IN THE MATTER OF

COOPER INDUSTRIES, INC.

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

Docket C-3469. Consent Order, Oct. 26, 1993--Modifying Order, Dec. 15, 1997

This order reopens a 1993 consent order -- that required the respondent to divest certain assets and to license certain technology for manufacturing industrial fuses -- and this order modifies the consent order by setting aside provisions of the consent order which required Cooper to license and divest low-voltage industrial fuse technology that it gained in its acquisition of Brush Fuses, Inc.; and by substituting a provision requiring prior Commission approval of certain acquisitions with a provision requiring prior notification.

ORDER REOPENING AND MODIFYING ORDER

I. THE COMPLAINT AND ORDER

On August 15, 1997, Cooper Industries, Inc. ("Cooper"), the respondent named in the above-referenced consent order ("order") issued by the Commission on October 26, 1993, filed its Petition to Reopen and Vacate Consent Order ("Petition"). Cooper asks that the Commission reopen and vacate the order pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC" Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, based on changed facts and the public interest and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement").[1] The thirty-day public comment period on Cooper's Petition ended on September 15, 1997. No comments were received.

The Commission has determined to grant, in part, Cooper's Petition by reopening the order and modifying it to set aside the requirements of paragraph II through VII, but to deny the request to vacate the order. Rather, the Commission has determined to substitute for the prior approval requirement of paragraph VIII the prior notification and waiting period requirements of Section 7A of the Clayton Act, 15 U.S.C. 18a, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, for all non-HSR reportable

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

acquisitions otherwise meeting the specifications of paragraphs VIII and IX. This modification therefore eliminates the need for the separate prior notification requirement of paragraph IX, and the Commission has determined to set aside that paragraph.

The complaint in this matter alleges that Cooper's agreement to acquire the Fusegear Group, including Brush Fuses, Inc. ("Brush"), from BTR plc violated Section 5 of the FTC Act, and that the acquisition of the Fusegear Group, including Brush, would violate Section 5 of the FTC Act and Section 7 of the Clayton Act, 15 U.S.C. 18, by lessening competition and tending to create a monopoly in the market for low voltage industrial fuses ("LVI Fuses") in the United States.

The resulting order became final on October 29, 1993.[2] Paragraph III of the order requires Cooper to grant a license within twelve months to a licensee, who has received prior approval by the Commission, to obtain and use the LVI Fuse Technology and Know-how to manufacture any and all types of LVI Fuses that had been manufactured by or for Brush and sold within the United States within the last three years prior to the acquisition of Brush by Cooper ("License"). Paragraph II orders Cooper to divest the Brush Assets to the licensee, but only to the extent the licensee chooses to acquire those assets. Paragraphs IV and V contain additional requirements related to maintaining the Brush Assets pending divestiture and to an interim supply agreement. Paragraph VI provides for the appointment of a trustee should Cooper fail to grant the License and divest within the requisite period, and paragraph VII specifies Cooper's notification and reporting obligations. The purpose of the License and divestiture is to remedy the lessening of competition in the LVI Fuse market and to assist the licensee to manufacture, distribute, and sell a full line of LVI Fuses.[3] Cooper failed to grant the License within the time required, and the Commission approved the appointment of a trustee, on February 12, 1996. The trustee also failed to grant the License before his term expired on February 15, 1997.

II. THE PETITION

In its Petition, Cooper describes its and the trustee's efforts to license and asserts, with supporting affidavits,[4] that despite these efforts, a licensee for the LVI Fuse Technology and Know-how has

[2] 116 FTC 1243 (1993).

[3] Order ¶¶ II and III.A.

[4] Affidavits of James R. Deen, Associate General Counsel, and Homer Blalock, Trustee.

not been found. Cooper believes that the value of the License and related assets now is reduced to such an extent that "no willing buyer is likely to come forward."[5] It also asserts that the prior approval and prior notice requirements of the order are "unique" and that "there is no 'credible risk' that Cooper will undertake an anticompetitive and unreportable transaction." Cooper further argues that the *de minimis* nature of less that $3.5 million sales specified in paragraph IX is *prima facie* evidence of the Commission's lack of concern about such acquisitions and that, therefore, such prior notification is unnecessary.

III. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. (unpublished) ("Hart Letter").[6]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5.; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.[7] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order. *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also

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[5] Petition at 11.

[6] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[7] Letter to Joel E. Hoffman, Damon Corp., C-2916 [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 at 22,585 (March 29, 1983)("Damon Letter").

will consider whether the particular modification sought is appropriate to remedy the identified harm. *Id.* at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of Commission orders.[8]

IV. REOPENING AND MODIFYING THE ORDER IS IN THE PUBLIC INTEREST

As Cooper described in its Petition, supported by the required affidavits, it and the trustee seemingly have done all that is possible to grant the License. Immediately after the order became final, Cooper notified all those companies thought to be likely potential acquirers of the License that the License was available. The availability of the License also was widely advertised, first by Cooper and then by the trustee. Although both Cooper and the trustee received serious inquiries, each of the initially interested parties declined to pursue the License after performing a more detailed evaluation. Cooper asserts that now, more than four years since the order became final, the value of the License and related assets is reduced to such an extent that "no willing buyer is likely to come forward."[9]

Although the fact that the passage of time has reduced the value of the assets was foreseeable and thus does not constitute the change

[8] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981)(strong public interest considerations support repose and finality).

[9] Petition at 11.

in fact necessary to justify reopening the order, it would be futile to continue to require Cooper to grant a License and inequitable to require it to keep paying a trustee to attempt the same. Accordingly, Cooper has demonstrated an affirmative need to reopen the order.

In balancing whether Cooper has demonstrated that the reasons to set aside the licensing, divestiture, and related requirements outweigh the need to continue to impose these obligations on Cooper, the Commission notes that the purpose of the order was to increase competition by granting a License to a licensee to manufacture, distribute, and sell a full line of LVI Fuses. Such a licensee could not be found, and the evidence indicates that the value of the License is now so reduced that such a licensee will not be found, regardless of the additional effort. The diligent attempts of the trustee to market the License demonstrate that further attempts to license, even at no minimum price, are likely to be fruitless.[10] Because there is no need to continue to require Cooper either to attempt to grant a License or to maintain the Brush Assets (as it has since those assets were acquired), the divestiture obligations of the order should be set aside.

V. PRIOR APPROVAL POLICY STATEMENT

In its Petition, Cooper also asks the Commission to vacate the prior approval and prior notification provisions of paragraphs VIII and IX. Paragraph VIII and paragraph IX together prohibit Cooper, for ten years, from making any acquisition of interests in or assets of specified entities without either the prior approval of the Commission or HSR-type prior notification. The value of the acquired entity's sales of LVI Fuses in each of the three years preceding such acquisition determines whether prior approval or prior notification is required. Cooper contends that these prior approval and prior notice requirements are unique and asserts that prior approval is unwarranted because "there is no 'credible risk' that Cooper will undertake an anticompetitive and unreportable transaction."[11] It adds that the *de minimis* level of sales that triggers paragraph IX's prior notification provision is *prima facie* evidence that the Commission was particularly unconcerned about such acquisitions, and, therefore, that prior notification also is unwarranted.[12]

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[10] The respondent made the same showing in Promodes, S.A., Docket No. 9228, in which the trustee accomplished divestiture of only some of the supermarkets to be divested. Order Granting Request to Reopen and Modify, 117 FTC 37 (1994).

[11] Petition at 14.

[12] *Id.*

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of the HSR Act to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

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

The presumption is that setting aside the prior approval requirement of paragraph VIII is in the public interest. The record contains no evidence suggesting that this matter presents the limited circumstances identified in the Prior Approval Policy Statement as appropriate for retaining a narrow prior approval provision, *i.e.*, a credible risk that, but for the prior approval provision, the respondent would attempt the same or approximately the same merger.

Prior notification, however, is appropriate for acquisitions that fall below the HSR threshold for the relevant market because the acquisition in this matter was just such a non-reportable acquisition, acquisitions of LVI Fuses from other producers are still possible, and, thus, a credible risk exists that Cooper could engage in future anticompetitive acquisitions that would not be subject to the premerger notification and waiting period requirements of the HSR Act. Cooper argues that the *de minimis* level of acquisitions requiring paragraph IX prior notification shows that the Commission has no concern for such acquisitions, but Cooper has presented no facts to support that assertion. Although such small acquisitions may not have required prior approval, they raise potential antitrust concerns sufficient to require prior notification. Accordingly, prior notification should be required for all acquisitions and may now be incorporated in one paragraph.

Accordingly, *It is ordered*, that this matter be, and it hereby is, reopened; and

It is further ordered, That the order be, and it hereby is, modified to set aside paragraphs II through VII and paragraph IX, as of the effective date of this order; and

It is further ordered, that paragraph VIII of the order be, and it hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for ten (10) years from the date this order becomes final, respondent shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, which manufactures (either directly or indirectly), and sells the Relevant Product (other than sales to subsidiaries or divisions of the concern) in or into the United States; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the manufacture and sale in or into the United States of the Relevant Product from any concern, corporate or non-corporate, except in the ordinary course of business.

On the anniversary of the date on which this order becomes final, and on every anniversary thereafter for the following nine (9) years, Cooper shall file with the Commission a verified written report of its compliance with paragraph VIII of the order.

The prior notifications required by this paragraph VIII 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 (30) 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 (20) 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. Notwithstanding, 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.

Commissioner Starek concurring in the result only.

IN THE MATTER OF

WEIGHT WATCHERS INTERNATIONAL, INC.

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

Docket 9261. Complaint, Sept 24, 1993--Decision, Dec. 24, 1997

This consent order requires, among other things, the New York-based corporation to provide certain types of evidence to substantiate future weight loss and weight loss maintenance claims; requires disclosure statements regarding the actual maintenance experience of the customers; and requires in some instances that testimonials concerning weight loss or maintenance success contain a statement reflecting the generally expected success for program participants or indicate that dieters should not expect to experience similar results.

Appearances

For the Commission: *Ronald Waldman* and *Michael Bloom.*

For the respondent: *Keith Pugh* and *Edward Henneberry, Howrey & Simon*, Washington, D.C. and *Robert Hollweg*, Woodbury, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Weight Watchers International, Inc., a corporation (hereinafter "Weight Watchers" or "respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Weight Watchers International, Inc. is a Virginia corporation, with its principal office or place of business at 500 N. Broadway, Jericho, New York.

PAR. 2. Respondent has 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 it makes available to consumers at numerous company-owned and franchised "Weight Watchers" centers nationwide.

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

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements for the Weight Watchers weight loss program, including but not necessarily limited to the attached Exhibits 1 through 21.

SUCCESS CLAIMS

PAR. 5. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 1 through 17, contain the following statements:

(a) Quick, successful weight loss. [Exhibit 1]

(b) The feelings of success cultivated during the early weeks of the Program foster the self-efficacy needed to see weight-loss goals to fruition. Therefore, Weight Watchers members not only lose weight successfully, they learn the necessary skills to keep it off for a lifetime. Through the cultivation of healthy eating and exercise habits, and the implementation of strategies for dealing with challenging weightless situations, our members learn to make proper weight management a lifelong habit. [Exhibit 2]

(c) Our program not only helps you slim down, it helps you stay that way. You'll learn how to eliminate the habits that have contributed to unwanted weight gain and replace them with constructive ones . . . .

Weight Watchers has already helped more than 30 million people around the world lose weight. In our At Work program you, too, will shed pounds with our medically approved program . . . . Explores food-related behavior patterns and helps you establish healthy eating and exercise habits so that you not only lose weight but also maintain the loss . . . .

At each At Work Program meeting you will receive additional weight-loss tools that make it easier to reach and maintain your goal weight. . . . Most importantly, you'll be setting the foundation for a lifetime of successful weight management, joining the tens of thousands of people who have reached and maintained their goal weights through our program. [Exhibit 3]

(d) As a Weight Watchers member, you'll discover an infinite number of choices. Best of all, you'll find that you control your diet; your diet does not control you. And when you've reached the weight you want, we'll show you how to stay there for the rest of your life. . . .

At Weight Watchers, you will lose weight at the pace that is best for you on a diet of foods you'll be able to eat for the rest of your life. [Exhibit 4]

(e) We pride ourselves on providing a state-of-the-art Program that works.... That's why the Weight Watchers program is a safe and healthy route to permanent weight loss. . . .

We're sure you'll agree that the Weight Watchers program is an investment in the future. The new knowledge, attitudes, and values you develop will last a lifetime for a slimmer, happier, healthier you. [Exhibit 5]

(f) Lose fast with results that last. [Exhibit 6]

(g) Its [sic] our most livable, effective way to lose weight ever. So hurry and join Weight Watchers. That way you'll learn how to lose weight and maintain it for a lifetime. [Exhibit 7]

(h) HUNGRY FOR A WEIGHT LOSS PROGRAM THAT REALLY WORKS? WEIGHT WATCHERS WORKS FOR A LIFETIME [Exhibit 8]

(i) Trusting a weight loss program.

Weight Watchers has been in business for 27 years. We don't rely on fads or gimmicks--just a safe, sensible approach to weight loss, based on sound nutrition, that works. And with our new 1991 Personal Choice Program, you decide the plan that's best for your lifestyle. You eat real food . . . and set your own pace. With the support you need to lose the weight and keep it off--all for just $10 a week. [Exhibit 9]

(j) Our Unique Four-Way Approach to Weight Loss

The new Quick Success program--it's not a diet, it's a total weight-loss package. Using our proven four-way approach, you'll progress toward one ultimate goal-permanent weight loss. Here's how it works . . . . [Exhibit 10]

(k) If you're having a hard time losing weight, chances are the problem isn't lack of willpower. It's what you're forced to eat.

That's why our Personal Choice Program works so well: You get a wide variety of delicious real foods, including treats like pizza and chocolate cake. What's more, you can choose the foods you like. We'll show you how.

With a Program this flexible, we know you'll find the power within you to lose weight. And there's a Weight Watcher's meeting near you to help.[Exhibit 11]

(l) Mary Mach, Lost 91 lbs./maintained for 16 years.
IT WORKS! [Exhibit 12]

(m) Jeanie Darnell Lost 77 lbs./maintained for 2 years.
IT WORKS! [Exhibit 13]

(n) I can't believe it. I ate pizza with my kids, the same meals I cooked for my family, and even had a snack with my coffee. And you know what? I lost every single pound I wanted to. . . .
What's more, because I can live with this program, I stuck to it and reached my goal. [Exhibit 14]

(o) Tracy Burgess, before. Tracy Burgess, after. . . .
Want proven results? Join Weight Watchers today. [Exhibit 15]

(p) [W]e've helped millions and millions of people lose weight. And learn how to keep it off, year after year after year. [Exhibit 16]

(q) If it's a smaller figure you're after, we've got one. With this terrific offer, it's a great time for you to join Weight Watchers and get one of your own.

You'll learn how to eat real foods right away. Handle real-life challenges. And develop permanent habits that won't just help you reach your goal weight. They'll help keep you there.

So take advantage of our great offer today. While your smaller figure may last forever, ours won't. So hurry and join Weight Watchers today. [Exhibit 17]

PAR. 6. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 1 through 17, respondent has represented, directly or by implication, that:

(a) Weight Watchers customers typically are successful in reaching their weight loss goals;

(b) Weight Watchers customers typically are successful in maintaining their weight loss achieved under the Weight Watchers diet program; and

(c) Overweight or obese Weight Watchers customers typically are successful in reaching their weight loss goals and maintaining their weight loss either long-term or permanently.

PAR. 7. Through the use of the statements and depictions contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 1 through 15, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph six, respondent possessed and relied upon a reasonable basis that substantiated those representations.

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

20% FASTER WEIGHT LOSS CLAIMS

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 18 through 21, contain the following statements:

(a) GREAT SAVINGS ON FASTER WEIGHT LOSS. PROVEN-EFFECTIVE, TOO!

Research proved it! Last year's Quick Success Program melted pounds 20% faster than before. And this year's New 1989 Quick Success Program is even better, thanks to an easier-to-use food plan, an expanded and simplified optional exercise plan and that wonderful meeting experience . . . . Come prove to yourself what we already know -- this is the program you can count on [Exhibit 18]

(b) Last year alone, this proven effective program [the "Quick Success Program"] helped millions of members take off weight over 20% faster than ever. This year, it's even easier. [Exhibit 19]

(c) THE PROVEN-EFFECTIVE WAY TO LOSE WEIGHT FASTER. Research proved last year's Quick Success Program melted pounds 20% faster than before. And now it's even easier to lose weight that fast! [Exhibit 20]

(d) Learn about our fastest-ever weight loss program!

Research proves our Quick Success Program works 20% faster than before. And this year, it's new and even better, with a revised, easier-to-follow food plan and an expanded optional exercise plan. [Exhibit 21]

PAR. 10. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that:

(a) Participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than participants in weight Watchers' prior weight loss program;

(b) Participants in Weight Watchers' 1989 "Quick Success" weight loss program lost weight as fast or faster than participants in Weight Watchers' 1988 "Quick Success" weight loss program; and

(c) Participants in Weight Watchers' 1989 "Quick Success" weight loss program lost weight 20%, or more than 20%, faster than participants in Weight Watchers' 1987 weight loss program.

PAR. 11. In truth and in fact:

(a) Participants in Weight Watchers' 1988 "Quick Success" weight loss program did not lose weight 20% faster than participants in Weight Watchers' prior weight loss program;

(b) Participants in Weight Watchers' 1989 "Quick Success" weight loss program did not lose weight as fast or faster than participants in Weight Watchers' 1988 "Quick Success" weight loss program; and

(c) Participants in Weight Watchers' 1989 "Quick Success" weight loss program did not lose weight 20%, or more than 20%, faster than participants in Weight Watchers' 1987 weight loss program.

Therefore, the representations set forth in paragraph ten were and are false and misleading.

PAR. 12. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that at the time it made the representations set forth in paragraph ten, respondent possessed and

relied upon a reasonable basis that substantiated those representations.

PAR. 13. In truth and in fact, at the time it made the representations set forth in paragraph ten, respondent did not possess and rely upon a reasonable basis that substantiated those representations. Therefore, the representation set forth in paragraph twelve was, and is, false and misleading.

PAR. 14. Through the use of the statements and depictions contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 18 through 21, respondent has represented, directly or by implication, that competent and reliable scientific evidence has proven that participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than participants in Weight Watchers' prior weight loss program.

PAR. 15. In truth and in fact, competent and reliable scientific evidence has not proven that participants in Weight Watchers' 1988 "Quick Success" weight loss program lost weight 20% faster than in Weight Watchers' prior weight loss program. Therefore, the representation set forth in paragraph fourteen was and is false and misleading.

COMPARATIVE PROGRAM CLAIMS

PAR. 16. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits 3 and 5, contain the following statements:

(a) We've adapted our proven weight-loss method--the world's most successful--to fit the high-pressure life-styles and hectic schedules of today's workplace. (Exhibit 3]

(b) We provide the most effective weight-loss methods and support for you to be successful, but you make it happen. [Exhibit 5]

PAR. 17. Through the use of the statements and depictions contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 3 and 5, respondent has represented, directly or by implication, that Weight Watchers weight loss programs are superior to other weight loss programs in enabling participants to achieve and maintain weight loss.

PAR. 18. Through the use of the statements and depictions contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the statements and depictions in the advertisements attached as Exhibits 3 and 5, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph seventeen, respondent possessed and relied upon a reasonable basis that substantiated that representation.

PAR. 19. In truth and in fact, at the time it made the representation set forth in paragraph seventeen, respondent did not possess and rely upon a reasonable basis that substantiated those representations. Therefore, the representation set forth in paragraph eighteen was, and is, false and misleading.

PAR. 20. In providing advertisements referred to in paragraph four to its individual franchisees for the purpose of inducing consumers to purchase its weight loss services and products, respondent has furnished the means and instrumentalities to those franchisees to engage in the acts and practices alleged in paragraphs four through nineteen.

PAR. 21 The acts and practices of respondent 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.

EXHIBIT 1

How to Win a Food Fight

Join Weight Watchers® At Work Program® Here. Where You Are.

- Quick, successful weight loss
- Group support
- Weekly on-site meetings
- Confidential weigh-ins

Look for our posters.

Weight Watchers®

THE AT WORK PROGRAM®

EXHIBIT 2

APPROACH TO WEIGHT LOSS

The philosophy of the Weight Watchers program encompasses a multidisciplinary approach to weight loss via The Quick Success Program. This comprehensive intervention program consists of the following four strategies:

• **Decreasing caloric intake through The Quick Success Food Plan.** The Food Plan is a healthy eating plan based on a variety of readily available, wholesome foods. Nutritional adequacy is attained through proper food selection that may be adjusted within carefully prescribed guidelines in order to allow for individual ethnic habits and preferences, cost, and availability. Calories build progressively, starting at approximately 1,000 kilocalories per day for women on the first week and building to approximately 1,200 kilocalories by the fifth week.* Micro/macro nutrients are supplied in adequate amounts as shown in Figure 1. The 15-20% protein, 25-30% total fat, and 50-55% carbohydrate breakdown shown in Figure 2 compares favorably with government guidelines. With prudent cholesterol, sodium, and simple sugar values, our nutritional parameters meet with guidelines sanctioned by the American Heart Association and Canadian Heart Foundation, the American and Canadian Cancer Societies, and the American and Canadian Diabetes Associations. More importantly, the Food Plan is flexible enough to be adapted to any life-style, thereby increasing each member's likelihood of long-term success.

• **Increasing caloric output through The Quick Success Exercise Plan.** When exercise is used in conjunction with diet for weight loss, a higher percentage of net weight lost will be adipose tissue. In addition, the inclusion of an exercise prescription increases the likelihood that dietary management will succeed, and also offers physiological, psychological, and social advantages. The Quick Success Exercise Plan affords all Weight Watchers members, from the sedentary to the more active, the opportunity to benefit from increased physical activity at any or all of its four levels of exertion. Members may participate in one or more of five aerobic activities: Walking, Walking-Jogging, Stationary Bicycling, Outdoor Bicycling, and Swimming, at low to moderate levels (60-80% of age predicted maximum heart rate) in order to provide optimal calorie- and fat-burning benefits and minimal stress on bones and joints. We integrate these low-impact activities into our gentle, prudent approach to increasing physical activity in order to provide an enjoyable path to a more active life-style. Our Exercise Plan meets guidelines for the exercise component of

*Kilocalories increase from 1,400 to 1,600 for men and from 1,500 to 1,700 for youths.

module.

• **Reshaping behavior through The Quick Success Self-Discovery Plan.** The necessity for the overweight individual to develop, strengthen, and maintain a strong motivation to lose weight cannot be overemphasized. Without success in this area, weight-loss results will not be long-lasting. Using behavior modification and cognitive restructuring techniques, the Self-Discovery Plan promotes positive attitudes and actions. Delivered through a self-teaching module, this Plan teaches members the necessary skills to reshape their eating and exercise behavior and develop more positive self images. Through this Plan, members may work on such challenges as binge eating, self-defeating thoughts, and eating triggers, while striving toward a lifetime of controlled eating.

• **Providing inspiration through our Group Support System.** Of all associated conditions, the psychological burden linked with overweight may cause the most suffering. That's why the Group Support System, the hallmark of the Weight Watchers organization, is the crux of our weight-loss Program. Empathy, encouragement, motivation, and support are all cultivated through weekly meetings with a trained group leader who lost weight on, and still successfully uses, our Program, and fellow members who share the same weight-loss concerns. In this warm, supportive, and trusting environment, members learn the skills and build the confidence they need to successfully follow the Program. Plus, our comprehensive Quick Success Program is *easier* to follow than ever before, increasing participants' adherence and, subsequently, weight loss.

FIGURE 1

Average Daily Nutrient Supply for Women Following the Week 5 Food Plan

Kilocalories	1,200
Protein	65 grams
Carbohydrate	160 grams
Fat	35 grams
Calcium	1,000 milligrams
Iron	12 milligrams
Vitamin A	2,000 R.E.
Vitamin C	165 milligrams
Thiamin	1.2 milligrams
Niacin	14 milligrams
Riboflavin	1.7 milligrams
Cholesterol	250 milligrams
Sodium	2,000 milligrams

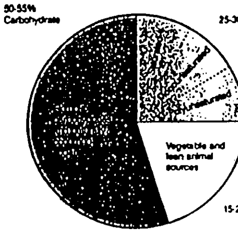
Note: Nutrient values for Women may vary according to individual food choices; nutrient values for the Men and Youths Food Plan vary from above.

Safe, Healthy, and Effective Weight Loss
Over the long term, our members average a one-half to one kilogram loss per week, with larger losses occurring in the first five weeks. In fact, our research shows that during the first 5 weeks of our new Quick Success Program, members lose 20% more weight than ever before. Additionally, our Exercise Plan works in conjunction with our Food Plan to promote maximum loss of adipose tissue while conserving lean body tissue.

Long-Term Life-Style Changes
The feelings of success cultivated during the early weeks of the Program foster the self-efficacy needed to see weight-loss goals to fruition. Therefore, Weight Watchers members not only lose weight successfully, they learn the necessary skills to keep it off for a lifetime. Through the cultivation of healthy eating and exercise habits, and the implementation of strategies for dealing with challenging weight-loss situations, our members learn to make proper weight management a lifelong habit.

FIGURE 2

Macronutrient Distribution of The Quick Success Food Plan (1,200 Kilocalories)



*Represents 65 grams of protein which provides 12% of kilocalories from a 2,200 kilocalorie diet and 20% of kilocalories from a 1,200 kilocalorie diet.

Weight Watchers has a weight-loss service to meet everyone's needs. All are based on our proven Quick Success Program and provide safe, healthy, and effective weight loss.

• *Our traditional group service* — neighbors and friends meeting within their communities to share in their weight-loss efforts.

• *Our convenient At Work® Program* — groups of fellow workers who meet right at their workplace.

• *Our exclusive Inner Circle®* — providing lots of personal attention to small groups of 8 to 12 members who share the same weight-loss concerns.

WEIGHT WATCHERS LINK IN THE HEALTH-CARE SYSTEM

Weight Watchers provides low-cost weight loss implemented at the community level by specially trained staff members. Our unique approach is to offer private weighing and informational *and* inspirational group meetings. This way, we work hand in hand with other health-care services by providing weight-loss expertise and the team spirit, support, and encouragement that can best be stimulated in a group working through weight-loss challenges together.

Weight Watchers welcomes any man, woman, or child (10 years or older) with at least 10 pounds to lose. While we are especially skilled at handling people with 40 pounds or more to lose, we are equally popular with individuals who are less than 20 pounds overweight. Our Program is informative, inspirational, and fun, and we have established an excellent reputation with your patients.

We recommend that every member seek her/his physician's approval before beginning our weight-loss Program, and ask your support by encouraging their participation and recognizing their progress. Our Program, a very palatable method of intervention, is designed to complement, not compete with, your medical/nutritional expertise. We have a weight-loss Program you can recommend with confidence.

Weight Watchers — the source for sensible weight loss.

EXHIBIT 2

EXHIBIT 3

EXHIBIT 3

Let Weight Watchers Work For You... Where You Work!

You'd like to lose weight, but there's just not enough time to commit to a program that will help you succeed. Right? Wrong! The Weight Watchers At Work Program® was designed with the needs of busy working people in mind.

We've adapted our proven weight-loss method—the world's most successful—to fit the high-pressure lifestyles and hectic schedules of today's workplace. And now, in cooperation with your employer, our expertise is available to you right where you work.

The At Work Program offers unparalleled convenience.

Getting to At Work Program meetings couldn't be easier or more convenient. Meetings are held on company premises during your lunch break or before or after hours. So the usual deterrents—meetings, children, errands, exhaustion, lack of time—don't get in the way of your attendance.

The At Work Program understands your needs.

We designed our program to accommodate the unique needs of working people. During our meetings, we'll show you how to:

- Cope with coffee breaks and candy machines.
- Brown bag with flair.
- Beat the after-work syndrome.
- Manage stress and maintain motivation.
- Take time-out for yourself.

The At Work Program is more than a diet.

The At Work Program is much more than a diet. It's a program that *fits* your lifestyle rather than requiring that you change it. Designed by a group of prominent medical, exercise, nutrition and psychological professionals, every facet of The At Work Program is geared to the special needs of working people who want to lose weight safely and effectively.

Our program not only helps you slim down, it helps you stay that way. You'll learn how to eliminate the habits that have contributed to unwanted weight gain and replace them with constructive ones. This doesn't mean you have to give up the foods you love. Our flexible food plan still has room for cheeseburgers, French fries, chocolate layer cake and other foods many people mistakenly think they have to give up. In fact, with the Weight Watchers® Program, no one will even know you're on a diet.

The At Work Program starts with success.

Weight Watchers has already helped more than 30 million people around the world lose weight. In our At Work Program you, too, will shed pounds with our medically approved program comprising the following:

- FOOD PLAN—Promotes faster yet safe weight loss through portion control and an exchange system that enables you to eat the everyday foods you love—at work, at home and on the go.
- EXERCISE PLAN—Helps you slim down, firm up and feel good with a choice of five optional inch-shaving activities and four levels of participation tailored to your needs and preferences.
- SELF-DISCOVERY PLAN—Explores food-related behavior patterns and helps you establish healthy eating and exercise habits so that you not only lose weight but also maintain the loss.
- GROUP LEARNING AND SUPPORT—You'll get up-to-the-minute information about weight-related issues in an atmosphere of mutual support, inspiration and motivation that will help you and your co-workers stay on the road to successful weight control.

The At Work Program continues with success.

At each At Work Program meeting you will receive additional weight-loss tools that make it easier to reach and maintain your goal weight. You'll learn that weight loss and delicious food go hand in hand and that eating well does not mean denying yourself the rewards you want for hard work. Most importantly, you'll be setting the foundation for a lifetime of successful weight management, joining the tens of thousands of people who have reached and maintained their goal weights through our program.

The At Work Program means privacy and personal choice.

At Work Program members are weighed each week—in privacy. You're free to tell anyone you want how much weight you've lost and how proud you are, but we won't tell anyone without your consent. The same goes for meeting participation. You can actively participate or just sit back and learn from the experiences of your leader and fellow members.

The At Work Program leaders care.

Genuine caring is one of the factors that helps At Work Program members succeed. Our leaders know how it feels to want to lose weight because they are all Weight Watchers success stories who themselves have met and maintained their weight-loss goals on our program. Their own experience makes them keenly aware of what you are experiencing, and you'll find that you benefit from their knowledge.

EXHIBIT 4

EXHIBIT 4

EXHIBIT 5

EXHIBIT 5

Why Weight Watchers?

Nothing succeeds like success, goes the old saying. And Weight Watchers has helped more people succeed at weight loss than any other weight-loss organization in the world.

Weight Watchers is the acknowledged leader among weight-loss and -control programs, bringing over a quarter century of knowledge and experience to members the world over. We pride ourselves on providing a state-of-the-art Program that works. Plus, our Program is regularly updated by experts in the fields of medicine, nutrition, exercise, physiology, and psychology who are at the forefront of new developments in the weight-loss field. With prudent cholesterol, sodium, and simple sugar values, our nutritional parameters meet with guidelines sanctioned by the American Heart Association and Canadian Heart Foundation, the American and Canadian Cancer Societies, and the American and Canadian Diabetics Associations. That's why the Weight Watchers program is a safe and healthy route to permanent weight loss.

Our Program contains a four-way approach: a Food Plan, an Exercise Plan, the Self-Discovery Plan®, and a Group Support System. These four facets of our Program mesh together to provide you with a personalized and enjoyable weight-loss experience, as well as a new way of thinking and living. We provide the most effective weight-loss methods and support for you to be successful, but you make it happen.

We're sure you'll agree that the Weight Watchers program is an investment in the future. The new knowledge, attitudes, and values you develop will last a lifetime for a slimmer, happier, healthier you.

Good Nutrition and Weight Loss: The Vital Link

Some people might think good nutrition and weight loss have little in common. Nothing could be further from the truth. Permanent weight loss is best achieved through good nutrition, which is what the Weight Watchers program offers.

Our Program embodies the three basic elements of good nutrition: balance, moderation, and variety. These three elements are critical to staying healthy

EXHIBIT 6


BURRELLE'S
"The only milk shakes I drink are the ones I want to."
Stephanie Fein, Director of Weight Watchers in N.J.
No special foods to buy.
Eat normally with family and friends.
Lose fast with results that last.
Costs less than $9 a week.
FREE
REGISTRATION
SAVE $19. Pay only $9 for your first meeting.
Weight Watchers
THE NEW EASY & FLEXIBLE PROGRAM
Over 400 weekly meetings to meet your busy schedule.
ATLANTIC COUNTY
ABSECON
Presbyterian Church of Absecon
208 New Jerusalem
Tues. 5:30 P.M. & 7:30 P.M.
ATLANTIC CITY
Chelsea Presbyterian Comm. Church
9 So. Chelsea Ave.
Fellowship Hall
Wed. 6:00 P.M.
BRIGANTINE
American Legion
3218 Brigantine Ave.
Thurs. 7:30 P.M.
EGG HARBOR CITY
Knights of Columbus
243 St. Louis Ave.
Thurs. 7:30 P.M.
HAMMONTON
Women's Civic Club
Broadway & Liberty St.
Mon. 5:15 P.M. & 7:30 P.M.
Tues. 9:30 A.M.
LINWOOD
Seaview Baptist Church
2025 Shore Road (opp. Myrtle Ave.)
Mon. 7:30 P.M.
LONGPORT
Church of the Epiphany
2801 Ventnor Ave.
Tues. 7:30 P.M.
MAYS LANDING
Mays Landing Fire Company
750 West Mill St.
Wed. 7:30 P.M.
NORTHFIELD
Northfield United Methodist Church
205 Northfield Avenue
(at Zion Road)
Main Floor-Wall Dyke Room
Wed. 4:00 P.M. & 6:30 P.M.
Thurs. 9:30 P.M.
SMITHVILLE
United Methodist Church
Moss Mill Rd. & Rt. 9
Mon. 7:30 P.M.
SOMERS POINT
American Legion
First St. & Pennsylvania Ave.
Wed. 9:30 A.M.
SOMERS POINT
Shore Memorial Hospital
New York & Sunny Aves. (5th Floor)
Wed. 7:00 P.M.
VENTNOR
Ventnor Community Church
Ventnor & Victoria Aves.
Mon. 7:30 P.M., Fri. 9:30 A.M.
CAPE MAY COUNTY
CAPE MAY
Kiwanis Club
1111 Beach Drive (next to Golden Eagle Horse)
Mon. 7:30 P.M.
CAPE MAY COURTHOUSE
First United Methodist Church
Memorial Hall
Church St. & Rt. 9
Thurs. 7:30 P.M.
OCEAN CITY
St. Peter's United Methodist Church
8th St. & Central Ave.
Thurs. 5:15 P.M. & 7:30 P.M.
PALERMO/MARMORA
The Second Cape May Baptist Church
600 So. Shore Road (Rear bldg., behind church downstairs)
Thurs. 9:30 A.M.
SEA ISLE CITY
Masonic Lodge
John F. Kennedy Blvd. & Park Rd.
Wed. 7:30 P.M.
VILLAS/ERMA
Stella Maris Home Assoc.
Knights of Columbus
324 Breakwater Rd.
Tues. 7:30 P.M.
VILLAS
Lower Twsp. Recreation Center
2600 Bayshore Rd. Rodin #3, Lwr. Floor
Tues. 10:30 A.M.
WILDWOOD (NORTH)
St. Simeon's By the Sea
26th & Central
Wed. 9:30 A.M. & 7:30 P.M.
CUMBERLAND COUNTY
BRIDGETON
Bridgeton Civic Club
University & Fayette Ave.
Tues. 9:30 A.M.
Wed. 7:00 P.M.
BRIDGETON/ UPPER DEERFIELD
Upper Deerfield Fire Dept. #1
Route 77 & 540
Thurs. 7:00 P.M.
MILLVILLE
Millville Public Library
210 Buck St.
Mon. 7:00 P.M. & Thurs. 9:30 A.M.
VINELAND
YMCA, 1159 East Landis Ave.
Tues. 5:15 P.M. & 7:30 P.M., Wed. 9:30 A.M., Thurs. 4:30 P.M. & 7:30 P.M., Sat. 10:00 A.M. & Sun. 10:00 A.M.
CUMBERLAND COUNTY
BRIDGETON
Bridgeton Civic Club
University & Fayette Ave.
Tues. 9:30 A.M.
Wed. 7:00 P.M.
BRIDGETON/ UPPER DEERFIELD
Upper Deerfield Fire Dept. #1
Route 77 & 540
Thurs. 7:30 P.M.
MILLVILLE
Millville Public Library
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Mon. 7:00 P.M. & Thurs. 9:30 A.M.
VINELAND
YMCA, 1159 East Landis Ave.
Tues. 5:15 P.M. & 7:30 P.M., Wed. 9:30 A.M., Thurs. 4:30 P.M. & 7:30 P.M., Sat. 10:00 A.M. & Sun. 10:00 A.M.
For Holiday schedules and locations, or other information, please call
The Connection 1-800-333-3000
Weight Watchers - We really fit your style.

610 Complaint

EXHIBIT 7

EXHIBIT 7

COURIER-STANDARD
ENTERPRISE

FORT PLAIN, NY
WEEKLY 4,778

OCT 10 1990

226 BURRELLE'S OF

nn31

Weight Watchers®

Safe, sensible weight loss for 27 years.

Introducing 2 for 1 Special

Join by October 27, Share the cost.
Pay only $14.50 each.

Come alone or bring a friend. It's that simple. What's also simple is the food plan itself. Its our most liveable, effective way to lose weight ever. So hurry and join Weight Watchers. That way you'll learn how to lose weight and maintain it for a lifetime.

Ask about our Slimming Savings Special!
3 Ways to Win: Slim down, Save money and Special Prizes!

Join for Half Price
Save $14.50

FAST & FLEXIBLE PROGRAM™

CANAJOHARIE
United Methodist Church
East Main Street
Thursday 6:00 pm

AMSTERDAM
Horace J. Inman,
Sr. Citizens Ctr.
53 Guy Park Avenue
Thursday 6:30 pm

GLOVERSVILLE
American Legion Hall
200 N. Main Street
Wednesday 5:30 pm
Thursday 9:00 am

Ask about our prepayment savings and our AT WORK Program™
FOR MORE INFORMATION, CALL
1-800-338-8838

Offer good October 7th through October 27th, 1990. Fee for subsequent weeks $10. Offer valid at participating locations only. Cannot be combined with other discounts or special rates. Weight Watchers and Fast and Flexible are registered trademarks of WEIGHT WATCHERS INTERNATIONAL, INC. © 1990 WEIGHT WATCHERS INTERNATIONAL, INC.

WWI 13247

EXHIBIT 8

EXHIBIT 8

Registration $20
Weekly Fee $5*
YOU SAVE $18
Offer Expires Sept. 24, 1981

WW I 6455

EXHIBIT 9

KEYES MARTIN
Advertising. Direct Marketing. Sales Promotion.

Copy

EXHIBIT 9

Date: 12/21/90 By
Client: Weight Watchers
Job #: WWS-235
Medium: Newspapers
Size: 235 - 4 X 10.5
235A - 3 X 10.5
235B - 6 X 18
Approval: (creative) (date)

Pg. 1 of 2

Weight Watchers
January Kick-off ad

(Headline)
Trusting a weight loss program

(Copy)
Weight Watchers has been in business for 27 years. We don't rely on fads or gimmicks--just a safe, sensible approach to weight loss, based on sound nutrition, that works. And with our new 1991 Personal Choices Program, you decide the plan that's best for your lifestyle. You eat real food....and set your own pace. With the support you need to lose the weight and keep it off--all for just $10 a week.

(Caption)
Stephanie Fein
President, Weight Watchers in New Jersey, at goal weight for 13 years

(Offer copy)
FREE Registration
Pay only $10 for 1st meeting.
Save $19

(Logo)
Weight Watchers
Safe, sensible weight loss for 27 years.

EXHIBIT 10

EXHIBIT 10

Our Unique Four-Way Approach To Weight Loss

The new Quick Success program—it's not a diet, it's a *total* weight-loss package. Using our proven four-way approach, you'll progress toward one ultimate goal—permanent weight loss. Here's how it works. . . .

1. Our FOOD PLAN promotes safe weight loss through a variety of nutritious and satisfying foods. Plus
   - ☐ *It's easy to follow* — guiding you with simple Menu Planners.
   - ☐ *It fits your life-style* — providing you with a "spending allowance" of extra calories, plus plans for dining out, celebrating special occasions, and more!

2. Our EXERCISE PLAN helps you slim down, firm up, and feel good. It offers
   - ☐ *Five "figure-slimming" activities* — walking, walking-jogging, stationary bicycling, outdoor bicycling, and swimming, plus special firming and toning exercises.
   - ☐ *Four levels of participation* — including one that's just right for you!

3. Our SELF-DISCOVERY PLAN® helps you put your Food and Exercise Plans into action. It helps you
   - ☐ *Discover your food-related behavior patterns* through self-tests and quizzes.
   - ☐ *Learn new skills* to help you develop healthy eating and exercise habits.
   - ☐ *Look and feel your best* while you slim down.

4. Our unique GROUP SUPPORT system is the key that has helped millions of people lose weight. It brings you
   - ☐ *A sense of belonging*, cultivated by the caring and interaction from your weekly meeting.
   - ☐ *Team spirit*, sparked by the pursuit of a common goal.
   - ☐ *Inspiration and motivation* to get you through the week—and ultimately to your goal!

Food Plan + Exercise Plan + Self-Discovery Plan + Group Support = the Quick Success program, which can mean permanent weight loss!

The Weight Watchers program has been developed under the guidance and direction of a group of scientists and physicians who have helped make it the safest and most successful weight-loss program in the world.

W. Henry Sebrell, M.D.
Medical Consultant — Former Director of the National Institutes of Health and of the Institute of Human Nutrition at Columbia University.

William D. McArdle, Ph.D.
Exercise Consultant — Professor of Physical Education and an Exercise Physiologist at Queens College of the City University of New York.

Ronna Kabatznick, Ph.D.
Psychological Consultant — Social Psychologist with a specialty in the behavioral aspects of weight management.

Lelio G. Perducci, Ph.D.
Vice President — International background in food research and development at the University of Strathclyde in Scotland, the University of Wisconsin, and with the H.J. Heinz Company.

Norma Frye, M.S., R.D./L.D.
Nutritionist with expertise in Sports and Cardiovascular Nutrition, Preventive Medicine, and Worksite Health Promotion programs.

Judy Marshall, M.B.A., R.D.
Nutritionist with expertise in international nutrition and weight control.

Mary Grace Sucholet, R.D.
Nutritionist with expertise in communications and nutrition.

Arlene Davis
Exercise specialist with expertise in exercise for women and the overweight population.

Reva T. Frankle, M.S.P.H., Ed.D., R.D.
Nutrition Consultant — Formerly Director of Nutrition for Weight Watchers International.

Barbara Ecker Gordon, M.S., R.D.
Nutrition Consultant — Formerly Chief, Technical Services for Weight Watchers International.

Weight Watchers®
25 ANNIVERSARY

EXHIBIT 11

EXHIBIT 11

Newsday, Long Island, N.Y. 7/27/71

PART II S 58

The Weight Loss Plan For People Who Like To Eat.

ASK ABOUT OUR **FREE** FAST START OPTION!

If you're having a hard time losing weight, chances are the problem isn't lack of willpower. It's what you're forced to eat.

That's why our Personal Choice® Program works so well. You get a wide variety of delicious real foods, including treats like pizza and chocolate cake. What's more, you can choose the foods you like. We'll show you how.

With a Program this flexible, we know you'll find the power within you to lose weight. And there's a Weight Watchers meeting near you to help. Join now for $11.00, a $17.00 savings.

Personal Choice Program

OFFER EXTENDED TILL OCT. 5

CALL 595-1300 TODAY!

Weight Watchers

You've Got It In You To Get It Off You.

To bring Weight Watchers to your workplace call 516-595-1300

Individual weight loss may vary. Fee for subsequent weeks $10. Cannot be combined with any other offer. Offer valid September 1st through September 22th 1971. Offer valid in participating areas only. Offer not available for AT WORK or COMMUNITY MEETINGS

JOIN NOW FOR JUST $11.00

Call (516) 595-1300 For Information

WEIGHT WATCHERS SCHEDULE OF MEETINGS

BAY SHORE CENTER
South Shore Mall (Brentwood by Sunrise)
Mon. - 11:30 a.m.
Mon. - 6 p.m., 10 a.m., 6 p.m., 7 p.m.
Tue. - 10 a.m., 12:30 p.m., 6 p.m., 7 p.m.
Wed. - 10 a.m., 1 NOON, 12 Noon, 5 p.m., 7 p.m.
Thu. - 10 a.m., 6 YOUTH 4 p.m., 7 p.m.
Fri. - 10 a.m., 6 p.m., 7 p.m.
Sat. - 9 a.m., 11:30 a.m.

BRIDGEHAMPTON
Old Post House
Scuttle Hole Road & Main Street
Mon. - 6:30 p.m.
Tue. - 6:30 p.m.

COMMACK CENTER
Mayfair Shopping Center
Jericho Turnpike

HAMPTON BAYS
United Methodist Church
1444 W. Montauk Hwy. (Parish Hall)
Wed. - 6:00 p.m.

HUNTINGTON CENTER
Walt Whitman Mall
Rte. 110 (Huntington Station)
(East of Meadow Lane York Ave. also)
Mon. - 10 a.m., 6 p.m., 7 p.m.
Tue. - 10 a.m., 12 Noon, 6 p.m., 7 p.m.
Wed. - 10 a.m., 6 NOW 12:30 p.m., 5 p.m., 7 p.m.
Thu. - 10 a.m., 6 p.m., 7 p.m.
Fri. - 10 a.m., 6:15 p.m., 6 YOUTH 3:45 (returns Sept. 20th)
Sat. - 9 a.m.

LAKE RONKONKOMA CENTER
Park Plaza Shopping Center
Hurseless Ave.
Mon. - 10 a.m., 6 p.m.
Tue. - 10 a.m., 7 p.m.

RIVERHEAD
Temple Israel
(420 Northville Turnpike)
Mon. - 9:30 a.m.
Wed. - 7 p.m.

SAYVILLE CENTER
Grand Union Shopping Center
Montauk Highway (Sunrise Hwy. and 27 Exit)
Sun. - 1 p.m.
Mon. - 10 a.m., 7 p.m.
Tue. - 10 a.m., 7 p.m.
Wed. - 10 a.m., 6 p.m., 7 p.m.
Thu. - 10 a.m., 7 p.m.
Fri. - 6 p.m.
Sat. - 10 a.m.

SHELTER ISLAND
at the Shelter Island Library
Thur. - 8:00

SMITHTOWN CENTER

LAST WEEK:
ONLY
PER WEEK
PLUS $10 TO REGISTER DURING MARCH
SAVE $10.
Slightly higher for Manhattan & Nassau
FAT
NEW FLEXIBLE PROGRAM
FEE AS YOU GO NO CONTRACTS
SUPPORTIVE STAFF NO HARD SELL
EASIEST DIETS TO FOLLOW
FAVORITE FOODS EVEN PIZZA
Weight Watchers
At people vary, so does individual weight loss.
IT WORKS! I FEEL TERRIFIC! JOIN NOW!
Lost 91 lbs./maintained for 10 years.

EXHIBIT 13

EXHIBIT 13

Weight Watchers®

As people vary, so does individual weight loss.

JOIN BY JUNE 30

There are over 1100 weekly meetings in the METRO AREA. For information, call

1-800-333-3000

CITY HALL CENTER
15 Park Row, 7th Floor
(Opposite City Hall)

EAST SIDE CENTER
210 E. 86th Street
(Bet. 2nd & 3rd Avenue)

45th STREET CENTER
17 E. 45th Street &
Madison Avenue

LEXINGTON AVE. CENTER
717 Lexington Avenue &
58th Street

* NEW LOCATION *
6TH AVENUE CENTER
Rockefeller Center Area
1290 Avenue of the Americas
(Between 51 & 52 Streets –
Lower Concourse)

34th STREET CENTER
19th W. 34th Street & 5th. 7th Floor

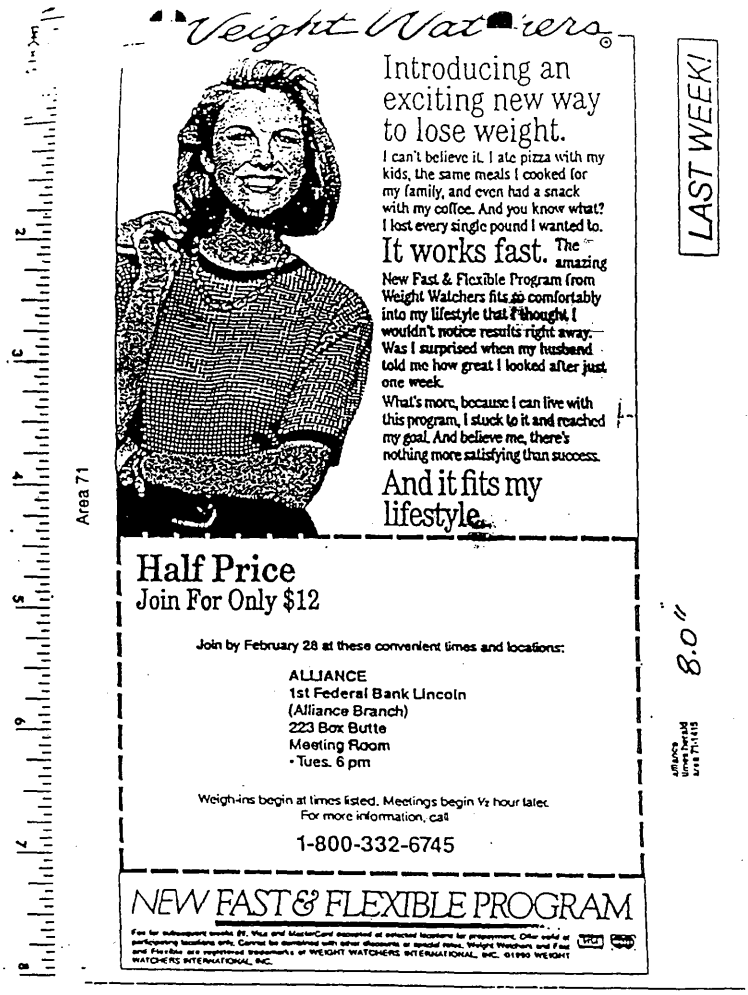
24th STREET CENTER
220 E. 24th Street (Between 2nd & 3rd Avenue)

WEST SIDE CENTER
1780 Broadway–3rd Floor
(Between 57th & 58th Streets)

NYC 5 BOROS	WESTCHESTER COUNTY	NASSAU	BERGEN & HUDSON COUNTIES	ROCKLAND COUNTY
(718) 229-1090	(914) 423-1200	(516) 829-4434	(201) 712-0266	(914) 634-7809

For a Weight Watchers meeting where you work, call 1-800-8 AT WORK.

EXHIBIT 14



HT WATCHERS INTERNATIONAL FEBRUARY, 1990 WEIGHT WATCHERS NEWSPAPER AD C

ication: ALLIANCE TIMES HERALD 071-1415
114 EAST 4TH STREET
ALLIANCE, NE 69301
act: RICK Phone: 308-762-3060

Title: A) NO MIRACLE B) TESTIMONIAL C) I LOVE FAST
Job #: 257

AD SIZE: 3AU 2 col X 8.00 = 16.00 inches

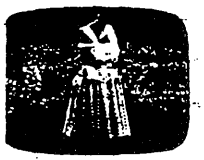
INSERTION DATES: WILL NOT BEGIN BEFORE FEBRUARY 1, 1990
See insertion order for actual dates.

EXHIBIT 15

EXHIBIT 15

WEIGHT WATCHERS INTERNATIONAL
"Hangers"
1989

LENGTH: 21 SECONDS



RESS OWNER (Not too appy): Tracy Burgess, before.

DRESS OWNER (Happy): Tracy Burgess, after.

VOICE OVER ANNCR: Now, at Weight Watchers, the difference...

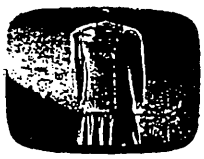
(Cut to nightgown worn before.)

between "before" and "after"

Pan to nightie worn after.)

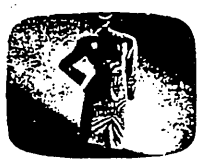
s fast.

VOICE OVER ANNCR: Our new Quick Success Program has a unique...



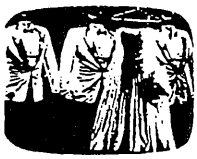
(Dissolve to dress worn before.)

food plan that...



(Pan to dress worn after.)

helps you lose weight...



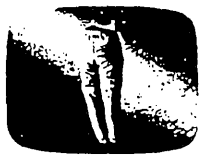
Cut to before evening gown, before tuxedos.)

ast.

(Pan to after evening gown, after tuxedos.)

TUXEDO OWNERS (Happy): Whooo Whoooo.

VOICE OVER ANNCR: Want proven results? Join Weight Watchers today.



(Dissolve to sweats worn before.)

And start living...

(Pan to bike pants worn after.)

happily ever after

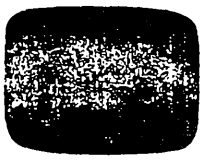
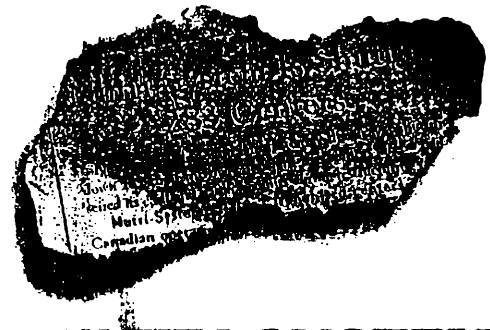


EXHIBIT 16

EXHIBIT 16



ATTENTION NUTRI-SYSTEM® CLIENTS:

THE NEWS IS NOT ALL BAD.

Bring any proof of your Nutri-System membership to any Weight Watchers Personal Cuisine® Center, and join completely free. All you'll pay for is the fabulous food.

If you're one of those affected by the closing of many Nutri-System centers, don't worry.

Weight Watchers is ready to help you now.

Simply bring in any of your Nutri-System materials to any Weight Watchers Personal Cuisine Center.

Then, when you purchase your first week of delicious Personal Cuisine foods, there's no registration or weekly fee payable. That's a savings of $30*. It's that easy.

And the foods are so good, our members swear they're the best-tasting they've ever tried. And so quick to prepare, you don't have to lose time to lose weight.

At Weight Watchers, we've seen a lot of fad diets come and go in the thirty years we've been around.

That's why we don't believe in diets, but in a healthy combination of good nutrition, exercise and group support.

And that's how we've helped millions and millions of people lose weight. And learn how to keep it off, year after year after year.

It's not magic. But when you follow the program it works.

So if you've been with Nutri-System, we welcome you to try Weight Watchers Personal Cuisine. Our offer is valid until May 8, 1993.

We look forward to seeing you soon.

For further information on substituting Weight Watchers for Nutri-System or for details of your nearest Personal Cuisine Center (including our newest Center at the Hotel Beacon, 2130 Broadway, Suite 205), call:

800-333-3000

Weight Watchers

As people vary, so does individual weight loss and results.

EXHIBIT 17

PART 2 S 23

EXHIBIT 17

HIP, HIP, GOODBYE.

If it's a smaller figure you're after, we've got one. With this terrific offer, it's a great time for you to join Weight Watchers and get one of your own.

You'll learn how to eat real foods right away. Handle real-life challenges. And develop permanent habits that won't just help you reach your goal weight. They'll help keep you there.

So take advantage of our great offer today. While your smaller figure may last forever, ours won't. So hurry and join Weight Watchers today.

Personal Cuisine
The Easiest Way to do Weight Watchers!
Now available in our Huntington/Melville and Stony Brook Locations.

$5.00 OFF
ONE PURCHASE OF PERSONAL CUISINE FOODS
Offer Valid With Coupon Only*
Expires April 30, 1983
* CANNOT BE COMBINED WITH ANY OTHER DISCOUNT.

Weight Watchers

PERSONAL CUISINE FOODS CAN MAKE IT EVEN EASIER.

Now we can offer as an option, the Personal Cuisine Food Plan, with delicious pre-packaged foods. Choose from 30 daily menus. This food option is available at our Huntington/Melville and Stony Brook Centers.

** YOU MUST BE A CURRENT MEMBER OF WEIGHT WATCHERS (ATTENDING MEETINGS AS STATED IN MEMBERSHIP POLICY) TO PURCHASE PERSONAL CUISINE FOODS.

20%... OFF
ANY ONE Weight Watchers Non-Food Product
Offer Valid With Coupon Only*
Expires April 30, 1983
*** LIMIT 1 DISCOUNT (FOR A NON-FOOD PRODUCT PURCHASE) PER COUPON.

FREE TRIAL MEETING
Pay only if you join.
JOIN FOR ONLY $13
Offer Expires May 15

Weight Watchers

the new
Weight Watchers
[illegible]
595-1300

Schedule of Meetings

BAY SHORE CENTER
[illegible]

EAST NORTHPORT
[illegible]

HAMPTON BAYS
[illegible]

BRIDGEHAMPTON
[illegible]

NEW HUNTINGTON/ MELVILLE LECTURE CTR.
[illegible]

MILLER PLACE CENTER
[illegible]

MONTAUK
[illegible]

SOUTHOLD
[illegible]

STONY BROOK CENTER
[illegible]

A

ANN LAND

DEAR ANN: N
experienced a p
were told that on
condition for wh
we should anticip
The pain we a
though we are pu
find someone in
more, we must fa
sibility of losing
angel. Although
with us, we ar
grieving. There
cloud hanging
heads, it is diffi
through the da
breaking down
around with te
eyes.
Please, Ann, h
up a child? Alt
strong in faith,
hard to pray.
May we ask yo
been in our shoes
our children out
Or is everyday li
about our other ch
for the loss? Can
them forever? Is t
what lies ahead?
help us?
— Arrow Throug

DEAR PARE
Every parent wi
feel your pain.
cruel blow.
You give no
the nature of he
may have left. I
if any of my re
will pass them
you. Over the
like family, and

DEAR ANN: I
write this letter
ing a medical
suggested that
a very private
under any circ
matter with any
The other n
something that
knew about my
three people w
and my doctor.
I know Geo
when he's had
is that he refu
dence.
This is not th
happened. If Ge
wrong, how ca
again? What sh

DEAR WIFI

EXHIBIT 18

WEIGHT WATCHERS EXHIBIT 18

GREAT SAVINGS ON FASTER WEIGHT LOSS.

LAST WEEK!

PROVEN-EFFECTIVE, TOO!

Research proved it! Last year's Quick Success® Program melted pounds 20% faster than before. And this year's New 1989 Quick Success Program is even better, thanks to an easier-to-use food plan, an expanded and simplified optional exercise plan and that wonderful meeting experience made even more wonderful! Come prove to yourself what we already know – this is the program you can count on!

HALF-PRICE
SAVE $10
Don't miss out! Join today and save big!

Join by April 22 at these convenient times and locations:

BAKER
• NEW LOCATION
Senior Citizens Building
• Mon. 5 pm

BILLINGS
702 Central
• Mon. 5:30 am, 11:45 am, 4:45 pm & 6 pm
• Tues. 4:45 pm
• Wed. 5:30 am, 11:45 am & 5:30 pm (Children Welcome 4:30 pm)
• Thurs. 4:45 pm
• Fri. 8:30 am & 11:45 am
• Sat. 9:30 am

BILLINGS HTS.
Alliance Church
1100 Lake Elmo Rd.
• Tues. 4:30 pm
• Thurs. 4:45 pm

CLEVELAND
Congregational Church
100 Power St.
• Thurs. 8:30 am & 5:30 pm

MARION
Open Bible Church
• Mon. 5:30 pm

LAUREL
United Methodist Church
• Wed. 5:30 pm

LEWISTOWN
Methodist Church
• Thurs. 4:45 pm & 6:30 pm

MILES CITY
Mark's IGA
• Wed. 4:30 pm

SIDNEY
116 2nd Ave. SE
• Tues. 6 pm
• Thurs. 9 am

Weight Watchers may be able to come to your Community or AT WORK site. Call us for further information.

1-800-541-5630

THE NEW QUICK SUCCESS® PROGRAM

7.50"

106-1320

ATCHERS INTERNATIONAL. APRIL, 1989 NEWSPAPER AD CAMPAIGN

ion: BILLINGS GAZETTE
401 N. BROADWAY
BILLINGS, MT 59103
BETTY WILLIAMS Phone: 406-657-1200

WWI - 000000187

GREAT SAVINGS ON FASTER WEIGHT LOSS
242

AD SIZE: SAU 3 col X 7.50 = 22.50 inches

INSERTION DATES: WILL NOT BEGIN BEFORE MARCH 26, 1989

EXHIBIT 19

Before. Before you know it.

Too many dieters never make it from "before" to "after."

Some lose motivation along the way. Others get too hungry from skimpy, so-called meals. And a few just give up—before the end of the first day.

If you're one of these people, then Weight Watchers New Quick Success Program can help you reach "after" a lot sooner than you think.

Last year alone, this proven effective program helped millions of members take off weight over 20% faster than ever. This year, it's even easier.

Our New Quick Success Program now includes even more delicious choices on its food plan. And as a Weight Watchers member, you'll receive the kind of support and motivation you need to change poor eating habits—and stick to your food plan.

If you'd like to make an even greater commitment to your weight loss effort, we offer an optional exercise plan. It's also the perfect way to build confidence and have some fun.

So if you've been thinking that "after" will never come, stop worrying. And start thinking about the great new figure—and fashions—you'll have soon after joining Weight Watchers.

For the Weight Watchers location nearest you, check your local telephone listing.

New for 1989
Quick Success® Program

Weight Watchers®

EXHIBIT 20

EXHIBIT 20

WEIGHT WATCHERS

THAT MILLION DOLLAR FIGURE IS NOW ON SALE!

THE PROVEN-EFFECTIVE WAY TO LOSE WEIGHT FASTER.

Research proved last year's Quick Success® Program melted pounds 20% faster than before. And now it's even easier to lose weight that fast! The New 1989 Quick Success Program has a revised food plan, plus an expanded and simplified optional exercise plan. And we've even improved that wonderful meeting experience. So what are you waiting for?

HALF-PRICE. SAVE $00

We've reduced the price of reducing, if you join now.

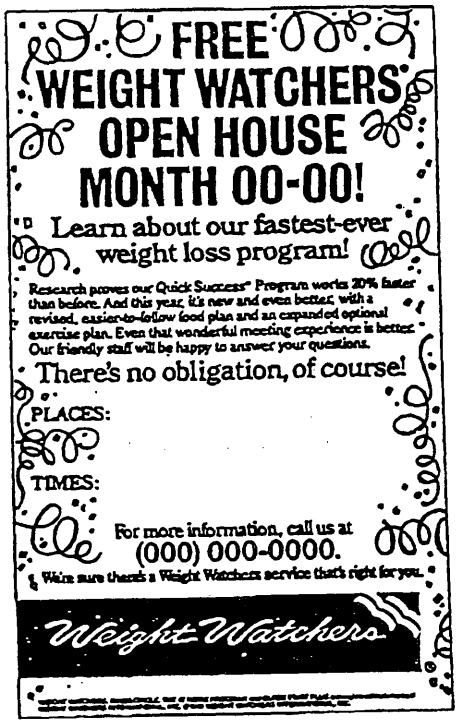
Join by (date) at these convenient times and locations:

Weight Watchers

THE NEW QUICK SUCCESS® PROGRAM

EXHIBIT 21

EXHIBIT 21



JANUARY FEBRUARY MARCH
APRIL MAY JUNE JULY AUGUST
SEPTEMBER OCTOBER NOVEMBER
DECEMBER 1 2 3 4 5 6 7
8 9 10 11 12 13 14 15 16
17 18 19 20 21 22 23 24
25 26 27 28 29 30 31

STATEMENT OF COMMISSIONER DEBORAH K. OWEN
CONCURRING IN PART AND DISSENTING IN PART

The Commission's decision to accept for public comment consent orders with three major marketers of low calorie diets, and to issue Part III complaints against two others, represents an important, and largely appropriate, next step in the Commission's efforts to address allegations of false and unsubstantiated advertising claims in the diet industry. However, I must dissent on two aspects of the proposed remedies in these matters.

First, in the earlier very low calorie diet cases, I took the position that the mandated weight loss maintenance disclosures were likely to be too complex to enlighten consumers if made during short radio or TV ads.[1] I recommended requiring more concise disclosures for such broadcast ads, which would be supplemented by full disclosure at the point of sale. The contemplated relief in the present five matters adopts much of this approach, and, as such, represents a significant improvement over the very low calorie diet consents. However, this improvement would not apply where a broadcast maintenance claim includes a number, percentage, or other descriptive term to convey a quantitative measure. I am concerned that this proviso will significantly reduce, if not eliminate, the incidence of shorter, more understandable broadcast ad disclosures, without providing sufficiently compensating gains in preventing deception. Furthermore, the proviso's language regarding descriptive terms conveying a quantitative measure is vague. Appropriate, non-deceptive claims may be inadvertently chilled as a result, and vexing compliance questions may arise as respondents attempt to conform to the requirements of the orders. Accordingly, I dissent with respect to inclusion of this proviso in the proposed consents and notice orders.

Second, I dissent with regard to the notice of possible action under Section 19(b) of the Federal Trade Commission Act, 15 U.S.C. 57b, in the Jenny Craig and Weight Watchers matters. Consumer redress has not been included in any of the recent settlements with marketers of very low, and low calorie diet programs, and there appear to be no distinguishable appropriate grounds for seeking this relief from Jenny Craig and Weight Watchers. Moreover, assessing consumer injury and determining levels of fair and equitable redress

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[1] *See* Statement Concurring in Part and Dissenting in Part in Jason Pharmaceuticals, Inc., File No. 902-3337, National Center for Nutrition, Inc., File No. 912-3024, and Sandoz Nutrition Corporation, File No. 912-3023 (Aug. 10, 1992).

are apt to pose insurmountable problems for meaningful Section 19(b) actions in these matters.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 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, 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 Weight Watchers International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal place of business located at 175 Crossways Park West, Woodbury, N.Y.

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

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, when offered to consumers in classes or meetings of one or more individuals where person-to-person instruction in weight loss or weight maintenance is provided. Food products shall not be considered, for purposes of this order, part of a weight loss program unless they are advertised, promoted, offered for sale or sold as a necessary part, *e.g.*, "Personal Cuisine," of a "weight loss program." Cardio-Fitness Corporation programs shall not be deemed, for purposes of this order, "weight loss programs," unless they are advertised, promoted, offered for sale, or sold using the Weight Watchers trademark or name and otherwise satisfy the definition of "weight loss program."

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.

I.

It is ordered, That Weight Watchers International, Inc., a corporation ("respondent"), its successors and assigns, and respondent's 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, respondent possesses and relies 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 respondent's 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 respondent's 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.D herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary.";

Provided, further, that respondent shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondent's 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 participants 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 endorsements or testimonials referred to in paragraph I.D herein, that participants of any weight loss program have successfully maintained weight loss, unless respondent discloses, 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 respondent's programs:

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

(b) The statement: "Weight Watchers makes no claim that this [these] result[s] is [are] representative of all participants in the Weight Watchers 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," respondent 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 participant, by following the procedures set out in Appendix A, a printed document containing all the information required by paragraph I.B and subparagraphs I.C(1)-(3) of this order;

Provided, further, that compliance with the obligations of this paragraph I.C in no way relieves respondent 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;

Provided, however, that in determining the success of participants in maintaining weight loss, respondent 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;

D. Using any advertisement containing an endorsement or testimonial about weight loss success or weight loss maintenance success by a participant or participants of respondent's weight loss program if the weight loss success or weight loss maintenance success depicted in the advertisement is not representative of what participants of respondent's weight loss programs generally achieve, unless respondent discloses, 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 Weight Watchers customers in losing weight or maintaining achieved weight loss; provided, however, that in determining the generally expected success for Weight Watchers customers, respondent 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, respondent can satisfy the requirements of this subparagraph by accurately disclosing:

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

(b) (i) The average number of pounds lost by Weight Watchers customers, using the following phrase: "Average weight loss (number) lbs. More details at centers"; 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 participant, by following the procedures set out in Appendix B, a printed document containing what the generally expected success would be for Weight Watchers customers in losing weight, expressed in terms of both average number of pounds lost and average duration of participation in the Weight Watchers program, 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;

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 participants 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; and

(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.

E. Making comparisons between the efficacy or success of one or more of respondent's weight loss programs and the efficacy or success of any other weight loss program(s), including but not limited to any other of respondent's weight loss programs, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

F. Making any representation, directly or by implication, about the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss, unless true.

G. Making any representation, directly or by implication, about the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey, unless true.

H. Making any representation, directly or by implication, about the performance or efficacy of any weight loss program, unless true.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent 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, respondent, or its 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 its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That respondent shall, within ten (10) days after the service of this order, distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees involved in the preparation and placement of advertisements or promotional materials, and to its regional managers; and distribute to those having point of sale responsibilities under the order, written instructions implementing the point of sale obligations of the orders; and, for a period of five (5) years from the date of service of this order, distribute same to all future such officers, agents, representatives, independent contractors, employees, and regional managers.

V.

It is further ordered, That:

A. Respondent shall use its best efforts to obtain its weight loss program franchisees' and licensees' compliance with this order by doing the following:

(1) Respondent shall, within forty-five (45) days after service of this order, distribute a copy of this order to each of its weight loss program franchisees or licensees, return receipt requested;

(2) Respondent shall review advertising and promotional materials submitted to it from its franchisees or licensees prior to

dissemination and publication to determine compliance with the requirements of this order;

(3) Respondent shall notify any franchisee or licensee in writing if any advertising or promotional material does not comply with the requirements of this order and that it should not be disseminated or published;

(4) Respondent shall monitor franchisee and licensee advertising and where it finds advertising that has not been submitted to it and which it believes is not in compliance with the requirements of this order, it will notify such franchisee or licensee in writing of its findings and that such advertising should be withdrawn;

(5) Respondent shall maintain separate files for each franchisee or licensee containing a copy of the signed receipt and copies of any correspondence relating to any advertising and promotional materials with respect to the issues raised by this order for a period of three (3) years;

(6) Upon request, respondent shall make these files available to the Commission staff for inspection and copying; and

(7) Where this order provides for the distribution of documents containing certain information to participants, respondent shall include such information in "Program" materials which its franchisees or licensees are required to supply to each participant.

B. Respondent shall include in all future weight loss program franchise or license agreements with new franchisees or licensees a requirement that the franchisee or licensee operate its business in full compliance with the prohibitions and affirmative requirements imposed on respondent pursuant to Part I of the Commission's order;

provided further, for purposes of this part of the order, the term "new franchisees or licensees" means those who are not franchised or licensed to conduct any weight loss program, or those who do not own or control such franchisees or licensees, at the time the order becomes final.

VI.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

It is further ordered, That this order will terminate twenty (20) years from the date of its issuance, 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; and

B. 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.

Commissioner Azcuenaga dissenting, having no reason to believe the law has been violated. Chairman Pitofsky was recused, and Commissioner Thompson did not participate.[1]

[1] Prior to leaving the Commission, former Commissioner Starek registered his vote in the affirmative for issuing the decision and order in this matter.

Re: Petition of Hoechst Marion Roussel, Inc., to Quash Subpoena Duces Tecum.
Hoechst AG, File No. 971-0055.

October 17, 1997

Dear Mr. Spears:

This is to advise you of the ruling of the Federal Trade Commission ("Commission") on the Petition of Hoechst Marion Roussel, Inc. to Quash ("Petition") filed on May 1, 1997, in the above-referenced matter.[1] The Petition seeks to quash a subpoena duces tecum ("Subpoena") issued by the Commission on March 26, 1997.[2]

The ruling set forth herein has been made by Commissioner Roscoe B. Starek, III, pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 CFR 2.7(d)(4). Commissioner Starek has carefully reviewed the Petition, the accompanying exhibits, and the Declaration of Mr. Edward Stratemeier, General Counsel of HMRI ("the Stratemeier Declaration" or "the Declaration"). He has also considered the oral presentation on the Petition made on June 18, 1997, and the supplement to the Petition filed on June 24, 1997 ("Pet. Supp."). The Petition is granted in part and denied in part for the reasons stated below.

[1] After granting several extensions of time to file a petition to quash, pursuant to Commission Rule of Practice 2.7(d) (3), 16 CFR 2.7(d) (3), the staff insisted that any such petition be filed by April 30, 1997. Petitioner filed a timely petition to quash on that date, and another version on May 1, 1997. The cover letter to the May 1 version stated that it corrected typographical and other errors found in the previous day's version and provided information about negotiations on April 30, 1997, with Commission staff to modify the Subpoena. The May 1 cover letter requested that the May 1 version be accepted for filing as a corrected copy. The Commission has determined to accept the May 1 version in substitution for the timely Petition filed on April 30, 1997.

[2] Although the Subpoena was addressed to Hoechst AG ("Hoechst") in care of Hoechst Marion Roussel, Inc. ("HMRI" or "Petitioner") -- a subsidiary of Hoechst with its North American headquarters in Kansas City, Missouri -- the Petition was filed only on behalf of HMRI. HMRI falls within the definition of "Hoechst" or "The Company" found in Definition A of the Subpoena. Because the Subpoena and the Petition are aimed primarily at documents in the possession of HMRI (including the files of HMRI's predecessor entities and of its agents and attorneys), the Commission has determined to consider the Petition insofar as it relates to those materials. The Commission declines, however, to accept the Petition's implicit assertion that only HMRI and not other Hoechst entities are subject to the Commission's Order and the Subpoena.

I. BACKGROUND

Hoechst, HMRI, and various officers, employees, affiliates and other subsidiaries of Hoechst are bound by a Commission Decision and Order issued on December 5, 1995, in Hoechst AG, Docket No. C-3629 ("the order").[3] The order, which resolved the Commission's investigation of Hoechst's acquisition of Marion Merrell Dow, Inc., addressed concerns that the acquisition would lessen competition in four product markets, including, as relevant here, the market for the manufacture and sale of diltiazem hydrochloride used in the treatment of hypertension or angina. Among its other requirements, the order obligated Hoechst to grant Biovail Research Corporation ("Biovail") -- a research firm with which Hoechst had been developing diltiazem prior to the acquisition -- a right to refer to certain scientific data about diltiazem in FDA applications (order ¶ II.A.1) and prohibited Hoechst from instituting any patent infringement action against Biovail with respect to any "Biovail Diltiazem Products" (a term defined in order ¶ II.A.3).

On March 18, 1997, the Commission issued a Resolution Authorizing the Use of Compulsory Process in an investigation intended "[t]o determine whether respondent Hoechst AG is violating or has violated the order in Docket No. C-3629." On March 24, 1997, as part of this compliance investigation, the Commission issued the Subpoena challenged by HMRI's Petition.

II. ANALYSIS

A. HMRI's claim that the Commission's resolution authorizing the Subpoena is fatally flawed because HMRI cannot have violated the order.

HMRI argues -- most clearly in the supplement to its Petition -- that the resolution authorizing compulsory process in this matter is "fatally flawed" and that therefore the Subpoena must be quashed. The crux of HMRI's argument is that the resolution authorizes an investigation only of whether "HMRI" is violating or has violated the order and, moreover, does not authorize an investigation of contemplated or anticipated conduct.[4] HMRI contends further that

[3] The definition of the respondent "Hoechst" is set forth in paragraph I.A of the order.

[4] *See* Pet. Supp. at 1. HMRI repeatedly characterizes both the investigation and the Subpoena as directed only at HMRI. The resolution plainly states, however, that the investigation is directed at Hoechst AG and the "Hoechst" entities encompassed by order paragraph I.A.

the "objective facts of this case" make it facially obvious that HMRI could not have violated -- and is not now violating -- the order provisions with which the investigation is concerned (¶¶ II.A.1 & II.A.3). Therefore, HMRI suggests, the Subpoena is not supported by a valid resolution and must be quashed. *See* Pet. Supp. at 4-5.

To be valid, a compulsory process resolution need only (1) establish the agency's statutory authority to conduct the inquiry and (2) announce the purpose and scope of the investigation with sufficient specificity to allow a determination of whether the information sought is reasonably relevant to the stated purpose. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992), *cert. denied,* 507 U.S. 910 (1993); *FTC v. Carter,* 636 F.2d 781, 788 (D.C. Cir. 1980); *FTC v. Texaco, Inc.,* 555 F.2d 862, 874 & n.26 (D.C. Cir.) (*en banc*), *cert. denied,* 431 U.S. 974 (1977); *see also RNR Enterprises, Inc. v. SEC,* 1997 U.S. App. Lexis 12174 (2d Cir. May 22, 1997). The resolution at issue here announces an investigation to determine whether the named respondent to a specific cease and desist order has violated or is violating that order. As HMRI concedes, it is clear beyond question that the Commission has authority to investigate compliance with its orders. Pet. Supp. at 4 n.1; *United States v. Morton Salt Co.,* 338 U.S. 632, 651 (1950).

Although it characterizes the resolution as flawed, HMRI does not actually challenge the resolution, HMRI concedes the Commission's authority to investigate compliance with its orders, does not challenge the legality of the resolution itself, and does not assert that the resolution fails to describe this inquiry adequately. Rather, HMRI argues that, as a factual matter, it cannot be violating or have violated the order -- as HMRI interprets the order -- and thus HMRI concludes that the "real" purpose of the investigation must be something other than its announced purpose. Pet. Supp. at 4 & n.1. As will be discussed in Part II.B, *infra*, the Subpoena (as modified by the instant ruling) seeks information reasonably relevant to the investigation of possible violations of the order properly announced by the resolution.

B. HMRI's contention that the information sought by the Subpoena is irrelevant to an investigation of order violations because HMRI cannot have violated the order and because, both as a matter of law and under binding Commission regulations, documents reflecting interpretations of the order are irrelevant.

HMRI correctly states that the resolution announces an investigation of possible order violations and argues that it cannot have violated order paragraph II.A.1 or II.A.3. Therefore, HMRI claims, the information sought by the Subpoena is by definition irrelevant because it is "impossible" for a violation to have occurred. Pet. Supp. at 4 & n.1. Although the resolution authorizes a potentially broader investigation than that depicted by HMRI, Petitioner is correct that Subpoena Specifications 1-4 and 6-11 focus on information relating to Hoechst's (and thus HMRI's) compliance obligations under order paragraph II.[5]

Contrary to Petitioner's argument, however, it is not "impossible" for Hoechst entities to have violated the order. Paragraph II.A.1 imposed an obligation on Hoechst to provide, within seven days after the order became final, a "right of reference" to Biovail that allows Biovail to use certain Hoechst scientific data to obtain FDA approval to manufacture and market certain drugs. HMRI interprets this provision extremely narrowly, asserts that it has complied with its own interpretation, and argues that any obligation to provide a broader right of reference can be triggered only by a future request from Biovail. *See* Pet. Supp. at 5-6. It is not necessary to resolve dispositively the merits of HMRI's reading of paragraph II.A.1 to see that HMRI's narrow interpretation appears to neglect the order's unconditional requirement that the right of reference be provided within seven days after the order became final.[6] Whether Hoechst's (and HMRI's) conduct to date has violated order paragraph II.A.1 is a factual question whose resolution should be advanced by the information sought by the Subpoena.

HMRI also argues that the Subpoena seeks internal documents reflecting subjective interpretations of the order and that, as a matter of law, those documents are irrelevant to the construction of the order. In HMRI's view, judicial precedent on the construction of consent orders establishes that documents reflecting a party's

[5] It is unnecessary to consider Specification 5 of the Subpoena, which seeks documents discussing plans that Hoechst is considering, has considered, or has determined to implement (or not to implement) if Biovail files a new drug application or an abbreviated new drug application ("ANDA") with the FDA for approval of a formulation of once-a-day diltiazem other than Tiazac. An important purpose of Specification 5 was to discover documents relating to Hoechst's intention to file suit against Biovail, given that such a suit could delay FDA action on an ANDA for up to 30 months. *See* 21 U.S.C. 355 (j) (4) (B) (iii). Since the Subpoena was served on Hoechst, Biovail has filed an ANDA with the FDA for such a drug, but Hoechst has not filed suit against Biovail within the period prescribed by statute. Accordingly, there is not evident need for the information sought by Specification 5.

[6] Although Hoechst/HMRI submitted a right of reference in December 1995, it appears that HMRI placed limitations on that right of reference in July 1996 and that counsel for HMRI sought confirmation of those restrictions in a letter to the FDA dated October 28, 1996.

subjective interpretations are irrelevant to the construction of an administrative consent order.

HMRI's argument on this point, however, focuses entirely on what, if anything, a court might properly rely on as extrinsic evidence in interpreting the order. HMRI's position ignores the range of other information -- whether or not ultimately admissible in court -- that is relevant to the Commission's pending pre-complaint investigation. The Commission has broad authority to gather relevant information to determine whether a respondent has violated an order issued by the Commission and whether enforcement action would be in the public interest. In *United States v. Morton Salt Co.,* 338 U.S. 632, 642-43 (1950), the Supreme Court distinguished between the limited scope of judicial subpoenas and the Commission's power to gather information:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency changed with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.

A Commission investigatory subpoena will be enforced if the documents are "not plainly irrelevant" to the investigative purpose. *FTC v. Carter, supra,* 636 F.2d at 788, citing *SEC v. Arthur Young & Co.,* 584 F.2d 1018, 1029 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979). It is the respondent's burden to show that the requested information is irrelevant. *FTC v. Invention Submission Corp., supra,* 965 F.2d at 1090. In the current, pre-complaint stage of a nonpublic investigation, there is no requirement that the documents sought be admissible in a hypothetical judicial proceeding to prove some potential charge or complaint; all that is required is that the information sought be relevant to a determination of whether the law has been violated and whether the Commission should exercise its prosecutorial discretion to proceed. *FTC v. Texaco, Inc., supra,* 555 F.2d at 874 & nn.24-25. *See also Moore Business Forms, Inc. v. FTC,* 307 F.2d 188 (D.C. Cir. 1962) (court enforced subpoena over contention that documents were "meaningless" to any theory of

violation, where the agency had not yet formulated a ruling on the factual question raised by the company).

Alternatively, HMRI argues that the Commission may not subpoena internal company documents discussing the meaning or interpretation of the order because Commission Rule 2.32, 16 CFR 2.32, requires that all consent agreements contain language stating that

> no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned [consent] agreement may be used to vary or to contradict the terms of the order.

But by its terms, Rule 2.32 is not a limitation on investigative activities but is merely guidance to the staff on certain waivers, procedures, and other "boilerplate" language that should appear in Commission orders. Obviously, the Commission must seek to define what materials it asserts are relevant in ascertaining the meaning of its orders. As relevant here, Rule 2.32 prohibits "sidebar" agreements and routine reference to extrinsic materials and declares the Commission's general policy with respect to the use of extrinsic materials. HMRI's Rule 2.32 argument -- like its argument about documents reflecting subjective order interpretations -- confuses relevance in an investigation with ultimate probative value in litigation. Nothing in Rule 2.32 bars the Commission from seeking records that may demonstrate an intent to violate the order, constitute admissions, or otherwise bear on the penalty or other remedy that should be sought.

Moreover, the agency's remedy for most order violations is to file a civil penalty action in federal court. No matter what HMRI or the Commission may think about the clarity of the order, a court called upon to judge Hoechst's order compliance -- particularly a court not convinced that the order is unambiguous -- may determine to consider extrinsic evidence to interpret the order.[7] Reviewing courts have considered a broad range of evidence to determine the correct interpretation of ambiguous consent orders. *See United States v. ITT Continental Baking Co.,* 420 U.S. 223 (1975) (compliant and negotiating history); *Dr. Pepper/Seven-Up Companies, Inc. v. FTC,* 151 F.R.D. 483 (D.D.C. 1993) (Commission's complaint, negotiating history, and internal legal memoranda); *United States v. American Society of Composers, Authors and Publishers,* 782 F. Supp. 778

[7] The staff and HMRI apparently agree that the order is clear on its face but disagree as to what obligations are imposed by the allegedly unambiguous language.

(S.D.N.Y. 1991) (negotiating history, internal legal memoranda, and post-decree conduct of parties to decree). In employing its broad investigative authority in aid of its exercise of prosecutorial discretion, the Commission is entitled to subpoena information that might ultimately be cited or relied on in a federal court proceeding to redress order violations.

HMRI's arguments and admissions themselves demonstrate the relevance of the information sought by the Subpoena. Order paragraphs II.A.1 and II.A.3 use the term "Biovail Diltiazem Products," which paragraph I.J defines to include once-a-day diltiazem formulations that Hoechst was developing with Biovail. HMRI contends that Tiazac is the only "Biovail Diltiazem Product," and that accordingly Hoechst has already performed all obligations imposed by paragraph II.A.1 respecting the grant of a right of reference to Biovail.[8] Pet. Supp. at 5. HMRI nonetheless concedes that some inquiry into the HMRI/Biovail relationship is relevant to a determination of which products were developed under the Hoechst/Biovail relationship. *Id.* at 10-11. Plainly HMRI and the staff disagree over the meaning of the term "Biovail Diltiazem Products" and the potential scope of Hoechst's obligations under the order. As limited by this ruling -- and as explained in Part II.C, *infra* -- the Subpoena seeks information relevant to clarification of those issues.

C. HMRI's argument that the Subpoena is unlimited in scope and imposes an undue burden.

HMRI takes the position that the Subpoena requires a search of literally hundreds of entities, including its affiliates and subsidiaries, its law firms, and a variety of entities in which it has an ownership interest. The Petition also argues that the Subpoena covers an unnecessarily broad time period, extending beyond the period of its relationship with Biovail. In support of these contentions, HMRI filed the Declaration of Mr. Stratemeier. That Declaration detailed the scope of the search required to comply with the Subpoena. Mr. Stratemeier also represented under oath that HMRI had collected the files of its predecessor or acquired entities (Marion Merrell Dow and

[8] Paragraph I.J of the order defines "Biovail Diltiazem Products" as:
the sustained release and/or extended release diltiazem products that Hoechst was developing with Biovail pursuant to the Rights Agreement that Hoechst and Biovail entered into on June 30, 1993.
This definition appears by its terms to encompass multiple products, raising a threshold obstacle to HMRI's argument that Tiazac was the sole "Biovail Diltiazem Product."

Hoechst Roussel Pharmaceuticals, Inc.), as well as the files of specific responsible individuals identified by name,[9] and that those files were being maintained in the possession of HMRI when Mr. Stratemeier executed his Declaration.

When the Commission's need for relevant documents to complete its law enforcement investigation is balanced against the burden that would be imposed on HMRI and other Hoechst entities, it appears that the Declaration -- in combination with factual developments that occurred after all papers were filed in this matter[10] -- provides a basis for some narrowing of the Subpoena. In addition, it appears that a search for some records may be unnecessary and, accordingly, may at a minimum be deferred until the staff has reviewed the initial wave of production and determined whether a further search is required.

Essentially, the Declaration suggests that all relevant responsive documents are in HMRI's possession. At the oral presentation before Commissioner Starek, however, Mr. Spears of Gadsby & Hannah (representing HMRI) agreed that responsive factual documents were also likely to be in the possession of either his law firm or Skadden Arps Slate Meagher & Flom ("Skadden Arps"), HMRI's counsel in their merger investigation that culminated in the Commission's issuance of the order.[11] Moreover, the staff may ultimately need documents created or prepared by Skadden Arps lawyers or employees (subject to specific privilege claims) to complete its inquiry.

Nevertheless, it appears acceptable to defer any search for Skadden Arps internal materials -- as distinguished from Hoechst-generated documents in that law firm's possession -- until the staff has reviewed material received from Hoechst and HMRI material and determined whether information from other sources would advance the investigation.[12] Accordingly, the required search is divided into two successive phases and limited as follows:

PHASE I: Production in this phase may be limited to (a) all responsive documents or portions of documents in the possession or custody of HMRI; (b) all responsive documents or portions of documents in all files of all individuals identified in the Stratemeier Declaration, wherever those individuals' files are located within

[9] Stratemeier Dec. ¶¶ 5, 9-10.

[10] *See* note 5, *supra*.

[11] Transcript of Oral Presentation at 49 (June 18, 1997).

[12] In addition, Specification 8 is limited to require only the production of documents that discuss joint development of once-a-day diltiazem formulations by Biovail and Hoechst entities or their predecessors. Petitioner need not produce documents that discuss only Biovail's unilateral development activities or activities involving third parties.

Hoechst (as "Hoechst" is defined in the Subpoena); (c) all responsive documents or portions of documents in all files of Marion Merrell Dow and Hoechst Roussel Pharmaceuticals, Inc., identified in the Stratemeier Declaration; (d) all responsive Hoechst-generated documents or portions of Hoechst-generated documents in the possession, custody, or control of Gadsby & Hannah or Skadden Arps.
PHASE II: If the staff determines it to be necessary, the production will also include all responsive documents or portions of documents in the possession, custody, or control of Skadden Arps, except for responsive documents produced during Phase I or listed in a privilege log during Phase I.[13]

Moreover, as noted above,[14] events that occurred after the filing of the Petition have obviated any immediate search for information on HMRI's intention (if any) to file a patent infringement action against Biovail. Accordingly, Specification 5 is eliminated.[15]

HMRI suggests further that, in the event the Commission does not quash the Subpoena, the time period which Biovail and Hoechst Roussel Pharmaceuticals, Inc., had a development relationship (*i.e.*, June 30, 1993, to August 25, 1995). Pet. Supp. at 11 n.10. HMRI argues that documents dated or generated before the beginning or after the end of that period are irrelevant.

On the contrary, the period between January 1, 1993, and June 30, 1993 is relevant to this investigation. HMRI concedes that the relationship between Biovail and Hoechst Roussel Pharmaceuticals, Inc., is a legitimate area of inquiry, Pet. Supp. at 10-11, and responsive documents generated or prepared during the six months during which that relationship was formulated are relevant. Documents generated or prepared during the period immediately following the termination of the relationship are also relevant. In addition, Specifications 1 and 3 seek, *inter alia,* documents relating to HMRI's attempt to limit the right of reference in letters sent to the FDA in July and October 1996. Whether this limitation violated the order is obviously relevant to this investigation. As to these two Specifications, therefore, the first 11 months of 1996 are also relevant.

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[13] HMRI may file a further petition to quash within 10 days after service on it of any written request by the staff to conduct the Phase II search.

[14] *See* note 5, *supra.*

[15] Although Petitioner need not produce information called for by Specification 5 regarding litigation plans, other specifications of the Subpoena seek information about Hoechst's compliance obligations under order paragraph II.A.3, which prohibits the filing of patent infringement suits against Biovail relating to the "Biovail Diltiazem Products." Because, as HMRI concedes, there is a legitimate basis for seeking information about the meaning and scope of "Biovail Diltiazem Products" (defined in paragraph I.J), documents discussing compliance obligations under paragraph II.A.3 are relevant even if specific violations of that paragraph may not have occurred. Compliance with those other Subpoena specifications is therefore required (as modified and limited by the instant ruling).

Accordingly, Instruction 2 of the Subpoena is modified by (1) deleting from the first sentence the phrase "on or after January 1, 1993" and substituting therefor the phrase "during the period January 1, 1993, through December 31, 1995"; (2) deleting the second sentence; and (3) adding the following as a new second sentence: "As they relate to Hoechst's actual or potential obligations under paragraph II.A.1 of the order, however, Specifications 1 and 3 cover documents dated, generated, received, or, if a contract or agreement, in effect during the period January 1, 1993, through November 30, 1996."

D. HMRI's claim that the Subpoena is directed at its counsel's files and improperly fails to provide adequate safeguards for proper assertion of the attorney-client and attorney work product privileges.

Finally, Hoechst contends that the Subpoena must be quashed because it seeks documents from the files of Hoechst's in-house and outside counsel that may contain information protected by the attorney-client and attorney work product privileges. Essentially, HMRI argues that the Subpoena is directed primarily at attorneys' files and thus should be quashed absent a demonstration of need.

This argument is obviated by the modifications set forth in Part II.C, *supra.* The initial phase of the search does not require any search of outside law firms' files for anything except documents generated by employees of Hoechst or of HMRI.[16] Specification 5 (seeking information on litigation plans) is withdrawn, and (with some exceptions) no document generated after the last day of 1995 is sought. No further search of Gadsby & Hannah's files is required. A Phase II search of Skadden Arps's files will be required only if further information is needed after Phase I production is reviewed.

HMRI also argues that it need not produce a privilege log. HMRI bases this claim both on the Subpoena's allegedly sweeping nature and on the proposition that Subpoena Instruction 7 requires so much information that filing a log fully compliant with that instruction would divulge privileged information. But because HMRI's objection to the Subpoena's reach (Pet. Supp. at 14-15) was based on the scope of Definition A -- which defined the "Hoechst" entities to be searched

[16] This discussion necessarily uses short-form descriptions of the specific modifications of the Subpoena set forth in Part II.C, *supra.* These short-form references do not vary or modify the specific modifications set forth in Part II.C.

-- and on Specification 5 -- which sought current litigation plans -- HMRI's first argument is obviated by the Subpoena modifications discussed above. The scope of the search has been limited, Specification 5 has been withdrawn, and no recently created documents are sought.

With regard to HMRI's second ground for objecting to production of a privilege log, the Commission's Rules of Practice, in accord with judicial precedent, require a party seeking to withhold documents or other evidence on the basis of privilege to provide sufficient underlying facts to establish its privilege claim. *See* 16 CFR 2.8A. The burden is on Hoechst "to present the underlying facts demonstrating the existence of privilege." *FTC v. Shaffner,* 626 F.2d 32, 37 (7th Cir. 1980); *accord, United States v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir.), *cert. denied,* 117 S. Ct. 294 (1996). Hoechst's blanket assertion of attorney-client and work product privileges is insufficient to satisfy its burden. *FTC v. Shaffner,* 626 F.2d at 37.

Hoechst also claims that the Commission has failed to make an allegedly required showing of need to compel the production of privileged documents.[17] This argument is unavailing: the Subpoena does not require the production of privileged documents. Rather, the Subpoena requires Hoechst to produce all responsive non-privileged documents, non-privileged portions of documents that contain some allegedly privileged information, and a privilege log. The purposes of the privilege log are to identify the responsive documents (or portions of documents) that Hoechst claims are privileged and to provide sufficient information about those privilege claims to equip the Commission to assess and, if necessary, challenge the validity of questionable claims.

Instruction 7 of the Subpoena is entirely consistent with Federal Rules of Civil Procedure 26(b) (5) and 45 (d) (2). Instruction 7 explicitly states that although the description of a withheld document must be sufficient to allow the Commission to assess the validity of the privilege, HMRI need not disclose any privileged information or communication. As Federal Rules 26(b) (5) and 45 (d) (2) emphasize, a proper assertion of privilege must describe the nature of the allegedly privileged document or communication and provide

[17] HMRI appears to suggest that the Commission must make a heightened showing of need, rather than of relevance, before it can subpoena documents that happen to be in the files of someone licensed to practice law. This is incorrect. *FTC v. Shaffner, supra,* 626 F.2d at 36-37. HMRI cannot argue that a heightened showing is necessary as to privileged documents because, by refusing to submit a log, it has failed to establish the privileged nature of the withheld documents.

sufficient information to allow the party seeking the information to contest the claim. *United States v. Construction Products Research, Inc., supra,* 73 F.3d at 473-74 (party asserting attorney-client or work-product privilege must supply a specific explanation of why each document is privileged and affidavits or evidence establishing existence of privileged relationship, if existence of privileged relationship is not facially obvious). HMRI's failure to provide the required information at the times specified below for compliance will waive its privilege claims. *See Dorf & Stanton Communications v. Molson Breweries,* 100 F.3d 919, 922-23 (Fed. Cir.), *cert. denied,* 117 S. Ct. 2455 (1997).

III. CONCLUSION

For the foregoing reasons, the Petition is granted in part and denied in part, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Hoechst is directed to comply with Phase I production pursuant to the Subpoena, as modified, on or before October 31, 1997, and to produce by that date any privilege log that it chooses to submit in compliance with Instruction 7 of the Subpoena. Phase II production (if any is required), including submission of any privilege log, will occur 30 days after receipt by HMRI of a written instruction from the Assistant Director for Compliance, Bureau of Competition, to produce Phase II documents.

Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The filing of such a request shall not stay the return date in this ruling unless the Commission otherwise specifies.

Re: Request of Hoechst Marion Roussel, Inc., for Full Commission Review of Ruling on Petition to Quash Subpoena. Hoechst AG, File No. 971-0055.

November 19, 1997

Dear Mr. Spears:

The Commission has considered (1) the Petition filed on behalf of Hoechst Marion Roussel, Inc. ("HMRI"), and other Hoechst entities to quash the pending subpoena duces tecum in the above-referenced matter ("the Subpoena"); (2) the transcript of the oral presentation on the Petition made on June 18, 1997; (3) the supplement to the Petition filed on June 24, 1997; (4) the October 17, 1997, ruling by Compulsory Process Commissioner Starek, granting the Petition in part and denying it in part ("the October 17 ruling"); (5) the specifications of the Subpoena, as modified by the October 17 ruling; and (6) your client's request for full Commission review of that ruling.

You ask that the Commission hear oral argument on review of the October 17 ruling. The Commission denies that request. There is no legal requirement that the Commission hear oral argument on petitions to quash subpoenas. *FTC v. Hallmark Cards, Inc.*, 265 F.2d 433 (7th Cir. 1959). Moreover, there was ample opportunity to make an oral presentation before Commissioner Starek, and the 59-page transcript of that presentation is before the Commission.

The Commission has determined that the request for review raises no issues that were not fully considered and discussed in the October 17 ruling. Upon review of all the material noted above, the Commission concurs in and adopts the October 17 ruling.

In determining to order enforcement of the Subpoena as modified, the Commission wishes to address a misunderstanding that has arisen in your request for full Commission review.[1] Your request states HMRI's understanding that it need not produce any privilege log until it has exhausted all judicial appeals on its contention that some subpoenaed documents are irrelevant to the investigation.[2] On the

[1] The Commission also notes that there is an error in Attachment C to your request, which is a CompareRite that you created to reflect the modifications to the Subpoena made by the October 17 ruling. The last sentence of Instruction 2 (both in its original version and as it appears in your CompareRite) was deleted by the October 17 ruling. Therefore, the Subpoena is no longer continuing in nature.

[2] Request at 18 n.21.

contrary, the October 17 ruling clearly required HMRI to produce the privilege log(s) called for by Instruction 7 of the Subpoena at the times specified for compliance with the Subpoena.[3] The Commission rejects the apparent suggestion that HMRI may contest enforcement on one legal ground (relevance) and then -- after the exhaustion of appeals from a federal court order rejecting HMRI's relevance arguments and ordering enforcement -- may recommence litigation on its privilege claims. The Commission is entitled to the logs on the date(s) ordered for compliance with the Subpoena, so that it can determine whether to challenge the privilege claims in any enforcement action that may be necessary. *See* Commission Rule 2.13. Therefore, the Commission will deem waived any assertion of privilege that is not made (and perfected with all supporting exhibits or affidavits) by the dates for compliance set forth below.

By letter dated October 31, 1997, Commissioner Starek granted your request to stay compliance obligations pending a ruling by the full Commission. Commission Rule 2.7(f). The Commission hereby directs that on or before December 3, 1997, Hoechst (1) comply with Phase I production pursuant to the Subpoena, as modified, and (2) produce any accompanying privilege log in compliance with Instruction 7 of the Subpoena. Phase II production (if any is required), including the submission of any privilege log, will occur 30 days after receipt by HMRI of a written instruction from the Assistant Director for Compliance, Bureau of Competition, to produce Phase II documents.

[3] October 17 ruling at 13.

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