associated with participation in the Jenny Craig program. This fact would be material to consumers in their purchase decisions regarding the program. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

HEALTH RISKS CLAIMS

PAR. 21. In the routine course and conduct of their business, respondents state:

(a) "In just a moment the computer will show you how safely and easily you are going to lose weight without feeling hungry. To put your mind at ease...we have a registered dietitian along with our medical consultant team to ensure that while your weight loss is easy, it is also 100% safe and hunger-free." (Suggested sales script for Jenny Craig tour guide)

(b) "Our Program provides a safe, easy weight loss that is personally supervised." ("Sample Telephone Script" contained in Jenny Craig Sales Manual)

(c) "Our experience has taught us that using drugs is neither safe nor permanent. Our program aims at more permanent weight loss results and it's 100% safe." ("Sample Telephone Script" contained in Jenny Craig Sales Manual)

PAR. 22. In the routine course and conduct of their business, respondents provide their customers with diet protocols that require said customers, *inter alia*, to come in to a Jenny Craig Weight Loss Centre at least once a week for monitoring of their progress, including weighing in.

PAR. 23. Through the use of the statements set forth in paragraph twenty-one, and through the conduct of the monitoring described in paragraph twenty-two, respondents have represented, directly or by implication, on an ongoing basis to each customer, that customers on respondents' weight loss program lose weight safely and do not experience an increased risk of developing health complications.

PAR. 24. In the course of regularly monitoring their customers' weight loss progress, respondents, in some instances, are presented with weight loss results indicating that a customer is losing weight significantly in excess of what would be expected, considering the daily caloric intake prescribed for that customer, which is an indication that the customer may not be consuming all of the calories prescribed by his or her diet protocol. Such conduct could, if

prolonged, result in health complications associated with rapid weight loss.

PAR. 25. Respondents have failed to disclose, either in their advertising, at point of sale, or to individual customers losing weight too rapidly, that such weight loss, if prolonged, could result in health complications, including the development of gallbladder disease. This fact would be material to consumers in their purchase and use decisions regarding respondents' program.

PAR. 26. In light of the representations set forth in paragraph twenty-three, respondents' failure to disclose that not consuming all of the calories prescribed by the diet protocol, if prolonged, could result in health complications, including the development of gallbladder disease, is a deceptive practice.

PAR. 27. In providing the advertisements referred to in paragraph four and the materials referred to in paragraph thirteen and paragraph twenty-one to their individual franchised stores for the purpose of inducing consumers to purchase their weight loss services and products, respondents have furnished the means and instrumentalities to those stores to engage in the acts and practices alleged in paragraphs five through twenty-six.

CUSTOMER SATISFACTION CLAIMS

PAR. 28. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits S through V and Exhibit L, 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 S)

(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 T)

(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 U)

(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 V)

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

PAR. 29. Through the use of the statements contained in the advertisements referred to in paragraph twenty-eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits S-V and L, respondents have 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. 30. 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 twenty-nine was, and is, false and misleading.

PAR. 31. Through the use of the statements contained in the advertisements referred to in paragraph twenty-eight, including but not necessarily limited to the statements in the advertisements attached as Exhibits S-V and L, respondents have represented, directly or by implication, that ninety percent or more of Jenny Craig customers would recommend the Jenny Craig Weight Loss Program.

PAR. 32. 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 S-V and L, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs twenty-nine and thirty-one, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 33. In truth and in fact, at the time they made the representations set forth in paragraphs twenty-nine and thirty-one, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph thirty-two was, and is, false and misleading.

PAR. 34. The acts and practices of respondents 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 and Commissioner Azcuenaga not participating.

EXHIBIT A

We'll pay you a dollar for every pound you lose.

Right now Jenny Craig will pay you a dollar for every pound you've lost once you reach your goal weight. 40 pounds to lose? Get $40 back. 60 pounds? $60 back, etc., etc., etc. How much would you like to get back?

DIAL DIRECT 1-800-92-JENNY

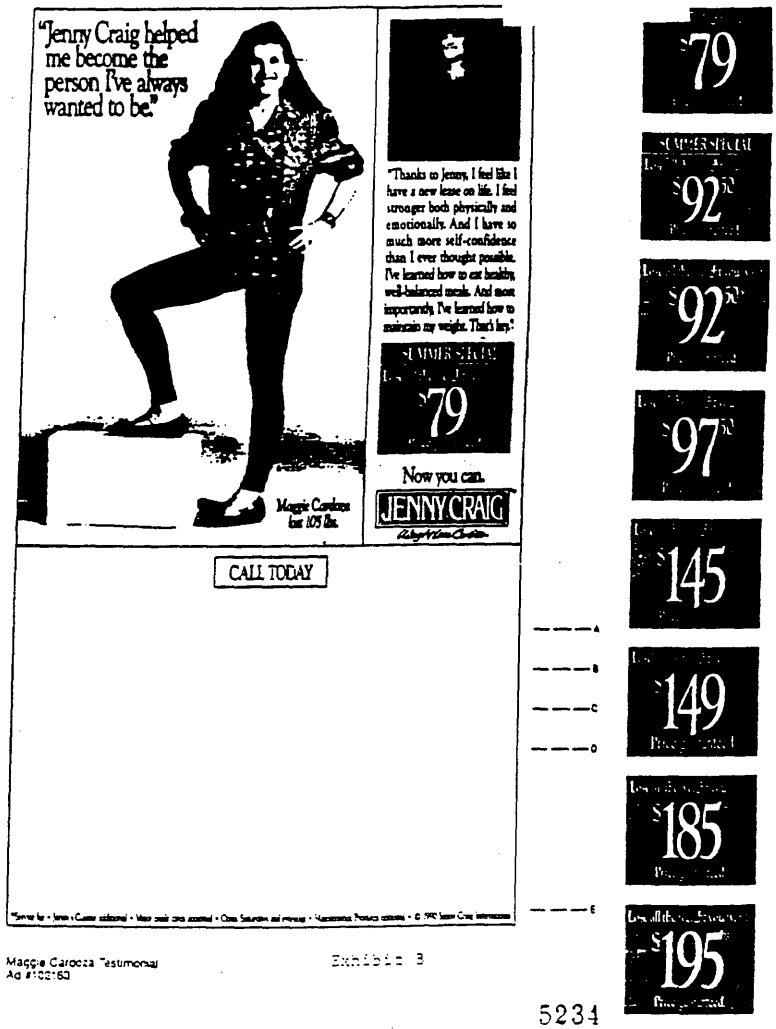
JENNY CRAIG™
Weight Loss Centers

There are 7 centres in the Milwaukee area including:

Bayshore Brown Deer Greenfield St. Francis
Brookfield East Brady Racine

Exhibit A

EXHIBIT B



Maggie Carocza Testimonial
Ad #102160

Exhibit B

5234

EXHIBIT C

Call Now. $99.*

Lose All You Want.

- One-on-one counseling.
- Nutritionally balanced menu plans.
- Weight management classes.
- Personal exercise plan.

ROSS PLAZA
4770 Montgomery NE. #C115
(Montgomery at Monroe)
888-1368

MANZANO CENTER
800 Juan Tabo NE #M
(Juan Tabo at Lomas)
275-7252

Exhibit C

EXHIBIT D

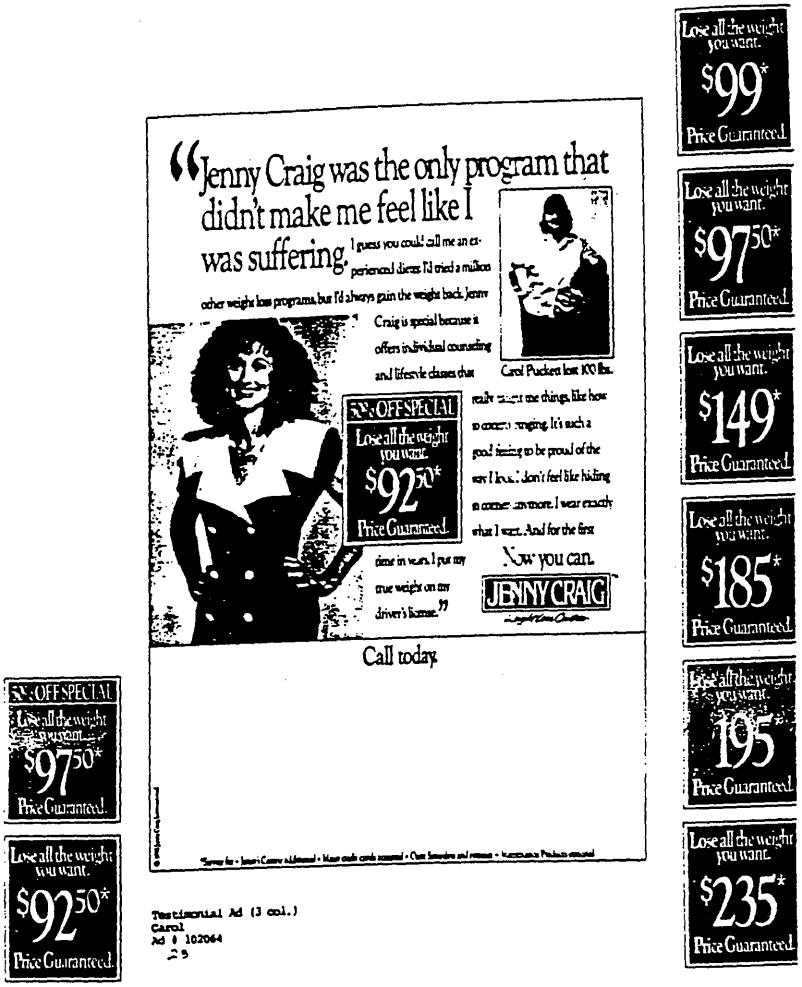


Exhibit D

EXHIBIT E

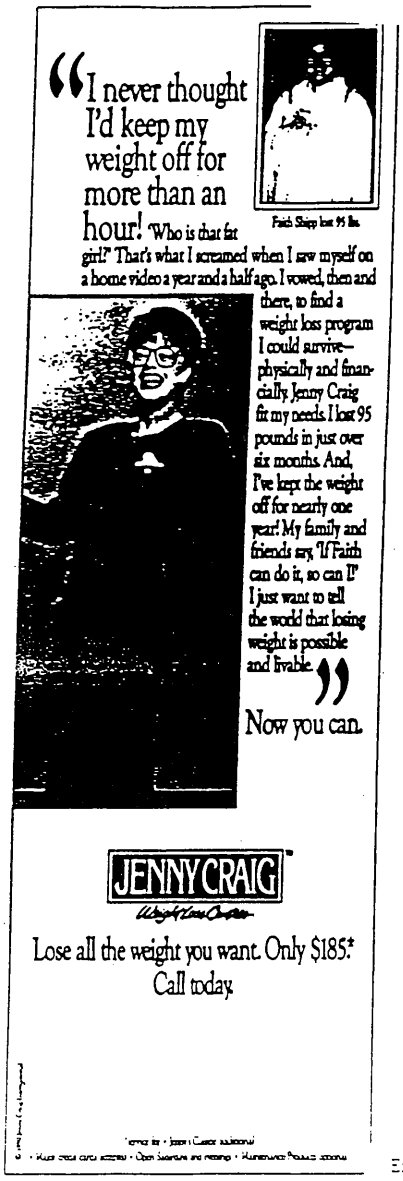


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Exhibit E

EXHIBIT F

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL	VISUAL
Claudine St. Clair (talking to camera):	
Hi. I'm Claudine St. Clair of KJOI Radio, here to tell you about the Jenny Craig weight loss program. On Jenny's program everything was planned for me. I lost eighteen pounds in only six weeks. And I've kept the weight off for over a year."	Claudine St. Clair KJOI Radio Lost 18 lbs. in 6 weeks Individual results may vary
Jenny Craig (talking to camera):	
"At Jenny Craig, we not only help you lose weight, we teach you how to keep it off. We helped Claudine St. Clair of KJOI Radio lose weight and improve her confidence. We'd like to do that for you too."	Jenny Craig
Announcer:	
"Call now and lose all the weight you want for only a $185 service fee. Jenny's cuisine not included."	Jenny Craig Weight Loss Centres Lose all the Weight You Want $185 Open Saturdays and Evenings Call 411 for location nearest you

EXHIBIT G

Exhibit G

EXHIBIT H

JENNY CRAIG TELEVISION CO!

ORAL	VISUAL
WOMAN (talking to camera): "I've been overweight so long that I just felt like I was destined to be fat. And now look at me. I can wear things that are tight around my waist and big prints and I'll even show my legs. What I learned from Jenny Craig is moderation. Anyone can lose weight. But the key is to learn how to keep it off. And that's what the Lifestyle Classes do. There's just something I'd like to say to all the people who have teased me when I was a kid. Nah. Nah. Nah. Nah. Nah. Nah. I'm on TV and you're not."	Jaynie Qualls lost 71 lbs Individual results may vary
Announcer: "Now you can.	Now you can
Lose all the weight you want for only a $79 service fee.	JENNY CRAIG *Weight Loss Centres* Lose all the weight you want $79
Call 1-800-76 Jenny."	1-800-76-JENNY

EXHIBIT I

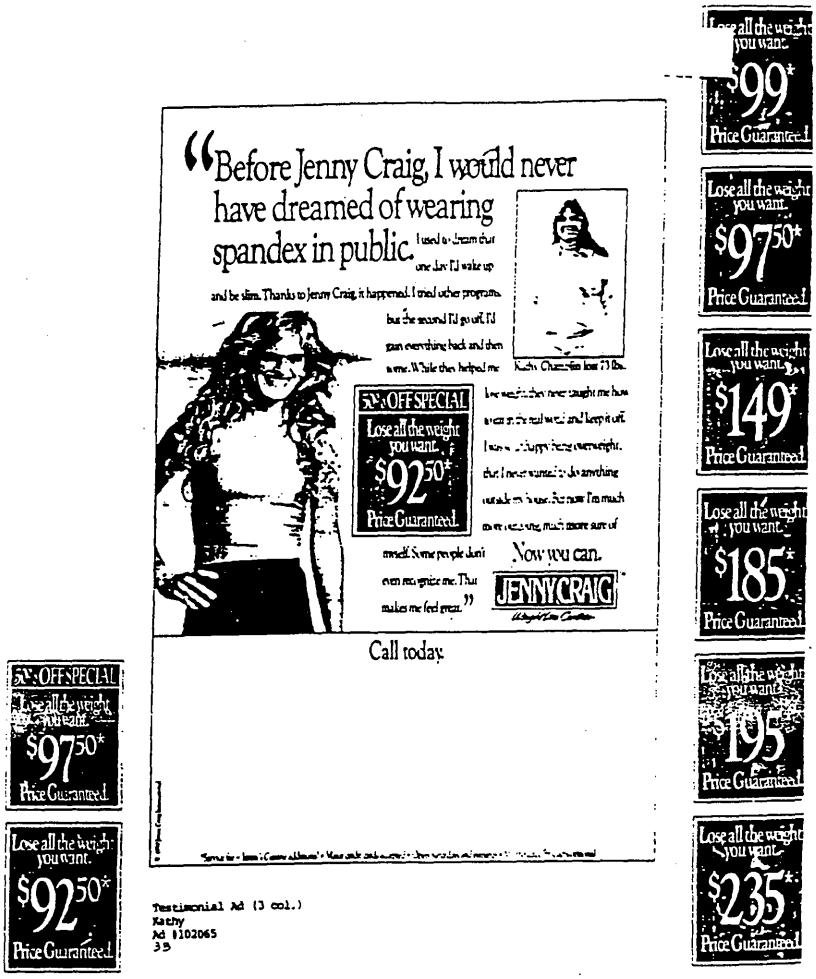


Exhibit I

EXHIBIT J

Exhibit J

EXHIBIT K

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL	VISUAL
WOMAN 1 (talking to camera): **"Like a whole new life."**	Lost 71 lbs.
WOMAN 2 (talking to camera): **"I feel like I matter."**	Lost 138 lbs.
MAN 1 (talking to camera): **"I don't think like a fat person."**	Lost 50 lbs.
	Jenny Craig Success Stories
WOMAN 1 (talking to camera): **"Control means success."**	Lost 71 lbs.
WOMAN 3 (talking to camera): **"How to say no."**	Lost 31 lbs
WOMAN 4 (talking to camera): **"Actually to eat only when I'm hungry."**	Lost 39 lbs.
MAN 1 (talking to camera): **"Not being the first person finished all the time."**	Lost 50 lbs.
WOMAN 2 (talking to camera): **"Leaving a little something on my plate."**	Lost 138 lbs.
WOMAN 5 (talking to camera): **"Success is losing weight with Jenny Craig."**	Lost 89 lbs.
WOMAN 6 (talking to camera): **"And controlling it."**	Lost 30 lbs.
WOMAN 5 (talking to camera): "I've kept it off nearly 2 years."	Lost 89 lbs.

EXHIBIT K

ANNOUNCER:
"Join our new success program

for only a $79 service fee.

Call 1-800-76-Jenny."

Jenny Craig
Weight Loss Centres
New Success Program

JENNY CRAIG
Weight Loss Centres
$79
Lose all the weight you want

1-800-76-JENNY

EXHIBIT L

JENNY CRAIG TELEVISION COMMERCIAL

ORAL	VISUAL
Announcer: If you discovered a way to control your weight,	If You Discovered A Way to Control Your Weight...
who would you tell?	Who Would You Tell?
WOMAN1 (talking to camera): "My Mom and Dad"	Dori Green lost 24 lbs. in 6 months
WOMAN2 (talking to camera): "My doubles partner"	Shelly Benedict lost 27 lbs. in 5 months
WOMAN3 (talking to camera): "The guy at the donut shop"	Leslie Baldwin lost 36 lbs. in 8 months
WOMAN2 (talking to camera): "Half the girls at the club"	
MAN1 (talking to camera): "My mechanic"	Mark Hackbarth lost 66 lbs. in 13 months
WOMAN1 (talking to camera): "My day care lady"	
Announcer: "That's what these successful Jenny Craig clients did"	That's What These Successful Jenny Craig Clients Did
WOMAN4 (talking to camera): "My dog trainer"	Joanne Walton lost 32 lbs. in 10 months
WOMAN1 (talking to camera): "My father"	
WOMAN5 (talking to camera): "My aunt"	Nanci Porter lost 31 lbs. in 4 months
WOMAN2 (talking to camera): "My chiropractor"	

EXHIBIT L

Announcer: "In fact, 9 out of 10 Jenny Craig clients	9 out of 10 Jenny Craig Clients Individual weight loss and maintenance may vary
would recommend Jenny Craig to their friends."	Would Recommend Jenny Craig To Their Friends. Individual weight loss and maintenance may vary
WOMAN1 (talking to camera): "There are so many"	
Announcer: "Pay as you go for just $9 a week, or	Pay as you go. $9 A WEEK Program Fee JENNY CRAIG *Weight Loss Centres* Jenny's Cuisine additional
lose all you want for just $49"	Lose all the weight. $49 Program Fee JENNY CRAIG *Weight Loss Centres* Jenny's Cuisine additional
Call 1-800-92 Jenny."	1-800-92-JENNY

EXHIBIT M

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL	VISUAL
Jenny Craig (talking to camera): "You know, I get so many letters from people. Sometimes they, they write to me even after they've had their weight off for maybe two or three years. Probably the thing that I hear most often is that 'Your counselors are wonderful. They really care.' I never get tired of hearing about the successes. I just feel like we're doing something important.	Jenny Craig
Announcer: "Now you can.	Now you can.
Lose all the weight you want for only a $79 service fee.	JENNY CRAIG *Weight Loss Centres* Lose all the weight you want $79 [illegible]
Call 1-800-76-Jenny."	1-800-76-JENNY

EXHIBIT N

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

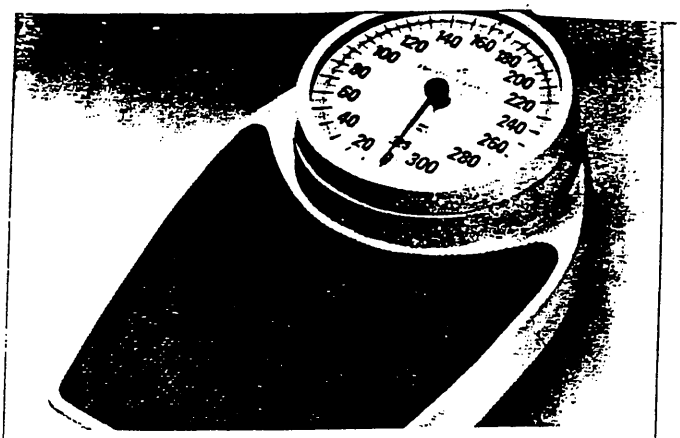
ORAL	VISUAL
JENNY CRAIG (talking to Camera): "Usually something happens in a person's life that will say, they'll say to themselves 'I've got to do something about this weight problem.' And when that happens, then what they're really saying is 'teach me how to do that.' Over the years, we've learned what really works with people, and that's what we've tried to incorporate into the Jenny Craig program. It's as easy and as quick as you can possibly make a weight loss program."	Jenny Craig Now you can
ANNOUNCER: "Now you can.	Now you can
Lose all the weight you want for only a $185 service fee.	JENNY CRAIG Weight Loss Centres Lose all the weight you want $185
Call 1-800-76-Jenny."	1-800-76-JENNY

EXHIBIT O

JENNY CRAIG TELEVISION COMMERCIAL (30 SECONDS)

ORAL	VISUAL
WOMAN (talking to camera): "I saw myself on this video tape at my son's birthday. I go: `Who is this fat girl?' I just said right then `I've got to do something." Jenny Craig was different. It didn't have any gimmicks. It's one set price. There wasn't any adding. It was honest. This was the truth. And I checked every place. I've lost 95 pounds. Ta Da"	Faith Shipp lost 95 lbs. Individual results may vary
Announcer: "Now you can.	Now you can
Lose all the weight you want f only a $185 service fee.	JENNY CRAIG *Weight Loss Centres* Lose all the weight you want $185 Jenny's Cuisine additional
Call 1-800-76-Jenny."	1-800-76-JENNY

EXHIBIT P



To most weight loss programs this is a cash register.

Call the wrong weight loss program and you end up playing "Let's Make a Deal." Some have hidden charges. Others, high administrative fees. And some even charge you by the pound. It's like they punish you just because you have to lose weight.

At Jenny Craig, we charge you one low fee to lose all the weight you want. No gimmicks. No hidden charges. Jenny Craig. Where weight loss means losing weight. Not your bank account.

$185.*

Lose all the weight you want for one low service fee.

Now you can.

JENNY CRAIG™

Weight Loss Centers

Call today.

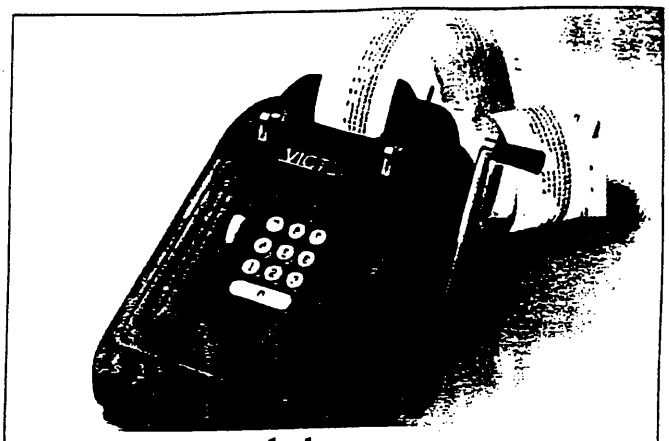
$99.*

$235.*

$195.*

*Service fee • Jenny's Cuisine additional • Maintenance Products optional • Major credit cards accepted • Open Saturdays and evenings

EXHIBIT Q



Most weight loss programs are more concerned with their bottom line than your waistline.

Most weight loss programs spend more time on their figures than yours. They figure out ways to hit you with administrative fees. Hidden charges. Some even charge you by the pound. It's like they're punishing you for losing weight. At Jenny Craig you can lose all the weight you want for one low service fee. No gimmicks. No hidden costs. Jenny Craig. Where you get thin. And your wallet doesn't.

$185.*

Lose all the weight you want for one low service fee.

Now you can.

JENNY CRAIG™

Weight Loss Centers

Call today.

$99.*

$235.*

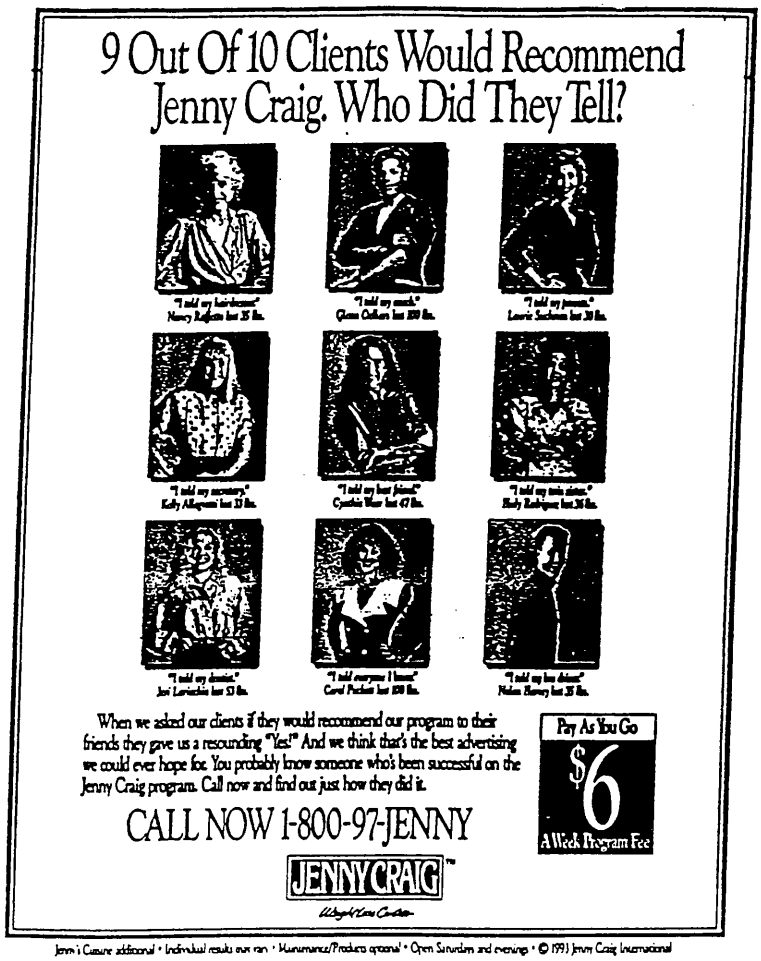
$195.*

*Service fee • Jenny's Cuisine additional • Maintenance Products optional • Major credit cards accepted • Open Saturdays and evenings

EXHIBIT R


"We've thought of everything you need to lose weight."
1. Counselors who care.
2. Learn from experts.
3. Fresh-frozen entrees.
4. Our price is guaranteed.
Lose all the weight you want. $92.50* Price Guaranteed.
Now you can.
JENNY CRAIG
Call today
Lose all the weight you want. $99* Price Guaranteed.
50% OFF SPECIAL
Lose all the weight you want. $97.50* Price Guaranteed.
Lose all the weight you want. $235* Price Guaranteed.
Lose all the weight you want. $195* Price Guaranteed.
Lose all the weight you want. $185* Price Guaranteed.
Lose all the weight you want. $149* Price Guaranteed.
Lose all the weight you want. $97.50* Price Guaranteed.
50% OFF SPECIAL
Lose all the weight you want. $92.50* Price Guaranteed.

EXHIBIT S



Issquah Press (Seattle)
9 Out of 10
Ad #132095, 3 col x 8"
3/17 Insertion

Exhibit S

EXHIBIT T

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	AS PRODUCED
Product		Length	:30
ISCI No	YJCJ 0527 CORPORATE	Date	4/16/92

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

Exhibit T

333 Complaint

EXHIBIT U

J. Walter Thompson

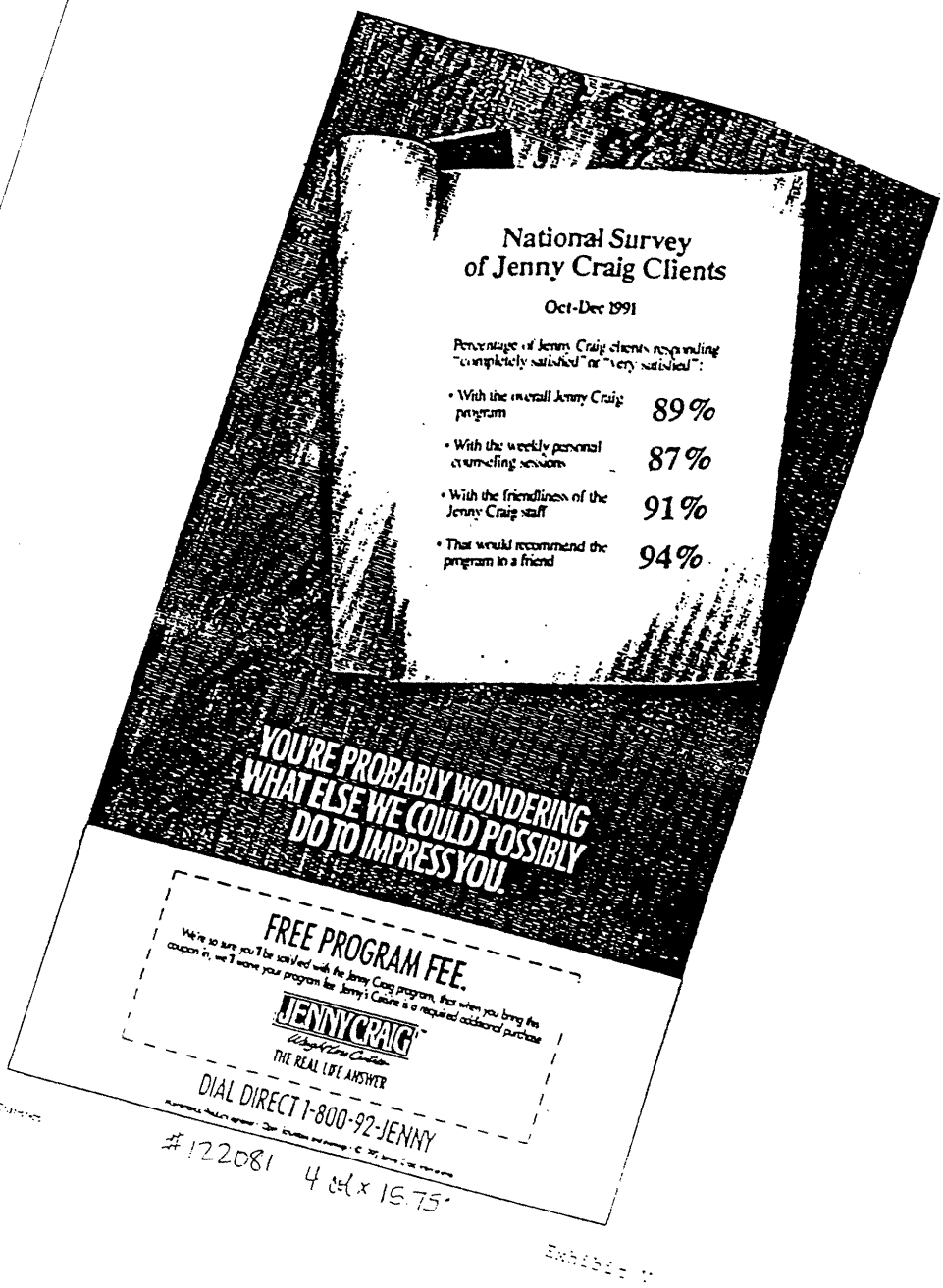
R A D I O

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. Geezh! 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.



#122081 4 3/4 x 15.75"

Exhibit V

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, and having modified the order in several respects, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Jenny Craig, 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 at 445 Marine View Avenue, #300, Del Mar, California.

Respondent Jenny Craig International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 445 Marine View Avenue, #300, Del Mar, California.

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

DEFINITIONS

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

A. *"Competent and reliable scientific evidence"* shall mean those tests, analyses, research, studies, surveys 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.

B. *"Weight loss program"* shall mean any program designed to aid consumers in weight loss or weight maintenance.

C. *"Broadcast medium"* shall mean any radio or television broadcast, cablecast, home video, or theatrical release.

D. For any order-required disclosure in a print medium to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* it must be given both in the same type style and in: (1) twelve point type where the representation that triggers the disclosure is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure where that representation is given in a type size that is smaller than twelve point type.

E. For any order-required disclosure given orally in a broadcast medium to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* the disclosure must be given at the same volume and in the same cadence as the representation that triggers the disclosure.

F. For any order-required disclosure given in the video portion of a television or video advertisement to be made *"clearly and prominently"* or in a *"clear and prominent manner,"* the disclosure must be of a size and shade and must appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend it.

G. *"Short broadcast advertisement"* shall mean any advertisement of thirty seconds or less duration made in a broadcast medium.

I.

It is ordered, That Jenny Craig, Inc., a corporation, and Jenny Craig International, Inc., a corporation ("respondents"), their successors and assigns, and respondents' officers, representatives,

agents, and employees, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, 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:

A. Making any representation, directly or by implication, about the success of participants on any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation;

Provided, further, that for any representation that:

(1) Any weight loss achieved or maintained through the weight loss program is typical or representative of all or any subset of participants of respondents' program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All participants who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those participants who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; or

(b) All participants who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

(2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of at least two years from their completion of the active maintenance phase of respondents' program, or earlier termination, as applicable; and

(3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of participants who were followed for a period of time after completing the program that is either:

(a) Generally recognized by experts in the field of treating obesity as being of sufficient length for predicting that weight loss will be permanent, or

(b) Demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary.";

Provided, further, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program;

Provided, however, that a truthful statement that merely describes the existence, design or content of a weight maintenance or weight management program or notes that the program teaches clients about how to manage their weight will not, without more, be considered for purposes of this order a representation regarding weight loss maintenance success;

C. Representing, directly or by implication, except through short broadcast advertisements referred to in paragraph I.D herein, and except through endorsements or testimonials referred to in paragraph I.E herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those participants,

(2) The duration over which the weight loss was maintained, measured from the date that participants ended the active weight loss phase of the program, provided, further, that if any portion of the time period covered includes participation in a maintenance program(s) that follows active weight loss, such fact must also be disclosed, and

(3) If the participant population referred to is not representative of the general participant population for respondents' programs:

(a) The proportion of the total participant population in respondents' programs that those participants represent, expressed in terms of a percentage or actual numbers of participants, or

(b) The statement: "Jenny Craig makes no claim that this [these] result[s] is [are] representative of all participants in the Jenny Craig program.";

Provided, however, that for representations about weight loss maintenance success that do not use a number or percentage, or descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term," respondents may, in lieu of the disclosures required in C.(1)-(3) above,

(i) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record."; and

(ii) For a period of time beginning with the date of the first dissemination or broadcast of any such advertisement and ending no sooner than thirty (30) days after the last dissemination or broadcast of such advertisement, give to each potential client, upon the first presentation of any form asking for information from the potential client, but in any event before such person has entered into any agreement with respondents, a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B and subparagraphs I.C(1)- (3) of this order, formatted in the exact type size and style as the example form described in paragraph I.D(2)(a) and set out below;

Provided, further, that compliance with the obligations of this paragraph I.C in no way relieves respondents of the requirement under paragraph I.A of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss.

D. Representing, directly or by implication, in short broadcast advertisements, that participants of any weight loss program have successfully maintained weight loss, unless respondents:

(1) Include, clearly and prominently, and in immediate conjunction with such representation, the statement: "Check at our centers for details about our maintenance record.";

(2) For a period of time beginning with the date of the first broadcast of any such advertisement and ending no sooner than thirty days after the last broadcast of such advertisement, comply with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(a) Give to each potential client a separate document entitled "Maintenance Information," which shall include all the information required by paragraph I.B and subparagraphs I.C (1)-(3) of this order and shall be formatted in the exact type size and style as the example form below, and shall include the heading (Helvetica 14 pt. bold), lead-in (Times Roman 12 pt.), disclosures (Helvetica 14 pt. bold), acknowledgment language (Times Roman 12 pt.) and signature block therein; provided, further, that no information in addition to that required to be included in the document required by this subparagraph I.D(2) shall be included therein;

MAINTENANCE INFORMATION

You may have seen our recent ad about maintenance success. Here's some additional information about our maintenance record.

[Disclosure of maintenance statistics goes hereXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]
For many dieters, weight loss is temporary.

I have read this notice. _____
(Client Signature) (Date)

(b) Require each potential client to sign such document; and
(c) Give each client a copy of such document; and

(3) Retain in each client file a copy of the signed maintenance notice required by this paragraph;

Provided, further, that: (1) compliance with the obligations of this paragraph I.D in no way relieves respondents of the requirement under paragraph I.A of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and (2) respondents must comply with both paragraph I.D and paragraph I.C of this order if respondents include

in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term";

Provided, however, that the provisions of paragraph I.D shall not apply to endorsements or testimonials referred to in paragraph I.E herein.

E. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondents' weight loss program if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondents' weight loss programs generally achieve, unless respondents disclose, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss success or weight loss maintenance success:

(1) What the generally expected success would be for Jenny Craig customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Jenny Craig customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to change of residence or medical reasons, such as pregnancy; and that for endorsements or testimonials about weight loss success, respondents can satisfy the requirements of this subparagraph by accurately disclosing:

(a) The generally expected success for Jenny Craig customers in the following phrase: "Weight loss averages (number) lbs. over __ weeks"; or

(b) The average number of pounds lost by Jenny Craig customers, using the following phrase: "Average weight loss (number) lbs. More details at centers"; and, for a period of time beginning with the date of the first dissemination of any such advertisement and ending no sooner than thirty days after the last dissemination of such advertisement, making in any on-site video promotion the preceding disclosure orally and complying with the following procedures upon the first presentation of any form asking for information from a potential client, but in any event before such person has entered into any agreement with respondents:

(i) Give to each potential client a separate one-page document with an appropriate title that alerts customers that important information follows, which shall disclose, clearly and prominently, what the generally expected success would be for Jenny Craig customers in losing weight, expressed in terms of both average number of pounds lost and average duration of participation in the Jenny Craig program; such document shall be formatted in the following type size and style: heading (Helvetica 14 pt. bold), disclosures (Helvetica 14 pt. bold), signature block (Times Roman 12 pt.), and any other language (no larger than 14 pt.); provided, further, that no information that contradicts this information shall be included in the document required by this subparagraph;

(ii) Ask each potential client to sign such document;

(iii) Give each client a copy of such document; and

(iv) Retain in each client file a copy of the notice provided to clients under the requirements of this subparagraph; or

(2) The limited applicability of the endorser's experience to what consumers may generally expect to achieve; *i.e.*, that consumers should not expect to experience similar results; respondents can satisfy the requirements of this subparagraph by clearly and prominently disclosing in close proximity to the representation one of the following statements:

(a) "You should not expect to experience these results."
(b) "This result is not typical. You may not do as well."
(c) "This result is not typical. You may be less successful."
(d) "_____'s success is not typical. You may not do as well."
(e) "_____'s experience is not typical. You may achieve less."
(f) "Results not typical."
(g) "Results not typical of program participants."

Provided, however, that a truthful statement that merely describes the existence, design or content of a weight maintenance or weight management program or notes that the program teaches clients how to manage their weight, or which states either through the endorser or in nearby copy that under the program "weight loss maintenance is possible," or words to that effect, will not, without more, be considered for purposes of this paragraph a representation regarding

weight loss maintenance success or trigger the need for separate or additional maintenance disclosures required by other paragraphs of the order;

Provided, further, that:

(i) A representation about maintenance by an endorser that states a number or percentage, or uses descriptive terms that convey a quantitative measure, such as "I have kept off most of my weight loss for 2 years," shall be considered a representation regarding weight loss maintenance success;

(ii) If endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure.

F. Representing, directly or by implication, that the price at which any weight loss program can be purchased is the only cost associated with losing weight on that program, unless such is the case.

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either (1) in close proximity to such representation, the existence and amount of all mandatory costs and fees associated with the program offered; or (2) in immediate conjunction with such representation, the following statement: "Plus the cost of [list of products or services that participants must purchase at additional cost].";

Provided, further, that in a broadcast medium, if the representation that triggers the disclosure is oral, the required disclosure must also be made orally.

H. Failing to disclose over the telephone, for a period of time beginning with the date of any advertisement of the price at which any weight loss program can be purchased and ending no sooner than 180 days after the last dissemination of any such advertisement, to consumers who inquire about the cost of any weight loss program, or are told about the cost of any weight loss program, the existence and amount of any mandatory costs or fees associated with participation in the program.

I. Representing, directly or by implication, that prospective participants in respondents' weight loss program will reach a specified weight within a specified time period, unless at the time of making

such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Misrepresenting, directly or by implication, the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss.

K. Failing to disclose, clearly and prominently, in writing either:

1) To all participants when they enter the program; or

2) To each participant whose average weekly weight loss exceeds two percent (2%) of his or her initial body weight, or three pounds, whichever is less, for at least two consecutive weeks;

that failure to follow the program protocol and eat all of the food recommended may involve the risk of developing serious health complications.

L. Misrepresenting, directly or by implication, the performance, efficacy, price, or safety of any weight loss program or weight loss product.

M. Representing, directly or by implication, that participants on any weight loss program recommend or endorse the program unless, at the time of making any such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

N. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey.

II.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

It is further ordered, That for three (3) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon

request make available to the Federal Trade Commission for inspection and copying:

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

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

IV.

It is further ordered, That respondents shall distribute a copy of this order to each of their officers, agents, representatives, independent contractors and employees who are involved in the preparation and placement of advertisements or promotional materials or in communication with customers or prospective customers or who have any responsibilities with respect to the subject matter of this order; and, for a period of ten (10) years from the date of entry of this order, distribute same to all future such officers, agents, representatives, independent contractors and employees.

V.

It is further ordered, That:

A. Respondents shall distribute a copy of this order to each of their franchisees and licensees and shall contractually bind them to comply with the prohibitions and affirmative requirements of this order; respondents may satisfy this contractual requirement by incorporating such order requirements into their current Operations Manual; and

B. Respondents shall further make reasonable efforts to monitor their franchisees' and licensees' compliance with the order provisions; respondents may satisfy this requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondents determine is failing materially or repeatedly to comply with any order provision that such franchisee or licensee is not in compliance with the order provisions and that disciplinary action may result from such noncompliance; and (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified;

provided, however, that the requirements of this Part V will not, by themselves, increase the liability of respondents for any acts and practices of their franchisees or licensees that violate this order.

VI.

It is further ordered, That this order will terminate on February 19, 2018, or twenty (20) 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 (20) years;
B. This order's application to any respondent that is not named as a defendant in such complaint; and
C. This order if such complaint is filed after the order has terminated pursuant to this 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 respondents shall, within sixty (60) days after the date of service of this order, and one year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Pitofsky recused and Commissioner Azcuenaga not participating.