IN THE MATTER OF

MANNESMANN, A.G.

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

Docket C-3378. Consent Order, Mar. 24, 1992--Set Aside Order, Oct. 11, 1995

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

ORDER SETTING ASIDE ORDER

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

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

[1] 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13.241, at 20,991 (June 21, 1995).

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

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

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

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

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

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

IN THE MATTER OF

THE COUNCIL OF FASHION DESIGNERS OF AMERICA, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

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

PARAGRAPH 1. Respondent The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1412

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

PAR. 2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Restraining competition among purchasers of modeling and modeling agency services;

B. Fixing or stabilizing the prices that are paid to models and modeling agencies; and

C. Depriving consumers of access to a competitively determined price and quality of modeling and modeling agency services.

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

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

DECISION AND ORDER

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

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

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

1. Respondent The Council of Fashion Designers of America (hereinafter "CFDA"), a trade association of fashion designers, is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1412 Broadway, New York, New York. CFDA engages in activities in substantial part for the profit of its members.

2. Respondent 7th on Sixth, Inc. (hereinafter "7th on Sixth") is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its

office and principal place of business located at 1412 Broadway, New York, New York. 7th on Sixth engages in activities in substantial part for the profit of its members.

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

ORDER

I.

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

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

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

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

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

II.

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

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

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

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

III.

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

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

1. Each of its members, officers, directors, and employees, and each fashion designer who has shown in the fashion shows organized by 7th on Sixth;
2. Each person to whom it has, at any time prior to the effective date of this order, communicated the benefits of membership in 7th on Sixth, or whom it has invited to join 7th on Sixth, as identified in Appendix B hereto;
3. The International Model Managers Association c/o David Blasband, Esq., Deutsch, Klagsbrun & Blasband, 800 Third Avenue, New York, New York;
4. Each of the modeling agencies listed in Appendix C attached hereto; and

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

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

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

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

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

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

IV.

It is further ordered, That each respondent shall:

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

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

V.

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

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

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

VI.

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

APPENDIX A

Dear :

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

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

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

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

Sincerely,

_____

[respondent]

Enclosure

APPENDIX B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX C

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

Boss Models
317 West Thirteenth Street
New York, NY 10014

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

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

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

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

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

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

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

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

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

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

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

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

Women Model Management
107 Greene Street
New York, NY 10012

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

IN THE MATTER OF

J. WALTER THOMPSON USA, INC.

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

Docket C-3622. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995

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

Appearances

For the Commission: *David M. Newman.*

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

COMPLAINT

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

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

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

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

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

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

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

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

(d) "National Survey of Jenny Craig Clients
Oct-Dec 1991
Percentage of Jenny Craig clients responding
'completely satisfied' or 'very satisfied':

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

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

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

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

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

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

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

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

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

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

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

Chairman Pitofsky recused.

EXHIBIT A

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

EXHIBIT A

EXHIBIT B

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

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

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

EXHIBIT C

J. Walter Thompson

R A D I O

SAN FRANCISCO CREATIVE DEPARTMENT

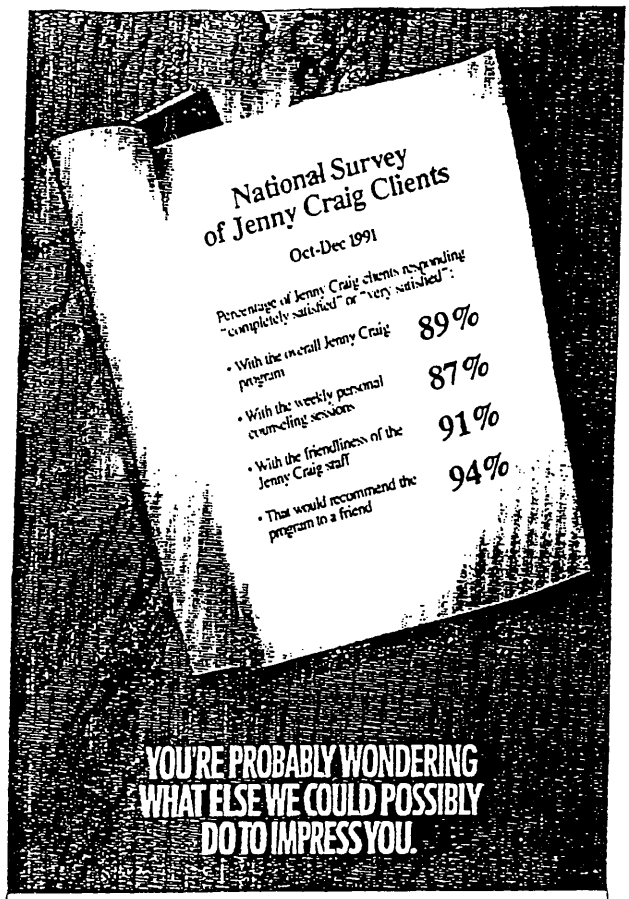
Job No.	732011	Title	"9 OUT OF 10/947"	
Client	JENNY CRAIG	Status	AS PRODUCED	
Product		Length	:45/:15	
ISCI No.	YJCR2017	Date	3/24/93	2126/am

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

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

EXHIBIT C

EXHIBIT D



#122081 - 4 col x 15.75"

EXHIBIT D

EXHIBIT E-1

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

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

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

VIDEO	AUDIO
TITLE: IF YOU DISCOVERED A WAY TO CONTROL YOUR WEIGHT...	ANNCR VO: If you discovered a way to control your weight...
TITLE: WHO WOULD YOU TELL?	Who would you tell?
SUPER: DORI GREEN LOST 24 LBS. IN 6 MONTHS	DORI: My mom and dad.
SUPER: SHELLY BENEDICT LOST 27 LBS. IN 5 MONTHS	SHELLY: My doubles partner.
SUPER: LESLIE BALDWIN LOST 36 LBS. IN 8 MONTHS.	LESLIE: The guy at the doughnut shop.
	SHELLY: Half the girls at the club.
SUPER: MARK HACKBARTH LOST 66 LBS. IN 13 MONTHS.	MARK: My mechanic.
	DORI: My daycare lady.
TITLE: THAT'S WHAT THESE SUCCESSFUL JENNY CRAIG CLENTS DID.	VO: That's what these successful Jenny Craig clients did.
SUPER: JOANNE WALTON LOST 32 LBS. IN 10 MONTHS.	JOANNE: My dog trainer.
	DORI: My father.
SUPER: NANCI PORTER LOST 31 LBS. IN 4 MONTHS	NANCI: My aunt.

EXHIBIT E-1

EXHIBIT E-2

J. Walter Thompson

T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No.	JCI-GEN-432004	Title	"9 OUT OF 10/3"		
Client	JENNY CRAIG	Status			
Product	9 OUT OF 10	Length	:30		
ISCI No	YJCJ1822	Date	2/16/93	2102/ms	PAGE 2 OF 2
	CORPORATE				

VIDEO	AUDIO
TITLE: 9 OUT OF 10 JENNY CRAIG CLIENTS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.	SHELLY: My chiropractor.
	VO: In fact, 9 out of 10 Jenny Craig clients would recommend Jenny Craig to their friends.
TITLE: WOULD RECOMMEND JENNY CRAIG TO THEIR FRIENDS. INDIVIDUAL WEIGHT LOSS AND MAINTENANCE MAY VARY.	DORI: There are so many.
TITLE: NEW PRICING POLICY PAY AS YOU GO	COUNSELOR: Get personal weight management at Jenny Craig.
TITLE: $6 A WEEK PROGRAM FEE JENNY'S CUISINE ADDITIONAL	Pay as you go for just $6 a week.
TITLE: 1-800-92-JENNY (LOGO)	Call 1-800-92-JENNY.

DECISION AND ORDER

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

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

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

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

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

ORDER

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

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

I.

It is ordered, That respondent, J. Walter Thompson USA, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such program is recommended, approved or endorsed by any person, group or other entity, unless, at the time of making any such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. For the purposes of this order, "competent and reliable scientific evidence" shall mean those tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

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

II.

It is further ordered, That respondent, J. Walter Thompson USA, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss or weight control program, weight loss product, health or fitness program, exercise equipment, or diet-related food, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey.

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

III.

It is further ordered, That for five (5) years after the date of the last dissemination of the representation to which they pertain, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

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

IV.

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

V.

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

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

VI.

It is further ordered, That this order will terminate twenty years from the date of its issuance, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

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

Chairman Pitofsky recused.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IN THE MATTER OF

SUMMIT COMMUNICATIONS GROUP, INC., ET AL.

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

Docket C-3623. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995

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

Appearances

For the Commission: *Jill M. Frumin.*

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

COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECISION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

I.

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

A. To allocate or divide markets, customers, contracts, or territories for cable television service in any part of the relevant geographic area. "Customers" includes, but is not limited to, residents of existing, newly-constructed, or future housing developments, subdivisions, apartment complexes, or hotels; and

B. To refrain from overbuilding any portion of any cable television system in any part of the relevant geographic area.

Provided that nothing contained in the foregoing paragraphs of this order shall be construed to prohibit TWI or USW from engaging in any lawful conduct or entering into any lawful agreement.

III.

It is further ordered, That Summit and Wometco shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order to each of their directors, officers, and supervisory employees who are in any way involved in cable television service in the relevant geographic area;

B. For a period of three (3) years after the date this order becomes final, furnish a copy of the complaint and order to each of their new directors, officers, and to each of their supervisory employees in any way involved in cable television service in the relevant geographic area, at the time they become a director, officer, or supervisory employee;

C. For a period of three (3) years from the date this order becomes final, and within thirty (30) days after the date any entity becomes a majority-owned subsidiary of Summit or Wometco, provide a copy of the complaint and order to all directors, officers, and supervisory employees of such entity who are in any way involved in cable television service in the relevant geographic area.

IV.

It is further ordered, That Summit and Wometco:

A. Within sixty (60) days after the date this order becomes final, and annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, shall each file a verified written report with the Commission

setting forth in detail the manner and form in which each has complied and is complying with this order;

B. For the purpose of determining or securing compliance with this order, shall permit any duly authorized representative of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Summit or Wometco, relating to any matters contained in this order; and

2. Upon five days' notice to Summit and Wometco, and without restraint or interference from them, to interview officers, directors, or employees of Summit and Wometco, relating to any matters contained in this order. Summit and Wometco, and the officers, directors, and employees, may have counsel present.

C. Shall notify the Commission at least thirty (30) days prior to any proposed change in Summit or Wometco affecting the provision of cable television service in the relevant geographic area, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect their compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on October 20, 2015.

STATEMENT OF THE COMMISSION

In this matter, the Commission has alleged that the respondents, Summit and Wometco, which were competing providers of cable television service, entered into a market allocation agreement. Such an agreement is *per se* illegal and, in this case, deprived cable television subscribers of a competitive marketplace.

The two respondents were Georgia-based firms, each of which offered cable television services in some or all of fourteen Georgia counties. Subsequent to the alleged illegal conduct, Wometco was

acquired by U.S. West, and after commencement of the Commission's investigation, Summit was acquired by Time-Warner. Thus, both Summit and Wometco are under the active control of major cable television firms whose managements were not implicated by the allegations of the Commission's complaint.

The consent order prevents these respondents from engaging in similar conduct in the fourteen counties in Georgia where either of the two firms had operations, a far broader area than the small area in one county where the parties had cable systems capable of competing for business. Under the unique circumstances of this proceeding, the Commission has concluded that relief may be limited in this fashion.

The Commission's policy is that where *per se* illegal conduct is found, it will seek the broadest possible relief, without geographic limitation. Boulder Ridge Cable TV, Docket No. C-3537 (Oct. 19, 1994). Only in extraordinary cases, such as this one, will it be appropriate to limit the scope of relief.

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

I concur in the Commission decision to issue a complaint alleging that the respondents conspired to allocate the market for cable television services. Market allocation agreements, including this one, are *per se* unlawful. *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

I dissent from the decision to limit the cease and desist order against Summit Communications Group, Inc. (Summit) and the seven named Wometco cable systems to a small geographic area surrounding Atlanta, Georgia. Summit operates cable television systems outside the fourteen Georgia counties that are included in the geographic coverage of the order, and the order does nothing to prevent future violations at those systems. If, after the order is issued, Summit enters an identical market allocation agreement at a cable system outside these fourteen counties, the Commission's only recourse will be to initiate an administrative proceeding to obtain still another order.

Market allocation, like price fixing, has long been deemed *per se* unlawful, and no proof of market power is necessary to condemn the conduct. Nothing about the fourteen Georgia counties renders them uniquely susceptible to market allocation schemes. Since market

allocation is unlawful whenever and wherever it occurs, I see no reason to limit the prohibition in the order to a tiny geographic region.

The complaint and order set forth no rationale for drawing a line around these fourteen counties as the geographic metes and bounds of the order's coverage. The actual agreements alleged in paragraphs six through eleven of the complaint relate to the provision of the cable television service to the Asbury Village apartment complex and specific housing subdivisions. As alleged in paragraph thirteen of the complaint, the restraint of trade had its anticompetitive effect only in these unincorporated areas of Cobb County, Georgia. The absence of any apparent rationale is troubling. In future cases, it opens the door to unguided negotiations regarding the geographic scope of conduct orders.

This is the second consent agreement involving allegations of market allocation in which the Commission has limited the coverage of the order to a narrow geographic area. In B&J School Bus Service, Inc., Docket No. C-3425 (April 22, 1993), I dissented from the limitation on the geographic coverage of the order on the ground that in the rare case in which the Commission uncovers a flagrant *per se* violation such as bid rigging, price fixing or market allocation, it should take strong action to prohibit the participants in conspiracy from repeating the violation. I expressed concern that the Commission was signaling a new leniency toward *per se* antitrust violations. In accepting this second order with such a weak and limited remedy, the Commission appears to eliminate the possibility that the school bus order can be disregarded as an aberration.

IN THE MATTER OF

CALIFORNIA MEDICAL ASSOCIATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2967. Consent Order, April 17, 1979--Set Aside Order, Oct. 27, 1995

This order reopens a 1979 consent order, which prohibited the medical association from participating in the creation or dissemination of fee schedules relating to physician compensation, and sets aside the consent order pursuant to the Commission's determination that the public interest requires reopening and setting aside the order because the order presents an obstacle to the respondent forming and operating a managed care subsidiary.

ORDER GRANTING PETITION TO REOPEN AND MODIFY OR SET ASIDE CONSENT ORDER

On May 24, 1995, California Medical Association ("CMA"), filed its Petition To Reopen and Modify or Set Aside Consent Order ("Petition") in Docket No. C-2967, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In its Petition, CMA requests that the Commission reopen the order and set aside or, in the alternative, modify provisions of the order that restrict the ability of CMA to develop and distribute a relative value study ("RVS"), as defined in the order.

CMA asserts in its Petition that changed conditions of law or fact warrant reopening the order and setting it aside or modifying it. The Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by CMA of relative value studies had the effect of establishing, maintaining or otherwise influencing the fees which physicians and other health care professionals charge for their professional services. The order, among other things, prohibits CMA from "directly or indirectly initiating, originating, developing,

publishing, or circulating the whole or any part of any proposed or existing relative value study." *In re California Medical Association,* 93 FTC 519 (1979).[1] In 1985, in response to CMA's Request to Reopen Proceeding and Modify Order ("1984 Petition"), the Commission amended the order so that it would not prevent CMA from petitioning state or federal government agencies and participating in federal or state administrative or judicial proceedings and providing information or views to third party payers concerning any issue, including reimbursement. *See* Order Reopening and Modifying Final Order In Docket No. C-2967 (issued April 19, 1985) ("Order Modifying Order"), at 4.

II. THE PETITION

CMA requests that the Commission reopen the order and set it aside or modify it. CMA seeks relief from the order's prohibition against developing and distributing RVSs because CMA would like to participate, with its member physicians, in forming and operating a statewide managed care subsidiary to offer "comprehensive health maintenance services . . .to enrolled individuals in California on a pre-paid basis . . . ." Petition at 3.[2] CMA states that it must be able to develop and distribute a reimbursement schedule to compensate physicians and other health care providers who contract with the managed care subsidiary. In addition, CMA asserts that the order must be modified or set aside so that CMA can transmit price and reimbursement information between physician-members of CMA's network and health care purchasers in connection with a messenger model contracting approach.

CMA also asks the Commission to set aside the order or add two new provisions to the order to resolve perceived uncertainty about

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[1] The order defines "relative value study" to mean:

> . . . [A]ny list or compilation of medical procedures and/or services which sets forth comparative numerical values for such procedures performed and/or services rendered by physicians and other health care providers, without regard to whether those values are expressed in monetary or non-monetary terms.

Order, ¶ I.A., *Id.* at 522

[2] CMA states that physicians participating in the managed care organization will share substantial financial risk, except to the extent that CMA is operating a messenger model network, and that the proposed organization will not inhibit new entry. The Petition notes, among other factors, that physician participation will be non-exclusive, so that participants will be free to join other managed care organizations; that CMA anticipates that fewer than 30% of physicians practicing in California will participate in the organization; and that numerous other competing plans with large provider networks currently exist in the market. Petition at 24-25.

CMA's ability to collect information and data from and transmit information and data to government agencies, third party payers, and its own members. CMA does not describe specific conduct in which CMA wishes to engage but asserts that "it is unclear" if certain hypothetical conduct might be prohibited by the order.

CMA's Petition is based on alleged changes of fact and law that CMA argues warrant reopening the order under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and either setting the order aside or modifying it. CMA contends that the order "severely impairs CMA's ability to establish a subsidiary company to sell managed care services in California's highly competitive healthcare market." Petition at 3. If the order is not set aside, CMA proposes the addition of a proviso to the order that specifically authorizes CMA to distribute information regarding fees that CMA will pay to physicians who participate in CMA's managed care network. Petition at 26. CMA also seeks an order modification that would permit CMA to use a messenger model approach to contracting. Letter from Martin J. Thompson of Riordan & McKenzie to Arthur M. Strong, Staff Attorney, Federal Trade Commission (August 15, 1995). Finally, CMA proposes provisions to the order that would address CMA's communications with government agencies, third party payers, and health care purchasers. Petition at 26-27.

III. STANDARD FOR REOPENING A FINAL COMMISSION ORDER

Section 5(b) of the Federal Trade Commission 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").

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. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (1979-1983 Transfer Binder) Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). 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 will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter 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 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 changed 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 necessary 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 in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality.)

IV. THE ORDER SHOULD BE REOPENED AND SET ASIDE

CMA has shown that reopening and setting aside the order is warranted in the public interest.[3]

The order's prohibition against the development or distribution of physician reimbursement schedules or other RVSs by CMA presents an obstacle to CMA forming and operating a managed care subsidiary. Without a reimbursement schedule, CMA would be unable to compensate physician-members of its proposed provider network. The order, therefore, inhibits conduct that is necessary for CMA to participate in the managed care market.

CMA's formation of a managed care organization is not inherently illegal, and may be procompetitive. This order was intended to inhibit the distribution of RVSs that might facilitate price-fixing by CMA's members. It was not intended to inhibit lawful entry by CMA into managed care markets. Accordingly, the order should be set aside. *See also* American Academy of Orthopaedic Surgeons, Docket No. C-2856, Order Setting Aside Order.

The order's prohibition against distributing RVSs and other fee information to physicians is at the heart of the order.[4] The danger that CMA members will use reimbursement schedules created by the proposed managed care organization as a basis for an unlawful agreement to fix prices has not been eliminated. As the Joint Health Care Policy Statements caution "information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices."[5] Although distribution of such reimbursement schedules through the proposed managed care organization may serve the public interest, CMA and its members remain subject to the laws against price fixing. Setting aside the restrictions of the order should not be construed as approval for use by CMA or any of its members of a relative value guide as a basis for an unlawful agreement on

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[3] Because the order is reopened on public interest grounds, the Commission need not and does not consider whether CMA has met its burden of showing that the order should be reopened on the basis of changed circumstances.

[4] The order as modified in 1985 already authorizes the distribution of RVSs to federal and state government bodies in connection with lobbying or participation in administrative or judicial proceedings and providing information and views to third party payers.

[5] Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,784.

price. Likewise, CMA is subject to the antitrust laws in the operation of its managed care subsidiary.[6]

VI. CONCLUSION

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the order in Docket C-2967 be, and it hereby is, set aside, as of the effective date of this order.

Commissioner Starek concurring in the result only.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision to set aside the order in this case. Respondent California Medical Association ("CMA") has discharged its burden of showing that the order's ban on the development and distribution of relative value studies is likely to impede CMA's formation and operation of a managed care subsidiary and that it is in the public interest to set the order aside. Consistent with the Commission's practice in numerous prior matters -- including Service Corporation International[1] and Tarra Hall Clothes[2] -- I reach this determination because it is merited under an overall weighing of the benefits and the costs of granting the relief requested by CMA.

As was the case in California and Hawaiian Sugar,[3] however, I do not join in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the order" when a petition to reopen is judged under the public interest rubric.[4] Neither the

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[6] Statement 8 and 9 of the Department of Justice and FTC Statement of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152 (1994), at 20,787-98, set forth the analysis of the applicability of the antitrust laws to physician network joint ventures.

[1] *See* Concurring Statement of Commissioner Roscoe B. Starek, III in Service Corporation International, Docket No. 9071 ("SCI") (May 12, 1994).

[2] Tarra Hall Clothes, Inc. and Abraham Cohen, Docket No. C-2797 (Oct. 27, 1992).

[3] *See* Concurring Statement of Commissioner Roscoe B. Starek, III in California and Hawaiian Sugar Co., Docket No. C-2858 ("C&H") (Jan. 17, 1995).

[4] Order Granting Petition To Reopen and Modify or Set Aside Consent Order, Docket No. C-2967, at 3 (Oct. 27, 1995) (italics added).

statute[5] nor the Commission rule[6] governing our consideration of such petitions says anything about "affirmative need." Instead, the concept has insinuated itself into the agency's stock explanation for modifying competition orders[7] under a public interest standard because of an uncritical fidelity to language that made its first -- and unfortunate -- appearance in a letter issued more than a dozen years ago.[8]

Aside from being superfluous, the "affirmative need threshold" causes genuine mischief. At least on paper, it serves as an obstacle that a petitioner must overcome before the Commission will consider balancing the reasons for and against reopening and modifying (or setting aside) an order under a public interest standard. And, as I have previously noted, the Commission has compounded the confusion in this area by finding the affirmative need requirement satisfied on the basis of a very marginal showing by the petitioner -- that is, establishing a "threshold" and then, in case after case, finding that threshold crossed on the flimsiest evidence.[9]

In the present case, CMA may have made a showing sufficient to satisfy the majority's "affirmative need" standard; it is at least a closer call than in C&H.[10] Under my reading of the governing statute and Commission rule, however, it is not necessary to make that judgment; rather, all that is required is the balancing of overall costs and benefits to which I alluded above. On the basis of that balancing, I agree with my colleagues that the order should be set aside.

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[5] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

[6] Rule 2.51(b) of the Commission's Rules of Practice, 16 CFR 2.51(b).

[7] As I pointed out in C&H, that matter was the first order modification in the consumer protection area in which the affirmative need threshold appeared. Concurring Statement at 1.

[8] In a letter sent to Joel E. Hoffman, Esquire in connection with Damon Corp., Docket No. C-2916 (Mar. 29, 1983), the Commission stated that a petitioner seeking an order modification in the public interest must demonstrate "[a]s a threshold matter . . . some affirmative need to modify the original order." [1979-83 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,007 at 22,585. The only support for this affirmative need threshold was a reference to a similar approach followed by the courts in modifying final court orders. *Id.* (citing *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982)). In Gautreaux, the court applied a two-step analysis in determining whether modification of a consent decree was appropriate, with the threshold step characterized as whether there were "exceptional circumstances, new, changed or unforeseen at the time the decree was entered," justifying modification of the decree. 535 F. Supp. at 426. The obvious Commission analogue to this exceptional circumstances inquiry would be requests to reopen based on changed conditions of law of fact, not requests to reopen under the public interest standard (under which modification may be justified even absent changed circumstances). The Commission has never explained -- and would be hard-pressed to do so -- why it has chosen to apply the affirmative need threshold when considering modifications based on the public interest.

[9] *See* Concurring Statement in SCI at 2.

[10] The evidence proffered by C&H fell far short of demonstrating that the order had caused it competitive harm. *See* Concurring Statement in C&H at 3.

IN THE MATTER OF

MUSTAD INTERNATIONAL GROUP NV, ET AL.

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

Docket C-3624. Complaint, Oct. 30, 1995--Decision, Oct. 30, 1995

This consent order requires, among other things, a Switzerland corporation and its Connecticut subsidiary to either divest all of their Connecticut horseshoe nail manufacturing assets, or to divest four nail machines and to grant a license of technology and know-how to operate them, to a Commission-approved acquirer by May 15, 1996.

Appearances

For the Commission: *Howard Morese, Joseph G. Krauss* and *William Baer.*

For the respondents: *Peter L. Costas, Pepe & Hazard,* Hartford, CT.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents Mustad Connecticut, Inc. ("Mustad Connecticut"), a Connecticut corporation, and Mustad International Group NV ("Mustad Group") have acquired all of the assets of Cooper Horseshoe Nail Co., Ltd., a majority interest in Emcoclavos S.A., and the horseshoe nail assets of Sterward Engineering Company, Ltd., and that such acquisitions violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE RESPONDENTS AND JURISDICTION

1. Respondent Mustad Connecticut, wholly-owned by Mustad International Group NV, is a corporation organized, existing and

doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business at 1395 Blue Hills Avenue, Bloomfield, Connecticut.

2. Respondent Mustad Group is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its principal place of business at St. Pierhalsteeg 5, NL-1012 GL Amsterdam.

3. Respondents Mustad Connecticut and Mustad Group (collectively "Mustad") manufacture, distribute, and sell rolled and forged horseshoe nails in the United States and worldwide.

4. Mustad Connecticut and Mustad Group are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE ACQUISITIONS

5. On or about July 30, 1985, Mustad Connecticut agreed to acquire and did acquire all of the assets relating to the horseshoe nail business of Capewell Manufacturing Company ("Capewell") (the "Capewell acquisition"). Capewell, which was headquartered in Hartford, Connecticut, manufactured and sold rolled horseshoe nails in the United States prior to its acquisition by Mustad Connecticut.

6. On or about March 5, 1986, Mustad Connecticut agreed to acquire and did acquire all of the assets of the Cooper Horseshoe Nail Co., Ltd. ("Cooper"), a division of Frederick Cooper plc (the "Cooper acquisition"). Cooper, which was headquartered in Wolverhampton, West Midlands, England, manufactured rolled horseshoe nails in England. Cooper exported virtually all of its production of horseshoe nails, prior to its acquisition by Mustad Connecticut, to the United States.

7. In February 1990, Mustad Group acquired a majority interest in Emcoclavos S.A. ("Emcoclavos") (the "Emcoclavos acquisition"). Emcoclavos, which is headquartered in Bogota, Colombia, manufactures and sells horseshoe nails, including rolled horseshoe nails for sale in the United States. Emcoclavos exported rolled horseshoe nails to the United States prior to its acquisition by Mustad Group.

8. On or about January 4, 1993, Mustad Connecticut agreed to acquire and did acquire all of the assets relating to horseshoe nail manufacturing of Sterward Engineering Company, Ltd. ("Sterward"), a British corporation, (the "Sterward acquisition"). Sterward, which was headquartered in Tipton, West Midlands, England, designed and manufactured tooling and equipment used in the production of rolled horseshoe nails. The Sterward assets that were purchased by Mustad Connecticut were designed to produce rolled horseshoe nails for sale in the United States.

9. Concurrent with the Sterward acquisition and the Cooper acquisition, Mustad Connecticut entered into agreements prohibiting Sterward and Cooper from producing horseshoe nails or equipment used or useful in the manufacture of horseshoe nails or otherwise competing directly or indirectly in the manufacture or sale of horseshoe nails for at least 20 years.

10. Mustad undertook the Cooper acquisition, the Emcoclavos acquisition, and the Sterward acquisition with the willful intention and effect of restraining, lessening, or eliminating competition, or creating or maintaining a monopoly in the market for rolled horseshoe nails.

III. THE RELEVANT MARKET

11. One relevant line of commerce within which to analyze the effects of Mustad's acquisitions is the manufacture and sale of rolled horseshoe nails. Rolled horseshoe nails are softer and slimmer than forged nails, which gives them different handling characteristics. Rolled horseshoe nails are preferred by customers in the United States and are not considered to be reasonably interchangeable with forged nails.

12. The relevant section of the country or geographic area within which to analyze the effects of the acquisitions is either the entire United States or the world. Rolled horseshoe nails are used and sold principally in the United States.

IV. MARKET STRUCTURE

13. Prior to the Capewell acquisition, Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition the market for rolled horseshoe nails was extremely concentrated as measured by the Herfindahl-Hirschmann Index ("HHI").

14. Prior to its acquisition in 1985, Capewell had approximately 50% of U.S. sales of horseshoe nails. Prior to its acquisition in 1986, Cooper had approximately 40% of U.S. sales of horseshoe nails. Prior to its acquisition in 1990, Emcoclavos had approximately 10% of U.S. sales of horseshoe nails.

15. Mustad, because of the acquisitions of Capewell, Cooper, Emcoclavos, and Sterward, is the largest producer and seller of rolled horseshoe nails in the world, with more than a 90% share of sales.

16. Mustad possesses monopoly power, or has a dangerous probability of obtaining monopoly power, in the market for rolled horseshoe nails.

V. ENTRY

17. Entry into the production and sale of rolled horseshoe nails would take well in excess of two years and is unlikely, among other reasons, because of the difficulty of designing and building the specialized and complex machinery required to produce such nails, the high capital expenditures relative to market size, substantial sunk costs, static demand, the need for technical expertise, and the need for a brand name and reputation for a quality product.

VI. EFFECTS OF THE ACQUISITIONS

18. The effect of the Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition has been and may be to lessen competition substantially and to tend to create a monopoly in the relevant market in the following ways, among others:

(a) By eliminating Capewell, Cooper, and Emcoclavos as substantial independent competitive forces in the relevant market;

(b) By eliminating actual, direct and substantial competition between and among Capewell, Cooper, and Emcoclavos;

(c) By eliminating actual potential competition between Mustad Connecticut and nails produced by the Steward machinery;

(d) By substantially increasing concentration, as measured by the HHI, in the relevant market;

(e) By substantially raising prices as much as 50-75% on the most popular, large volume sizes of horseshoe nails in the United States since the Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition;

(f) By significantly enhancing the likelihood of coordinated behavior or collusion between Mustad Connecticut and any remaining rolled horseshoe nail manufacturing competitors;

(g) By significantly enhancing the likelihood that Mustad will unilaterally exercise market power; and

(h) By increasing barriers to new entry into the relevant market.

19. The Cooper acquisition, Emcoclavos acquisition, and Sterward acquisition restrained trade and created or maintained a monopoly in the rolled horseshoe nail market.

VII. OTHER ACTS AND PRACTICES

20. Mustad has destroyed saleable rolled horseshoe nail making machinery in order to prevent potential competitors from producing rolled horseshoe nails.

VIII. VIOLATIONS CHARGED

21. The acquisitions of Cooper, Emcoclavos, and Sterward by Mustad Connecticut and Mustad Group constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

22. The Sterward non-compete agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

23. Mustad Connecticut and Mustad Group, in making the Cooper acquisition, the Emcoclavos acquisition, and the Sterward acquisition, in destroying machinery, and in entering the non-compete agreements, attempted to monopolize and did monopolize the rolled horseshoe nail market in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

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

violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, Mustad International Group NV and Mustad Connecticut, Inc., their 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Mustad Group is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its principal place of business at St. Pierhalsteeg 5, NL-1012 GL Amsterdam.

2. Respondent Mustad Connecticut, wholly owned by Mustad International Group NV, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its principal place of business at 1395 Blue Hills Avenue, Bloomfield, Connecticut.

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

ORDER

I.

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

A. *"Mustad Connecticut"* means Mustad Connecticut, Inc., a wholly owned subsidiary of Mustad International Group NV, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mustad Connecticut, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. *"Mustad Group"* means Mustad International Group NV, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mustad Group, their successors and assigns, and their directors, officers, employees, agents and representatives.

C. *"Respondents"* or *"Mustad"* means Mustad Connecticut and Mustad Group.

D. *"Acquisitions"* means the acquisitions by Mustad of the assets of Cooper Horseshoe Nail Co., Ltd.; stock of Emcoclavos S.A.; and assets of Sterward Engineering Company, Ltd.

E. *"Capewell"* means substantially all assets of Capewell Horsenails, Inc., including assets, properties, business and goodwill, tangible and intangible, used in the manufacture and sale of rolled horseshoe nails, including the following:

1. Machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;

2. Customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes and quality control data;

3. Inventory of nails produced by Capewell;

4. Rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

5. Rights under warranties and guarantees, express or implied;
6. Books, records, files; and
7. Items of prepaid expense.

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

G. *"Rolled horseshoe nails"* means horseshoe nails that are produced by the rolling process of drawing the shank of the nail through a series of dies.

H. *"Functioning nail machine"* means a fully functioning and operational machine that has produced at least 800 pounds per week of city head no. 5 rolled horseshoe nails during the preceding year, or the equivalent production of other types and sizes of nails, including tooling used in the maintenance or operation of such nail machines, and capable of producing rolled horseshoe nails in at least the following sizes: city head 5, city head 6, slim blade 5, regular head 5, and race nail 3½.

I. *"Spare nail machine"* means a functioning or non-functioning machine suitable for use in providing spare and replacement parts for the functioning nail machines.

J. *"Nail machine"* means a functioning nail machine or spare nail machine.

K. *"Technology and know-how"* means all of Mustad's drawings, blueprints, patents, specifications, tests, and other documentation, and all information contained therein or available to Mustad personnel relating to the design, and the production methods, processes and systems used in the production of rolled horseshoe nails.

II.

It is further ordered, That:

A. Mustad shall divest, absolutely and in good faith, by May 15, 1996, either (i) Capewell as an ongoing business, or (ii) four (4) functioning nail machines and one (1) spare nail machine and shall grant a perpetual non-exclusive license of the technology and know-how to the acquirer.

B. The divestiture and granting of the license shall be made only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission and only in a manner that receives the prior approval of the

Commission. The purpose of the divestiture and licensing is to create an independent competitor in the production and sale of rolled horseshoe nails and to remedy the lessening of competition in the United States resulting from the Acquisitions as alleged in the Commission's complaint. Mustad shall divest such other ancillary assets and effect such other arrangements as are reasonably necessary for the acquirer to be viable, and competitive.

C. If Mustad divests the functioning nail machines and spare nail machine, then upon reasonable notice from the acquirer to respondents, respondents shall provide such assistance to the acquirer as is reasonably necessary to enable the acquirer to produce rolled horseshoe nails in substantially the same manner and quality employed or achieved by the respondent prior to divesture. Such assistance shall include reasonable consultation with knowledgeable employees and training for a period of time sufficient to satisfy the acquirer's management that its personnel are appropriately trained in the production of rolled horseshoe nails. Respondents shall convey all know-how necessary to produce rolled horseshoe nails in substantially the same manner and quality employed or achieved by respondent prior to divestiture. However, respondents shall not be required to continue providing such assistance for more than one (1) year from the date of the divestiture. Respondents shall charge the acquirer its own direct costs for providing such assistance.

III.

It is further ordered, That, pending divestiture of Capewell or the functioning nail machines and spare nail machine pursuant to paragraph II.A., Mustad shall take such action as is necessary to maintain the viability and marketability of the nail machines to be divested and shall not cause or permit the destruction, removal, wasting, deterioration or impairment of such nail machines, except for ordinary wear and tear that does not affect the viability and marketability of the nail machines.

IV.

It is further ordered, That:

A. If respondents have not completed the divestiture required by paragraph II.A. by May 15, 1996, the Commission may appoint a trustee to divest four (4) functioning nail machines, one (1) spare nail machine, and license the technology and know-how. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Mustad shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Mustad to comply with this order.

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

(1) The Commission shall select the trustee, subject to the consent of Mustad, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Mustad has not opposed the selection of a proposed trustee within fifteen (15) days after notice by the Commission's staff to Mustad of the identity of the proposed trustee, Mustad shall be deemed to have consented to the selection of the proposed trustee.

(2) Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the nail machines and grant a license for the technology and know-how and to make any further arrangements that may be reasonably necessary to maintain the viability and competitiveness of the business.

(3) The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.B.8. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that the divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or, in the case of a court-appointed trustee, by the court,

provided, however, that the Commission may extend this period only two (2) times and for a total period not to exceed two (2) years.

(4) The trustee shall have full and complete access to the personnel, books, records, and facilities related to the nail machines, or to any other relevant information, as the trustee may reasonably request. Respondents shall provide such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Mustad shall take no action to interfere with or impede the trustee's accomplishment of the divestiture and licensing. Any delays in divestiture caused by Mustad shall extend the time for divestiture under paragraph IV.B.3 in an amount equal to delay, as determined by the Commission or, for a court-appointed trustee, by the court.

(5) Subject to Mustad's absolute and unconditional obligation to divest and license at no minimum price, and the purpose of the divestiture and licensing as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission. The divestiture shall be made in the manner set out in paragraph III of this order, provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Mustad from among those approved by the Commission.

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

commission arrangement contingent on the trustee's divesting the Nail Machines and licensing the technology and know-how.

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

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

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

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

(11) The trustee shall have no obligation or authority to operate or maintain the nail machines.

(12) The trustee shall report in writing to Mustad and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture and licensing.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Mustad has fully complied with the provisions of paragraphs II or IV of this order, Mustad shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is

complying, and has complied with those provisions. Mustad shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and IV of the order, including a description of all substantive contacts or negotiations for the divestiture and licensing and the identity of all parties contacted. Mustad also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year from the date that this order becomes final, annually for the next nine (9) years on the anniversary of the date on which this order becomes final, and at such other times as the Commission may require, Mustad shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with paragraph VI of this order.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written 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, presently engaged in, within the two years preceding such acquisition engaged in, or in the process of attempting to engage in producing or selling horseshoe nails in the United States; or

B. Acquire any assets used for, or previously used for (and still suitable for use for) the production of horseshoe nails from any concern, corporate or non-corporate, presently engaged in, within the past two years engaged in, or in the process of attempting to engage in producing or selling horseshoe nails in the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"). Respondent shall provide to the Commission at least thirty days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"), both the Notification and

supplemental information either in respondent's possession or reasonably available to respondent. Such supplemental information shall include a copy of the proposed acquisition agreement; the names of the principal representatives of respondent and of the firm respondent desires to acquire who negotiated the acquisition agreement; and any management or strategic plans discussing the proposed acquisition. If, within the first waiting period, representatives of the Commission make a written request for additional information, respondent shall not consummate the acquisition until twenty days after submitting such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

VII.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, Mustad reasonably shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Mustad relating to any matters continued in this order; and

B. Upon five (5) days notice to Mustad, and without restraint or interference from Mustad, to interview officers or employees of Mustad, who may have counsel present, regarding such matters.

VIII.

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

IN THE MATTER OF

KKR ASSOCIATES, L.P.

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

Docket C-3253. Consent Order, June 13, 1989--Set Aside Order, Oct. 31, 1995

This order reopens a 1989 consent order--which required KKR Associates to divest, within twelve months, certain assets and businesses associated with RJR Nabisco or Beatrice/Hunt-Wesson, and prohibited them from making certain acquisitions without prior Commission approval--and sets aside the prior approval provisions of the consent order pursuant to the Commission's Prior Approval Policy Statement. Under that Policy Statement, the Commission presumes that the public interest requires reopening the prior approval provisions in outstanding merger orders and making them consistent with the policy.

ORDER SETTING ASIDE ORDER

On July 19, 1995, the respondents, KKR Associates, L.P., et al.,[1] filed their Petition To Reopen Proceedings and To Modify Consent Order ("Petition") in this matter. KKR asks that the Commission reopen and modify the 1989 consent order, as modified in 1993,[2] pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, issued June 21, 1995 ("Prior Approval Policy Statement").[3] KKR in its Petition requests that the Commission reopen and set aside the order in Docket No. C-3253 or, in the alternative, reopen and modify the order by deleting the

[1] All respondents in this matter joined in the Petition, and they are: KKR Associates, L.P., a limited partnership; Kohlberg Kravis Roberts & Company, L.P., a limited partnership; RJR Nabisco, Inc. (successor by merger to RJR Acquisition Corporation), a corporation; Whitehall Associates, L.P. (formerly known as RJR Associates, L.P.), a limited partnership; RJR Nabisco Inc. (for itself and as successor to RJR Nabisco Holdings Group, Inc.), a corporation; RJR Nabisco Holdings Corp. (formerly known as RJR Holdings Corp.), a corporation; Henry R. Kravis, a natural person; Robert I. MacDonnell, a natural person; Michael W. Michelson, a natural person; Paul E. Raether, a natural person; and George R. Roberts, a natural person (collectively, "respondents").

[2] The Commission previously modified the June 13, 1989, consent order in this matter on May 13, 1993.

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

requirement in paragraph V that KKR seek prior Commission approval for certain acquisitions.[4] The Petition was on the public record for thirty days; two comments were received.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement, at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

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

The Commission in its Prior Approval Policy Statement announced its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.*, at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the

[4] KKR's Petition incorrectly characterizes the notice obligation of paragraph V.B. of the modified order, *i.e.*, that respondents give the Commission notice of re-entry into a relevant product market within 10 days of such an acquisition, as a "prior notice" requirement. Petition, at 4. The Petition also incorrectly states that by the 1993 modification, the Commission substituted a prior notification provision in the place of a prior approval provision for oriental foods and catsup, but not for packaged nuts. In fact, the 1993 modification excepted from the prior approval obligation an acquisition of any relevant product so long as no respondent owns any interest in a company selling such relevant product (including packaged nuts). In such instance, all that is needed is 10 days' notice of re-entry.

Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced" in the Statement. *Id.*

The presumption is that setting aside the prior approval requirement in paragraph V of the order in Docket No. C-3253 is in the public interest. Nothing to overcome the presumption has been presented, and nothing in the record, including the original complaint and order, and the two public comments, suggests that the exceptions described in the Prior Approval Policy Statement are warranted. Based on the record in this matter, there is no evidence that a prior notification provision is needed. At this time, KKR Associates and its related entities do not own any interest in the relevant products identified in the order, and thus there is no credible risk that in the future KKR Associates or its related entities will engage in anticompetitive acquisitions in the relevant markets. RJR Nabisco remains in the packaged nut market, but based on the record it appears that an acquisition by RJR of any of the competitively significant firms in the packaged nut market likely would be reportable under the HSR Act. Thus, the Commission has determined to reopen the proceeding in Docket No. C-3253 and set aside the order.[5]

Accordingly, *It is hereby ordered*, That this matter be, and it hereby is, reopened, and that the Commission's order issued on June 13, 1989, and modified on May 13, 1993, be, and it hereby is, set aside as of the effective date of this order.

[5] KKR completed the divestitures required by the order in 1989; the only remaining obligation under the order is the prior approval requirement in paragraph V and the attendant reporting obligations.

IN THE MATTER OF

PORT WASHINGTON REAL ESTATE BOARD, INC.

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

Docket C-3625. Complaint, Nov. 6, 1995--Decision, Nov. 6, 1995

This consent order prohibits, among other things, a New York brokerage service from restricting the use of exclusive agency listings, fixing commission splits between listing and selling brokers, restricting or prohibiting members from holding open houses or using "For Sale" signs, restricting brokers from advertising free services to property owners, and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service.

Appearances

For the Commission: *Alan B. Loughnan, Michael J. Bloom* and *William Baer.*

For the respondent: *Stephen Limmer, Schiffmacher, Cullen, Farrell & Limmer,* Port Washington, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Port Washington Real Estate Board, Inc. (hereinafter "PWREB" or "respondent"), a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) *"Multiple listing service"* means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(2) *"PWREB's service area"* means the territory within which PWREB provides its multiple listing service.

(3) *"Broker"* means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(4) *"Member"* means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(5) *"Applicant"* means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York, and who has applied individually or on behalf of his or her firm for membership in respondent's multiple listing service.

(6) *"Listing broker"* means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) *"Listing agreement"* means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(8) *"Selling broker"* means any broker, other than the listing broker, who locates the purchaser for a listed property.

(9) *"Exclusive agency listing"* means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed.

(10) *"Open house"* means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

PAR. 2. PWREB is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Port Washington Real Estate Board, Port Washington, NY.

PAR. 3. PWREB is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses and through the policies, acts, and practices described in paragraphs twelve through sixteen below, PWREB and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. PWREB is, and for some time has been, providing a multiple listing service for member real estate brokerage firms in and around Port Washington, New York.

PAR. 6. PWREB's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together purchasers and sellers of residential real estate located within PWREB's service area, as well as other services designed to facilitate sales of such properties. Each PWREB member agrees to submit all of its exclusive listings pertaining to sales of residential real estate located within PWREB's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in PWREB's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in PWREB's service area. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services within PWREB's Service Area.

PAR. 8. Publication of listings on PWREB's multiple listing service generally is considered by sellers and brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in PWREB's service area.

PAR. 9. PWREB's multiple listing service is the predominant multiple listing service in its service area. PWREB currently has about 18 member brokers. PWREB's membership includes most of the active residential real estate brokerage firms located in PWREB's service area. Annual sales of real estate listings published on PWREB's multiple listing service approach $100 million dollars.

PAR. 10. Except to the extent that competition has been restrained as described herein, PWREB members are and have been in competition among themselves in the provision of residential real estate brokerage services within PWREB's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through sixteen below, PWREB has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services in PWREB's service area.

PAR. 12. The rules governing PWREB and its multiple listing service have provided that a listing broker may not retain any portion of a commission paid by a property owner on an exclusive agency listing that is sold by a different selling broker.

PAR. 13. The rules governing PWREB and its multiple listing service have prohibited members from holding open houses.

PAR. 14. The rules governing PWREB and its multiple listing service have prohibited members from using permanently affixed real estate signs on residential properties or using signs for house inspections attended by brokers and salespeople, and homeowners. Such rules have also prohibited display of a member's name or telephone number on permanent signs placed by homeowners.

PAR. 15. The rules governing PWREB and its multiple listing service have prohibited members from offering free services to property owners.

PAR. 16. PWREB has required as a condition of membership in PWREB and its multiple listing service that each applicant operate and maintain an office within PWREB's service area staffed and open for at least 40 hours per week.

PAR. 17. The purpose, capacity, tendency or effect of the combination or conspiracy described in paragraphs twelve through sixteen above has been, and continues to be, to restrain competition among brokers and to injure competition by, among other things:

(1) Discouraging or inhibiting brokers from accepting exclusive agency listings or similar contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through a broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

(2) Substantially reducing the ability of residential property owners to compete with real estate brokers in locating purchasers;

(3) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;

(4) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;

(5) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to provide other services free of charge to the property owner;

(6) Impeding new membership in PWREB's MLS by part-time or less-than-full-time real estate brokers, thus impeding entry into the residential real estate business in PWREB's service area;

(7) Restraining competition from brokerage firms located outside the service area of PWREB's MLS.

PAR. 18. The policies, acts, practices, and combinations or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The alleged conduct may continue or recur in the absence of the relief requested.

DECISION AND ORDER

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

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

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

1. Respondent Port Washington Real Estate Board, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at: care of Charles Walker, President of Charles E. Hyde Agency, 277 Main Street, Port Washington, New York.

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

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

(1) *"PWREB"* means the Port Washington Real Estate Board, In., or any affiliated or successor organization comprised or real estate brokers doing business in PWREB's service area which operates a multiple listing service.

(2) *"Multiple listing service"* means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(3) *"PWREB's service area"* means the territory within which PWREB provides its multiple listing service.

(4) *"Broker"* means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(5) *"Member"* means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(6) *"Applicant"* means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker by the State of New York, and who has applied individually or on behalf of his or her firm for membership in PWREB's multiple listing service.

(7) *"Listing broker"* means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(8) *"Listing agreement"* means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(9) *"Selling broker"* means any broker, other than the listing broker, who locates the purchaser for a listed property.

(10) *"Exclusive agency listing"* means any listing under which a property owner appoints a broker as exclusive agent for the sale or lease of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(11) *"Exclusive right to sell listing"* means any listing under which a property owner contracts to pay the broker an agreed commission if the property is sold, whether the purchaser is procured by the broker or any other person, including the property owner.

(12) *"Open house"* means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

II.

It is further ordered, That respondent PWREB, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall

forthwith cease and desist from adopting, maintaining, or enforcing any rule, policy, or practice or taking any other action that has the purpose or effect of:

(A) Restricting or interfering with (1) any broker's offering or accepting any exclusive agency listing; or (2) the publication on a PWREB multiple listing service of any exclusive agency listing submitted by a member; provided, however, that nothing contained in this subpart shall preclude respondent from (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether an exclusive agency listing or an exclusive right to sell listing.

(B) Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any listing broker and any selling broker, or restricting any property owner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(C) Restricting or interfering with the ability of member brokers or homeowners to hold open houses or to place signs on any property; provided, however, that nothing contained in this subpart shall preclude PWREB from requiring its members to comply with local ordinances governing open houses or use of signs.

(D) Restricting or interfering with the ability of member brokers to advertise free services to property owners.

(E) Conditioning membership in or use of a multiple listing service operated by PWREB on any applicant or member operating or maintaining a full-time office, or on such applicant or member operating or maintaining an office in PWREB's service area; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

III.

It is further ordered, That respondent PWREB shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of PWREB or a multiple listing service operated by PWREB.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and other of its materials to conform to the provisions of this order and provide each member of PWREB or a multiple listing service operated by PWREB with a copy of the amended by-laws, rules and regulations, and other materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to any new member, applicant, or any person who inquires about possible membership in PWREB or its multiple listing service, within thirty (30) days after such person's initial application or inquiry.

IV.

It is further ordered, That respondent PWREB shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(B) In addition to the report required by paragraph IV(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondent has complied with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution,

assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on November 6, 2015.

APPENDIX A

[Date]

[Respondent's Letterhead]

The Federal Trade Commission has conducted an investigation into certain rules and practices of the multiple listing service ("MLS") operated by the Port Washington Real Estate Board ("PWREB") that have been alleged to be unlawful restraints of trade. To avoid litigation, PWREB has entered into a consent agreement. The agreement is not an admission the PWREB or any of its members has violated any law. For your information, PWREB is prohibited from the following practices in connection with the operation of an MLS.

1. Restricting or interfering with any broker's offering or accepting an exclusive agency listing, or limiting the publication on the MLS of any exclusive agency listing entered into by an MLS member.

2. Requiring or fixing the rate, range or amount of any split or division of a commission or other fees between a listing broker and a selling broker, or restricting any property owner's participation in the determination of the split or division of any commission or other fees between the listing and selling brokers.

3. Restricting or interfering with the ability of member brokers or homeowners to conduct open houses or to place signs on property.

4. Restricting or interfering with the ability of member brokers to advertise free services to homeowners.

5. Requiring as a condition of membership in its MLS that a member or applicant for membership operate an office full-time or engage in real estate brokerage full-time in PWREB's service area.

President
Port Washington Real
Estate Board, Inc.