IN THE MATTER OF

PHYSICIANS WEIGHT LOSS CENTERS OF AMERICA, INC., ET AL.

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

Docket C-3476. Complaint, Dec. 22, 1993--Decision, Dec. 22, 1993

This consent order prohibits, among other things, the Ohio diet-program companies from misrepresenting the performance or safety of any weight-loss program they offer in the future, and requires them to have scientific data to substantiate future claims they make regarding weight loss and maintenance. In addition, the consent order requires certain disclosures regarding safety and health risks.

Appearances

For the Commission: *Michael Milgrom* and *Richard Kelly.*

For the respondents: *Thomas R. Brule*, in-house counsel, Akron, OH.

COMPLAINT

The Federal Trade Commission having reason to believe that Physicians Weight Loss Centers of America, Inc., and Physicians Weight Loss Centers, Inc., (referred to collectively herein as "respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Physicians Weight Loss Centers of America, Inc. (PWLCA) is an Ohio corporation with its office and principal place of business located at 395 Springside Drive, Akron, Ohio. Respondent Physicians Weight Loss Centers, Inc.

(PWLCI) is an Ohio corporation with its office and principal place of business located at 395 Springside Drive, Akron, Ohio.

PAR. 2. Respondents advertise, offer for sale, sell, and otherwise promote throughout much of the United States weight loss and weight maintenance services and products, and make them available to consumers at their numerous "Physicians Weight Loss Centers" (centers) in many states. These products include "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act. Through centers franchised by PWLCA and centers owned by PWLCI, respondents are engaged and have been engaged, in the sale and offering for sale of low-calorie diet (LCD) weight loss programs, very-low-calorie diet (VLCD) weight loss programs and weight maintenance programs to consumers. LCD's are diets providing 800 calories or more per day, designed to cause weight loss. VLCD's are rapid weight-loss modified fasting diets providing less than 800 calories per day requiring medical supervision.

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

PAR. 4. Respondents have disseminated, or have caused to be disseminated, advertisements for Physicians Weight Loss Centers services and products, including but not necessarily limited to the attached Exhibits A through N.

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

A. "I lost 12 and ½ pounds in 21 days, 46 in all!" Louise Conant went from 171 to 125 pounds in 15 weeks. 21 days to results. GUARANTEED! Average weight loss 3 pounds per week.*
*Rules of Guarantee are available at every Physicians WEIGHT LOSS Centers.
(Exhibit A.)
B. "It Works!"
The diet that's worked for a million people can work for you, too.
You'll lose an average of 3 pounds per week -- GUARANTEED.*
Professionally supervised diet with immediate results.

Safe, effective and no injections.
You'll learn eating habits to stay slim.
* Rules of Guarantee available at Centers.
The weight loss success story for nearly a million people. (Exhibit B.)
C. We guarantee it because it works!
GUARANTEED average weight loss of 3 pounds per week.*
Professionally supervised diet with immediate results.
Safe, effective and no injections.
You'll learn eating habits to stay slim.
"It works! I lost 15 pounds and 25 inches!" Joyce Johnson.
* Rules of Guarantee available at all Centers. (Exhibit C.)
D. VOICE OVER: These are real photos of real people who successfully lost weight at Physicians Weight Loss Centers - a million in ten years.
LOUISE CONANT: I lost fifty pounds at Physicians Weight Loss Centers. It works.
VOICE OVER: Our professionally supervised program really works. We guarantee you'll lose an average of three pounds per week, and you'll see immediate results too.
AVA MACK: It works.
VOICE OVER: Play our "It Works" game. It's a 40% to 60% off the weight loss portion of our program not valid with any other offer.

(Transcript of audio portion of television advertisement.) (Exhibit D.)

E. SPOKES: One weight loss program has been a success story for nearly/over a million people. Physicians WEIGHT LOSS Centers. Our proven program gives you immediate results. Our weight loss professionals help you lose every pound you want. And teach you new eating habits to stay slim.
DEBRA : (BY PHONE) Hi:
SPOKES: Hi, Debra. You lost 60 pounds at Physicians WEIGHT LOSS Centers?
DEBRA: I sure did! And 81 inches.
SPOKES: That's terrific!
DEBRA: That's your program. I saw results right away, lost all I wanted by eating regular grocery store food, and I've kept if off for two years now.
SPOKES: Fantastic, Debra. Thanks (SFX: CLICK OF PHONE). Individual weight loss varies, but what Physicians WEIGHT LOSS Centers did for Debra, we can do for you.

(Transcript of radio advertisement.) (Exhibit E.)

F. "EVERY WOMAN SHOULD FEEL LIKE I FEEL." Pam Yancy lost 40 pounds in 12 weeks. "I love myself! After hiding my weight for so long, now I feel great about my looks and success. The physicians, nurses and counselors broke the yo-yo diet cycle for me. I saw results from day one and I know how

to keep the weight off." Love yourself again. Call today for a free weight loss consultation. "It Works!" (Exhibit F.)
G. IT WORKS because of the support and supervision you receive from our professional staff. People who understand the behaviors and attitudes of weight loss nutrition and wellness. Guiding you from short-term weight loss to long-term weight control. "It Works!" (Exhibit G.)
H. "It Works!" "It Works! I lost 55 pounds and 81 inches." Debra Shedd. (Exhibit K.)

PAR. 6. Through the use of the statements contained in the advertisements referred to in paragraph five, including but not necessarily limited to the statements in the advertisements attached as Exhibits A-G and K, respondents have represented, directly or by implication, that:

A. Physicians Weight Loss Centers customers typically are successful in reaching their weight loss goals;

B. Physicians Weight Loss Centers customers typically are successful in maintaining their weight loss achieved under the Physicians Weight Loss Centers diet program; and

C. Physicians Weight Loss Centers customers typically are successful in reaching their weight loss goals and maintaining their weight loss long-term.

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

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

PAR. 9. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits H and I, contain the following statements:

A. Our program has helped over a million people lose weight. We can help you lose 3 pounds per week on average -- guaranteed! (Exhibit H.)

B. Pam Yancy lost 40 pounds in 12 weeks. Average weight loss is 3 lbs. per week. (Exhibit I.)

PAR. 10. Through the use of the statements contained in the advertisements referred to in paragraph nine, including but not necessarily limited to the statements in the advertisements attached as Exhibits H and I, respondents have represented, directly or by implication, that the average rate of weight loss for participants in the advertised Physicians Weight Loss Centers LCD program is three pounds per week.

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

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

PAR. 13. In the routine course and conduct of their business, respondents have represented during initial sales presentations that consumers will typically reach their desired weight loss goal within the time frame computed for their program by Physicians Weight Loss Centers personnel.

PAR. 14. Through the use of the statements described in paragraph thirteen, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the

time they made the representation set forth in paragraph thirteen, respondents possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 15. In truth and in fact, at the time respondents made the representation set forth in paragraph thirteen they did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, respondents' representation as set forth in paragraph fourteen was, and is, false and misleading.

PAR. 16. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit J, contain the following statements:

Safe, effective and no injections. (Exhibit J.)

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the statements in the advertisement attached as Exhibit J, respondents have represented, directly or by implication, that the Physicians Weight Loss Centers VLCD programs are unqualifiedly free of health risks. Respondents have failed to disclose adequately that physician supervision is required to minimize the potential risk to customers of the development of health complications on very-low-calorie diets. In view of the representation that the Physicians Weight Loss Centers' VLCD program is free of health risks, the disclosure as to the requirement for medical supervision is necessary. Therefore, in light of respondents' failure to disclose, said representation was, and is, misleading.

PAR. 18. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit H, contain the following statements:

The Weight Loss Experts

Our Physicians, nurses and counselors supervise your complete program. They show you how to eat for healthy weight loss, oversee your progress and well-being, and teach you new eating habits for staying slim. (Exhibit H.)

PAR. 19. Through the use of the statements contained in the advertisement referred to in paragraph eighteen, including but not necessarily limited to the statements in the advertisement attached as Exhibit H, respondents have represented, directly or by implication, that their customers' health will be monitored regularly to ensure that the weight loss that customers experience is free of serious health risks.

PAR. 20. In the routine course and conduct of their business, respondents provide customers on respondents' LCD programs with diet instructions that require said customers, *inter alia*, to come in to a Physicians Weight Loss Center three times per week for monitoring of their progress, including weighing in. In the course of regularly ascertaining weight loss progress, respondents, in some instances, are presented with weight loss results indicating that a customer is losing weight significantly in excess of his or her projected rate of weight loss, which is an indication that the customer may not be consuming all of the calories prescribed by his or her diet instructions. Such conduct could, if not corrected promptly, result in health complications.

PAR. 21. When presented with the weight loss results described in paragraph twenty, respondents on many occasions have not disclosed to the customers that failing to follow the diet instructions and consume all of the calories prescribed could result in health complications. This fact would be material to consumers in their purchase and use decisions regarding the diet program. In light of the representation set forth in paragraph nineteen, and others in advertisements and promotional materials not specifically set forth herein, and in light of respondents' practice of monitoring customers on their LCD programs, said failure to disclose was, and is, a deceptive practice.

PAR. 22. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits H and L-N, contain the following statements:

A. WALK INTO THE RIGHT WEIGHT LOSS CENTER, AND YOU'LL SEE AN OBVIOUS DIFFERENCE.

(Picture of man in lab coat with stethoscope.)

At Physicians Weight Loss Centers, a physician is the first step to success. Most plans can't say that. So some of them make wild scary claims about prices instead. Let's weigh the facts. Our physicians, nurses and professional counselors guide you every step of the way . . . . (Exhibit L.)

B. A physician is the first step to weight loss success at Physicians Weight Loss Centers. That's something you won't see on most plans. The physician, along with nurses and professional counselors, guides you to successful weight loss on our high-fiber, low-fat, low cholesterol diet. Call and enroll today. (Exhibit M.)

C. Physicians, nurses, counselors help you lose and keep it off. (Exhibit N.)

D. The Weight Loss Experts. Our Physicians, nurses and counselors supervise your complete program. They show you how to eat for healthy weight loss, oversee your progress and well-being, and teach you new eating habits for staying slim. (Exhibit H.)

PAR. 23. Through the use of the statements contained in the advertisements referred to in paragraph twenty-two, including but not necessarily limited to the statements in the advertisements attached as Exhibits H and L-N, respondents have represented, directly or by implication, that customers participating in the advertised diet programs are actively supervised by the center physicians throughout the diet program.

PAR. 24. In truth and in fact, customers participating in the advertised diet programs are not actively supervised by the center physicians throughout the diet program. Therefore, respondents' representation as set forth in paragraph twenty-three was, and is, false and misleading.

PAR. 25. The advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibits A and K, contain the following statements:

A. If we guaranteed weight loss results in 21 days, would you spend $60? (Exhibit A.)

B. $99 FOR ALL THE WEIGHT YOU CAN LOSE*
Offer expires June 25, 1993
* Rules of guarantee available at all centers. (Exhibit K.)

PAR. 26. Through the use of the statements contained in the advertisements referred to in paragraph twenty-five, including but

not necessarily limited to the statements in the advertisements attached as Exhibits A and K, respondents have represented, directly or by implication, that the advertised price is the only cost associated with losing weight on the advertised Physicians Weight Loss Centers programs.

PAR. 27. In advertising the price of the Physicians Weight Loss Centers programs, respondents fail to disclose adequately to consumers the existence and amount of all mandatory expenses associated with participation in the programs. In light of respondents' representation as set forth in paragraph twenty-six that the advertised price represents the only cost associated with the Physicians Weight Loss Centers programs, said failure to disclose was, and is, a deceptive practice.

PAR. 28. In providing advertisements and promotional materials such as those referred to in paragraph four to their individual franchised centers for the purpose of inducing consumers to purchase their weight loss services and products, respondent PWLCA has furnished the means and instrumentalities to those centers to engage in the acts and practices alleged in paragraphs five through twenty-seven.

PAR. 29. The acts and practices of respondents as alleged in this Complaint constitute deceptive acts or practices in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

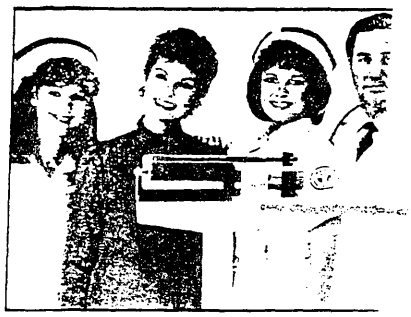
EXHIBIT A

Physicians WEIGHT LOSS Centers

If we guaranteed weight los results in 21 days, would yo spend $60?

Introducing the

GUARANTEED Success PLAN℠



"I lost 12½ pounds in 21 days, 46 in all!"

Louise Conant went from 171 to 125 pounds in 15 weeks.

- 21 days to results. GUARANTEED! Average weight loss 3 pounds per week*.
- Nutritionally sound, real food diet.
- Safe, effective and no injections.
- You'll learn eating habits to *stay* slim.

Call Now For Your FREE Weight Loss Consultatio
Open Mon.-Fri. 9 a.m.-7:30

OFFER EXPIRES

EXHIBIT A

Weight loss varies by individual.

000191

Physicians WEIGHT LO Centers.

With you every day, every pound of the way.℠

EXHIBIT B

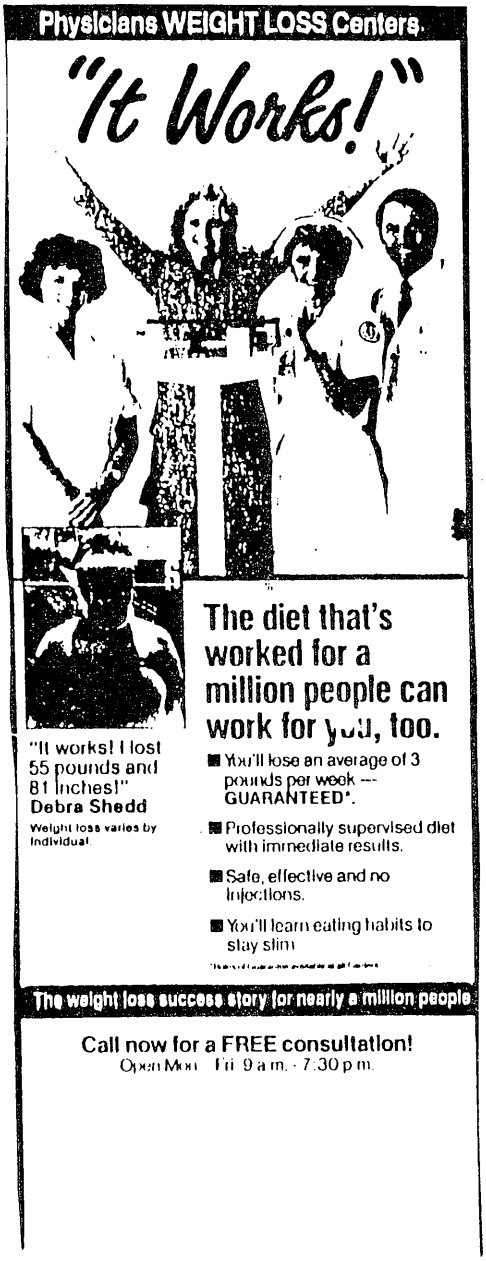

Physicians WEIGHT LOSS Centers
"It Works!"
"It works! I lost 55 pounds and 81 inches!"
Debra Shedd
Weight loss varies by individual
The diet that's worked for a million people can work for you, too.
You'll lose an average of 3 pounds per week — GUARANTEED*.
Professionally supervised diet with immediate results.
Safe, effective and no injections.
You'll learn eating habits to stay slim
The weight loss success story for nearly a million people
Call now for a FREE consultation!
Open Mon - Fri 9 a.m. - 7:30 p.m.

EXHIBIT C

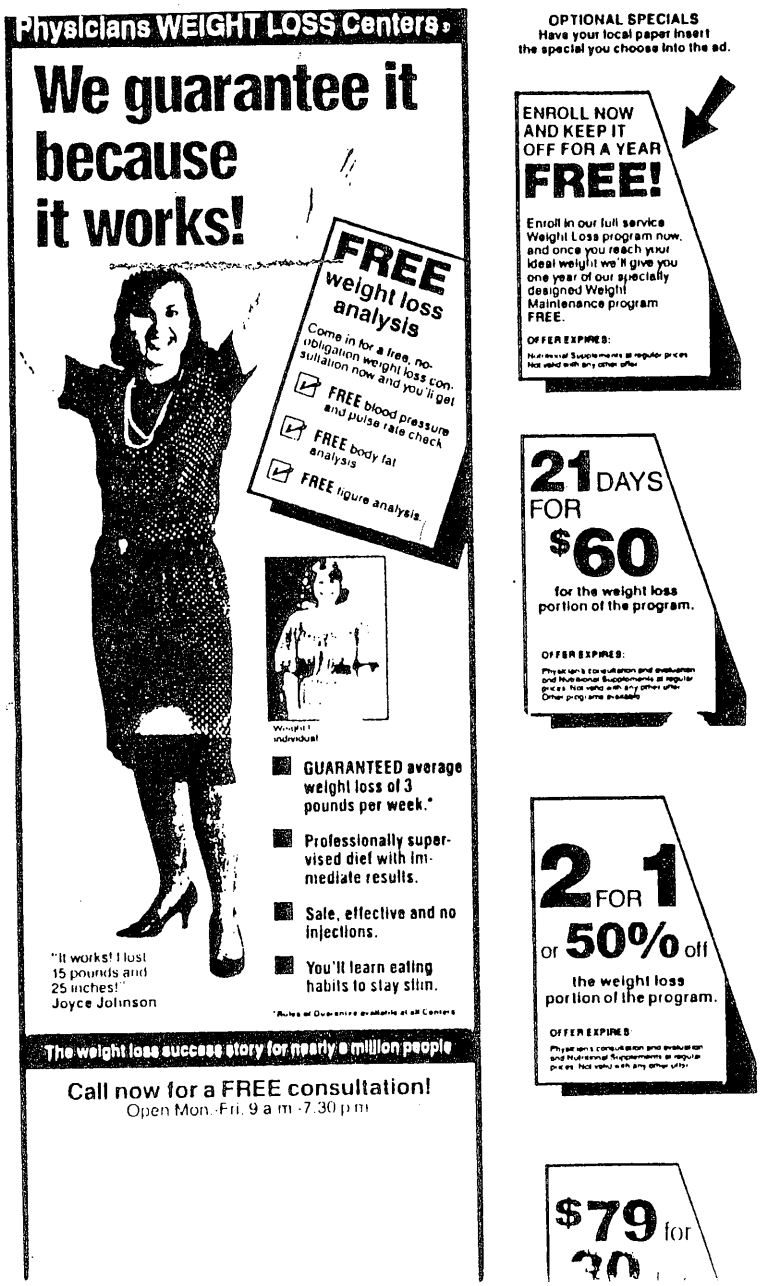

Physicians WEIGHT LOSS Centers
We guarantee it because it works!
FREE weight loss analysis
Come in for a free, no-obligation weight loss consultation now and you'll get
FREE blood pressure and pulse rate check
FREE body fat analysis
FREE figure analysis
"It works! I lost 15 pounds and 25 inches!" Joyce Johnson
GUARANTEED average weight loss of 3 pounds per week.*
Professionally supervised diet with immediate results.
Safe, effective and no injections.
You'll learn eating habits to stay slim.
The weight loss success story for nearly a million people
Call now for a FREE consultation!
Open Mon.-Fri. 9 a.m.-7:30 p.m.
OPTIONAL SPECIALS
Have your local paper insert the special you choose into the ad.
ENROLL NOW AND KEEP IT OFF FOR A YEAR FREE!
Enroll in our full service Weight Loss program now, and once you reach your ideal weight we'll give you one year of our specially designed Weight Maintenance program FREE.
OFFER EXPIRES:
21 DAYS FOR $60
for the weight loss portion of the program.
OFFER EXPIRES:
2 FOR 1
or 50% off
the weight loss portion of the program.
OFFER EXPIRES
$79 for

EXHIBIT D

RADIO-TV MONITORING SERVICE, INC.
3408 WISCONSIN AVENUE, N.W. • WASHINGTON, D.C. 20016 • 244-1901

PROGRAM:	DATE:
COMMERCIAL	MARCH 14, 1990
STATION OR NETWORK:	TIME:
WRC-TV	7:20 AM

PHYSICIANS WEIGHT LOSS CENTER AD

VOICEOVER: These are real photos of real people who successfully lost weight at Physicians Weight Loss Centers - a million in ten years.

LOUISE CONANT: I lost fifty pounds at Physicians Weight Loss Centers. It works.

VOICEOVER: Our professionally supervised program really works. We guarantee you'll lose an average of three pounds per week, and you'll see immediate results too.

AVA MACK: It works.

VOICEOVER: Play our "It Works" game. It's a 40% to 60% off the weight loss portion of our program not valid with any other offer.

(END)

EXHIBIT E-1

CES ADVERTISING
30 SPRINGSIDE DRIVE
AKRON, OH 44313
(216) 666-7952

COPY "Shedd" Radio (JPW-0104-A/1) 6/6/89

SPOKES: (NEED TWO VERSIONS MADE)	One weight loss program has been a success story for nearly/over a million people. Physicians WEIGHT LOSS Centers. Our proven program gives you immediate results. Our weight loss professionals help you lose every pound you want. And teach you new eating habits [illegible]
DEBRA:	(BY PHONE) Hi!
SPOKES:	Hi, Debra. You lost 60 pounds at Physicians WEIGHT LOSS Centers?
DEBRA:	I sure did! And 81 inches.
SPOKES:	That's terrific!
DEBRA:	That's your program. I saw results right away, lost all I wanted by eating regular grocery store food, and I've kept it off for two years now.
SPOKES:	Fantastic, Debra. Thanks. (SFX: CLICK OF PHONE)

000201

EXHIBIT E-2

CES ADVERTISING
30 SPRINGSIDE DRIVE
AKRON, OH 44313
(216) 666-7952

COPY

Individual weight loss varies, but what Physicians WEIGHT LOSS Centers did for Debra, we can do for you.

(TAG)

000201

EXHIBIT F


"EVERY WOMAN SHOULD FEEL LIKE I FEEL."
Pam Yancy lost 40 pounds in 12 weeks.
Physicians WEIGHT LOSS Centers.
SAVE 40-80% ON A NEW YOU FOR THE NEW YEAR!
Physicians WEIGHT LOSS Centers.

EXHIBIT G


Physicians WEIGHT LOSS Centers.
$88 WEIGHT LOSS SPECIAL*
IT WORKS because of the support and supervision you receive from our professional staff. People who understand the behaviors and attitudes of weight loss nutrition and wellness. Guiding you from short-term weight loss to long-term weight control. "It Works!"
OFFER EXPIRES:
Call now for a FREE Consultation
Open Mon. - Fri. 9 a.m. - 7:30 p.m.
Physicians WEIGHT LOSS Centers.

EXHIBIT H

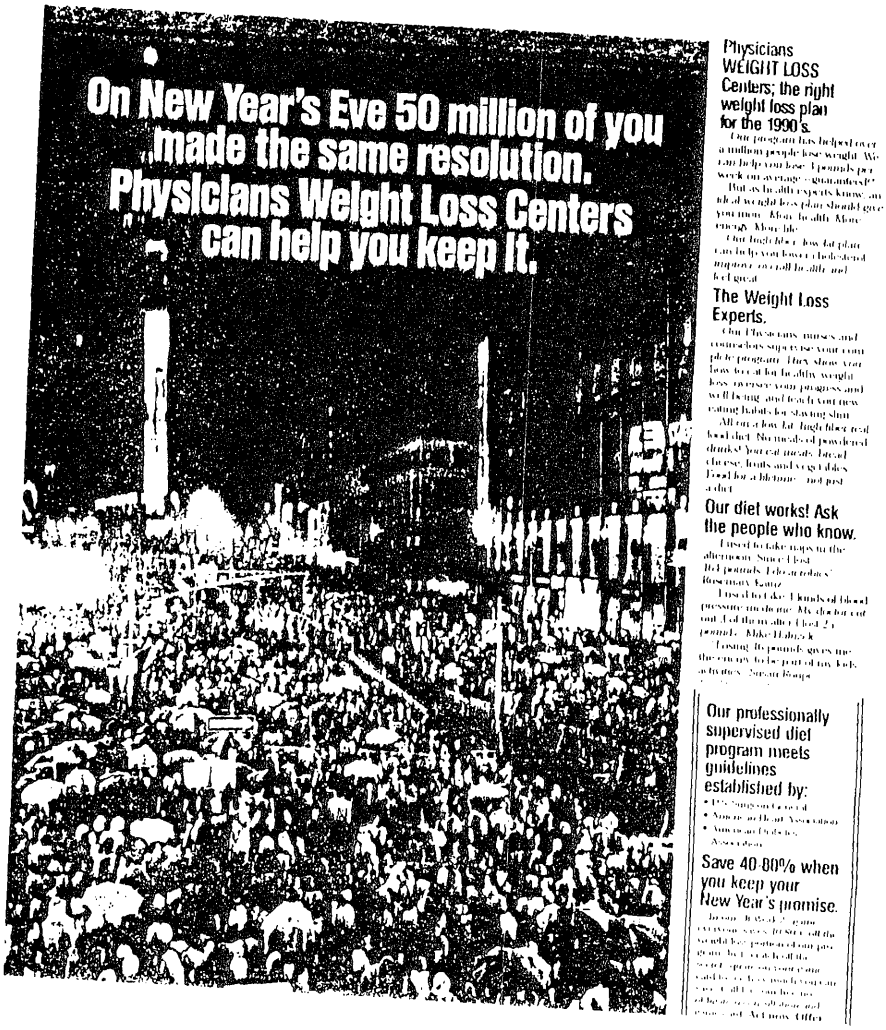

On New Year's Eve 50 million of you made the same resolution.
Physicians Weight Loss Centers can help you keep it.
Physicians WEIGHT LOSS Centers; the right weight loss plan for the 1990's.
The Weight Loss Experts.
Our diet works! Ask the people who know.
Our professionally supervised diet program meets guidelines established by:
Save 40-80% when you keep your New Year's promise.

EXHIBIT I


Physicians WEIGHT LOSS Centers
Pam Yancy lost 40 pounds in 12 weeks.
Avg. weight loss is 3 lbs. per week
Say goodbye to every pound you hate.
SAVE 40-80%! **
In our "It Works!" game, everyone saves 40%-80% off the weight loss portion of our program. Just scratch off the secret on your game card to see how much you can save. Call for your free consultation and game card. Offer expires 3-10-90.
**Off the weight loss portion of the program. Physician's consultation and evaluation and Nutritional Supplement at regular prices. Not valid with any other offer.
Call now for a FREE consultation!
Open Mon.-Fri. 7:30 a.m.-7:30 p.m. +Open at 7 a.m. ++Open at 9:00 a.m.
Alexandria 354-SLIM
Arlington/Ballston 841-0100
(Free Parking Now)
Crystal C++ 486-1600
Fairfax+ 591-2223
Manassas 361-4868
McLean++ 847-5353
Reston++ 478-5262
W. Springfield 451-4633
Bethesda++ 951-1006
Clinton++ 856-2000
College Park++ 982-0300
Gaithersburg 948-0088
Rockville 231-0650
Silver Spring++ 439-6111
Waldorf++ 932-4622
(Metro) 843-8897
D.C. Metro 457-1270
Physicians WEIGHT LOSS Centers
*Physicians do not own or operate Centers.
© 1990 Copyright Physicians WEIGHT LOSS Centers of America, Inc., Akron, Ohio 44313


CLEAR RECEPTION FOR ALL SEASONS!
Quality Satellite Systems starting at $2,988.95 fully installed
Local reception starting at $149.95
Davis Antenna
843-1166
800-4 ANTENNA


GET A GREAT DEA ON GREAT ENTERTAINMEN
BEACHES
BILL & TED'S EXCELLENT ADVENTURE
THE BLUES
Call Now and Get Your First month of
SHOWTIME AND
For The Price Of One!
MEDIA GENERAL CABLE OF FAIRFA
New Subscribers Save $25.00 on Install
(703) 378-8411
Current Subscribers Save $5.00 on Connect
(703) 378-3422
Serviceable areas only. No substitutions. Add-on service only. Not valid with other offers. First month once ($11.95) based on full premium service rate. Install required by 3-31-90


CARPET DISCOUNTERS
Your full service carpet shop!
SPRING SPECIAL
FEATURING NEW REVOLUTIONARY BREAKTHROUGH FROM DUPONT
DUPONT CERTIFIED
STAINMASTER
CARPET
STAIN RESISTANCE NEVER BEFORE AVAILABLE
DOZENS OF STYLES & COLORS—40-60% O
Your Living Room-Dining Room Combination Complete
Padding & Custom Installation
FINE FINISH
Tip Shear
Made of Dupont Nylon
5-Year Warranty
$395.00
Dense Tone-on-Tone
Sculptured Look
100% Dupont Nylon
5-Year Warranty
$595.00
BUY TODAY
IMMEDIATE INSTALLATION
WITH NO PAYMENTS 'TIL JUNE 1990
INTEREST FREE
Special Senior Citizen's Discounts
Free Estimates
Call
568-5900
EXHIBIT I

PHYSICIANS WEIGHT LOSS CENTERS, ET AL.

Complaint

EXHIBIT J

1484

EXHIBIT K

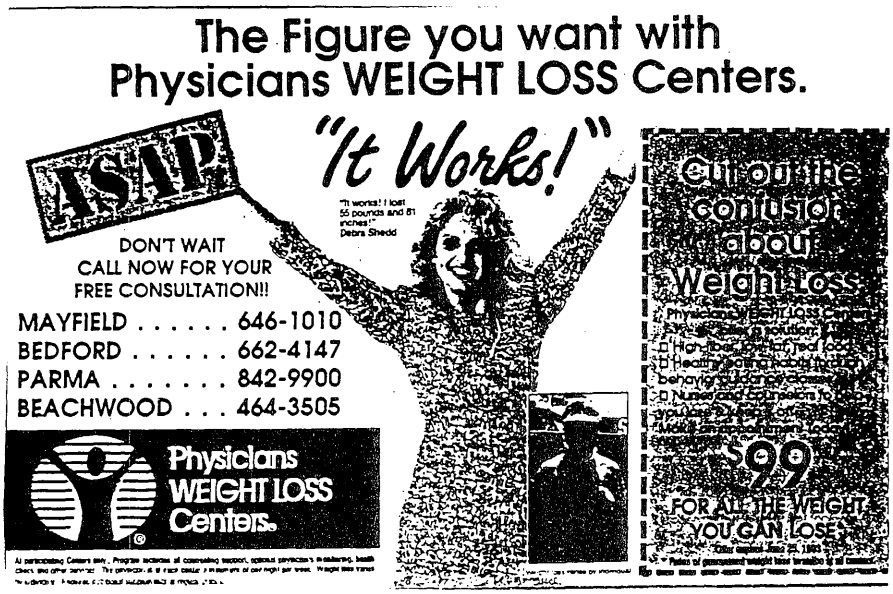

The Figure you want with
Physicians WEIGHT LOSS Centers.
ASAP
"It Works!"
"It works! I lost 55 pounds and 81 inches!" Debra Shedd
DON'T WAIT
CALL NOW FOR YOUR
FREE CONSULTATION!!!
MAYFIELD 646-1010
BEDFORD 662-4147
PARMA 842-9900
BEACHWOOD . . . 464-3505
Physicians
WEIGHT LOSS
Centers.
Cut out the
confusion
about
Weight Loss
$99
FOR ALL THE WEIGHT
YOU CAN LOSE*

EXHIBIT L

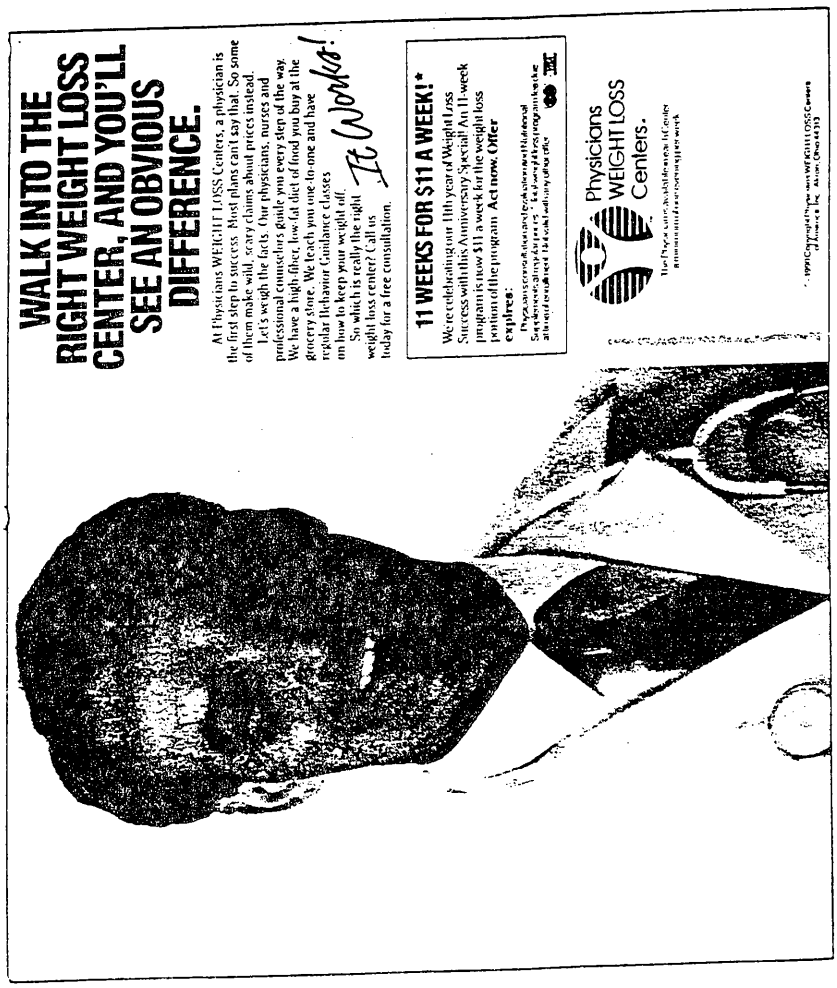

WALK INTO THE RIGHT WEIGHT LOSS CENTER, AND YOU'LL SEE AN OBVIOUS DIFFERENCE.
At Physicians WEIGHT LOSS Centers, a physician is the first step to success. Most plans can't say that. So some of them make wild, scary claims about prices instead.
Let's weigh the facts. Our physicians, nurses and professional counselors guide you every step of the way. We have a high-fiber, low-fat diet of food you buy at the grocery store. We teach you one-to-one and have regular Behavior Guidance classes on how to keep your weight off.
So which is really the right weight loss center? Call us today for a free consultation.
It Works!
11 WEEKS FOR $11 A WEEK!*
We're celebrating our 11th year of Weight Loss Success with this Anniversary Special! An 11-week program is now $11 a week for the weight loss portion of the program. Act now. Offer expires:
Physicians WEIGHT LOSS Centers.

EXHIBIT M

TOP

A physician is the first step to weight loss success at Physicians WEIGHT LOSS Centers. That's something you won't see on most plans. The physician, along with nurses and professional counselors, guides you to successful weight loss on our high-fiber, low-fat, low-cholesterol diet. Call and enroll today.

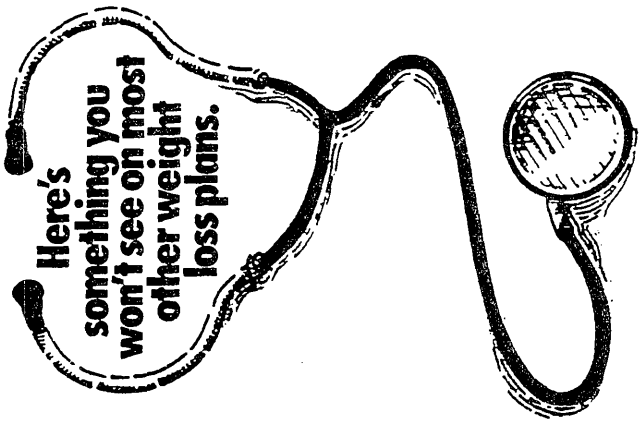
Lose All The Weight You Want For $99!

Right now you can lose all the weight you want for $99 for the weight loss portion of our proven program. Physician's consultation and evaluation and Nutritional Supplements at regular prices. Not valid with any other offer.

Offer Expires:

Physicians WEIGHT LOSS Centers.

TOP



000139

EXHIBIT M

EXHIBIT N

2 col. x 7½"

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 had 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 Physicians Weight Loss Centers of America, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its offices and principal place of business at 395 Springside Drive, Akron, Ohio.

2. Respondent Physicians Weight Loss Centers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its offices and principal place of business at 395 Springside Drive, Akron, Ohio.

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

DEFINITIONS

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

A. "*Competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, surveys, or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the relevant profession or science to yield accurate and reliable results.

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

C. "*Very-low-calorie diet*" or "*VLCD*" shall mean any dietary regimen that provides less than 800 calories per day.

D. "*Low-calorie diet*" or "*LCD*" shall mean any dietary regimen designed to cause weight loss that provides 800 calories or more per day.

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

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

same volume and in the same cadence as the representation that triggers the disclosure.

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

H. "*Affiliate*" includes, but is not limited to, any corporation with a majority of shareholders or directors in common with either respondent.

I.

It is ordered, That respondents Physicians Weight Loss Centers of America, Inc., a corporation, and Physicians Weight Loss Centers, Inc., a corporation, their successors, assigns and affiliates, their officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, about the success of participants in any weight loss program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation, provided, further, that for any representation that:

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

a. All participants who have entered the program where the representation relates to such persons; *provided, however,* that the required sample may exclude those customers who dropped out of

the program within two weeks of their entrance or who did not complete the program due to illness, pregnancy, or change of residence; or

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

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

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

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

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

B. Representing, directly or by implication, except through endorsements or testimonials referred to in paragraph I.E. herein, that participants of any weight loss program have successfully maintained weight loss, unless respondents disclose, clearly and prominently, and in close proximity to such representation, the statement: "For many dieters, weight loss is temporary"; *provided, further*, that respondents shall not represent, directly or by implication, that the above-quoted statement does not apply to dieters in respondents' weight loss program; *provided, however,* that a mere statement about the existence, design, or content of a maintenance program shall not, without more, be considered a representation that participants of any weight loss program have successfully maintained weight loss.

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

1. The average percentage of weight loss maintained by those participants;

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

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

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

b. The statement: "Physicians Weight Loss Centers makes no claim that this [these] result[s] is [are] representative of all participants in the Physicians Weight Loss Centers program."

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

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

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

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

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

MAINTENANCE INFORMATION

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

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

I have read this notice.

_____

(Client Signature) (Date)

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

provided, however, that if any potential participant who does not then participate in the program refuses to sign or accept a copy of such document, respondents shall so indicate on such document and shall not, for that reason alone, be found in breach of this subparagraph I.D.(2); and,

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

provided, further, that: (1) compliance with the obligations of this paragraph I.D. in no way relieves respondents of the requirement under paragraph I.A. of this order to substantiate any representation about the success of participants on any weight loss program in maintaining weight loss; and (2) respondents must comply with both paragraph I.D. and paragraph I.C. of this order if respondents include in any such short broadcast advertisement a representation about maintenance success that states a number or percentage, or uses descriptive terms that convey a quantitative measure such as "most of our customers maintain their weight loss long-term;"

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

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

1. What the generally expected success would be for Physicians Weight Loss Centers customers in losing weight or maintaining achieved weight loss; *provided, however*, that in determining the generally expected success for Physicians Weight Loss Centers customers, respondents may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

2. One of the following statements:

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

provided, further, that if endorsements or testimonials covered by this paragraph are made in a broadcast medium, any disclosure required by this paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure; *provided, however*, that:

(1) For endorsements or testimonials about weight loss success, respondents can satisfy the requirements of subparagraph I.E.(1) by accurately disclosing the generally expected success in the following phrase: "Physicians Weight Loss Centers clients lose an average of _____ pounds over an average _____- week treatment period;"

(2) If the weight loss success or weight maintenance success depicted in the advertisement is representative of what participants of a group or subset clearly defined in the advertisement generally achieve, then, in lieu of the disclosures required in either subparagraph I.E.(1) or (2) herein, respondents may substitute a clear and prominent disclosure of the percentage of all of respondents'

customers that the group or subset defined in the advertisement represents; and

(3) A clearly defined claim about respondents' very-low-calorie diet program, or low-calorie diet program, shall not require a disclosure as to representativeness for all of respondents' programs, where the claim does not refer to all programs.

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

G. Representing, directly or by implication, the price at which any weight loss program can be purchased, unless respondents disclose, clearly and prominently, either:

(1) In close proximity to such representation, the existence and amount of all mandatory costs or fees associated with the program offered; or

(2) In immediate conjunction with such representation, one of the following statements:

(a) "Plus the cost of [list of products or services that participants must purchase at additional cost]."

(b) "Purchase of [list of products or services that participants must purchase at additional cost] required";

provided, further, that in broadcast media, if the representation that triggers the disclosure is oral, the disclosures required by either (1) or (2) of this paragraph must also be made orally.

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

program, the existence and amount of any mandatory costs or fees associated with participation in the program;

provided, however, that:

(1) Respondents may satisfy this requirement by directing their weight loss centers to disclose the information, by providing the center personnel with suggested language to be used when responding to phone inquiries and by making their best efforts to ensure compliance with their directive to disclose price information over the telephone; and

(2) Respondents may satisfy the disclosure of food costs in connection with such telephone inquiries by the disclosure of average approximate weekly costs.

I. Representing, directly or by implication, the average or typical rate or speed at which prospective participants in any weight loss program will lose weight, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

J. Representing, directly or by implication, that prospective participants on respondents' weight loss program will reach a specified weight within a specified time period, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence substantiating the representation.

K. For any LCD program, failing to disclose, clearly and prominently, either (1) to each participant who, after the first two weeks on the program, is experiencing average weight loss that exceeds two percent of said participant's initial body weight or three pounds, whichever is less, for at least two consecutive weeks, or (2) in writing to all participants when they enter the program, that failure to follow the diet instructions and consume the total caloric intake recommended may involve the risk of developing serious health complications.

L. For any VLCD program, making any representation, directly or by implication, regarding its safety, unless respondents disclose, clearly and prominently, and in close proximity to any such representation, that physician monitoring is required to minimize the potential for health risks.

M. Misrepresenting, directly or by implication, the extent to which any weight loss program is supervised or monitored by physicians or any other health care professional.

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

II.

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

III.

It is further ordered, That respondents shall maintain for a period of three (3) years after the date the representation was last made and upon request make available to the Federal Trade Commission staff or inspection and copying, all materials possessed and relied upon to substantiate any representation covered by this order, and all test reports, studies, surveys or other information in their possession or control, including complaints from consumers, that contradict, qualify or call into question the representation.

IV.

It is further ordered, That respondents Physicians Weight Loss Centers of America, Inc., and Physicians Weight Loss Centers, Inc., shall distribute a copy of this order to each of their officers, agents, and to employees or other entities involved in the preparation and placement of advertisements or promotional materials, and, for a period of three (3) years from the date of entry of this order, distribute the same to all of respondents' future such officers, agents, representatives, independent contractors and employees. It shall be sufficient compliance with this provision as to employees with point-of-sale contact with customers to distribute a document that is approved by the Commission or its designated staff and contains the substantive provisions of this order.

V.

It is further ordered, That:

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

B. Respondents shall further make reasonable efforts to monitor their franchisees' and licensees' compliance with the order provisions; respondents may satisfy this requirement by: (1) taking reasonable steps to notify promptly any franchisee or licensee that respondents determine is failing materially or repeatedly to comply with any order provision; (2) providing the Federal Trade Commission with the name and address of the franchisee or licensee and the nature of the noncompliance if the franchisee or licensee fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the

order, diligently pursuing reasonable and appropriate remedies available under their franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

Provided, however, that respondents' compliance with this part shall constitute an affirmative defense to any civil penalty action arising from an act or practice of one of respondents' franchisees or licensees that violates this order where respondents: a) have not authorized, approved or ratified that conduct; b) have reported that conduct promptly to the Federal Trade Commission under this Part; and c) in cases where that franchisee's or licensee's conduct constitutes a material or repeated violation of the order, have diligently pursued reasonable and appropriate remedies available under the franchise or license agreement and applicable state law to bring about a cessation of that conduct by the franchisee or licensee.

VI.

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

Commissioner Owen dissenting as to the exception requiring full numerical disclosures involving quantitative weight loss maintenance claims in short radio and television advertisements.

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

The Commission's decision to approve and issue consent orders with these three major marketers of low calories diets represents an important, and largely appropriate, next step in the Commission's efforts to address allegations of false and unsubstantiated advertising claims in the diet industry. However, I must dissent on one aspect of the remedies in these matters.

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

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

Re: The Commission overruling the 1979 staff opinion letter regarding gasohol. *[Nebraska Gasohol Committee, R811005]*

January 8, 1993

Dear Mr. Sneller:

In October, 1979, the Federal Trade Commission staff, in an informal staff opinion issued to what is now known as the Nebraska Gasohol Committee, concluded that gasohol was not covered by either the definition of "automotive gasoline" in Title II of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. 2821,[1] or the Commission's Octane Rule, 16 CFR 306.[2] The purpose of this letter is to advise you formally of the Commission's view that, notwithstanding the earlier news expressed by the staff, gasohol is covered by the PMPA and the Octane Rule.[3] Accordingly, the 1979 staff opinion letter should not be given any weight.

In the 1979 opinion, gasohol was defined as a mixture of 90% unleaded gasoline and 10% ethyl alcohol. The staff noted that the definition of "automotive gasoline" in Section 201(6) of the PMPA is "gasoline of a type distributed for use as a fuel in any motor vehicle." The staff took the position that gasohol did not fall within the scope of the statutory definition because it was not gasoline, but a mixture of gasoline and alcohol.

When the staff issued its opinion in 1979, the Commission had not reviewed or approved staff's interpretation of the PMPA. The Commission first considered the issue in responding to a 1983 letter from the Honorable John Dingell, Chairman of the House Committee on Energy and Commerce. In the Commission's reply, then

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[1] Section 201(6) of the PMPA, 15 U.S.C. 2821(6), states that the term "automotive gasoline" means gasoline of a type distributed for use as a fuel in any motor vehicle.

[2] In 1979, the Nebraska Gasohol Committee was called the Agricultural Products Industrial Utilization Committee.

[3] Under the Commission's Rules of Practice, the staff is authorized to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. 16 CFR 1.1(b). However, staff advice is not reviewed or approved by the Commission and is given without prejudice to the right of the Commission to rescind the advice. 16 CFR 1.3(c).

Chairman James Miller stated that the Commission itself had not formed a view concerning the applicability of the requirements of the PMPA and the Octane Rule to gasohol. He also noted that staff opinions are not binding on the Commission. Chairman Miller further stated that the staff would continue to watch developments in this area, and, if appropriate, recommend further Commission action.

Recently, the Commission interpreted the PMPA and the Octane Rule as covering gasohol. The Commission enunciated its position concerning gasohol in testimony before the House Subcommittee on Energy and Power, in June, 1990, and again in June, 1991. In both occasions, the Commission testified that the mandatory posting of octane ratings is appropriate for gasohol.[4]

In February, 1992, the Commission addressed the gasohol issue in the context of an enforcement action, alleging that gasohol sales are covered by the Octane Rule. Specifically, the Commission alleged that the Wright Companies had violated the Octane Rule by, among other things, misrepresenting the octane content of automotive gasoline, including gasoline blended with alcohol, other oxygenates or blending agents. The Consent Decree resolving the Octane Rule charges against the Wright Companies also specifically requires future compliance with the Octane Rule in connection with the sale of automotive gasoline, including gasoline blended with alcohol, other oxygenates or blending agents.[5]

The Commission's conclusions are consistent with the legislative history of the PMPA. In drafting the PMPA, Congress was aware that all gasoline is a blend of ingredients (*e.g.*, tetraethyl lead and gasoline in the case of leaded gasoline, which was indisputably

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[4] *See* "Prepared Statement of the Federal Trade Commission on Gasoline Marketing before the House Energy and Commerce Committee, Subcommittee on Energy and Power, June 20, 1990," and "Prepared Statement of the Federal Trade Commission on the Octane Display and Disclosure Act of 1991 before the House Energy and Commerce Committee, Subcommittee on Energy and Power, June 12, 1991."

[5] The Consent Decree in the Wiliam P. Wright case (Civil Action No. 92-281H (CM)), which was negotiated after the Consent Decree in the Wright Companies case (Civil Action No. CV-S-92-157-HDM-RJJ), also covers gasohol. *See* the Commission's Press Releases relating to the Wright Companies and William P. Wright cases that were issued on February 26, 1992 and October 15, 1992, respectively.

covered by the definition of gasoline in the PMPA).[6] Congress stated that, as commercially distributed, gasoline contains components added to the blend after completion of the refining process. Congress referred to these components as additives, which are designed to boost octane, clean internal carburetor parts and impart specific characteristics to the gasoline, such as cold starting ability, resistance to vapor lock and prevention of fuel freezing. In fact, Congress specifically described tetraethyl leàd as an additive that was often used to boost the octane rating of gasoline.[7]

Consequently, the Commission concluded that Congress recognized that gasoline does not have a particular molecular structure, but is, rather, a mixture of differing molecules. In light of the PMPA's legislative history, there is no indication that Congress intended to exclude from PMPA coverage any gasoline-based fuel for which an octane rating can be determined using the (R+M)/2 test method.[8] Nor is there any indication that Congress intended to exclude a gasoline-based fuel merely because it contains components other than gasoline itself.

Since the 1979 staff opinion was issued, gasohol has become an increasingly common automotive fuel and the ethanol in gasohol has come to be viewed generally as a relatively low-cost octane enhancer. Ethanol has become more popular as lead, also an octane enhancer, has been increasingly regulated by the Environmental Protection Agency. Rather than always being sold as "gasohol," as it was when the 1979 staff opinion was issued, gasohol is now often marketed either as "gasoline," or with an explanation that the gasoline contains ethanol. Finally, gasoline blended with 10% ethanol, does not lose its essential character as gasoline which can

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[6] H.R. Rep. No. 161, 95th Cong., 1st Sess. 16-18 (1977) and S. Rep. No. 732, 95th Cong., 2d Sess. 19-20 (1978).

[7] *Id.*

[8] *See* PMPA Sections 201(1) and (2) and 202(a)(1). Gasoline refiners are required to determine the octane ratings of the gasoline they produce in accordance with this formula. The formula is the sum, divided by two, of the Research Method and the Motor Method, two accepted laboratory test methods for evaluating the antiknock performance of automotive gasoline. This formula and method for determining the octane rating of automotive gasoline - (R+M)/2 - is recommended by the American Society for Testing and Materials ("ASTM"). The test method is referenced and discussed in ASTM D4814, "Standard Specification for Automotive Spark-Ignition Engine Fuel." Congress specified this method in the PMPA, and it was adopted in the Commission's Octane Rule.

be demonstrated by the fact that its octane rating can be determined by following the (R+M)/2 formula specified in the PMPA. For these reasons, against the historical legislative background discussed above, the Commission has interpreted the PMPA and the Octane Rule as covering gasohol.

The Energy Policy Act of 1992, enacted into law on October 24, 1992, amends the PMPA to extend automotive fuel posting requirements to all liquid automotive fuels. When the required conforming amendments to the Octane Rule become effective one year after the date of enactment of the Act, gasohol will be covered expressly by the Octane Rule.[9]

Pursuant to Rule 1.3(b) of the Commission's Rules of Practice, any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. This Commission opinion, overruling the 1979 staff opinion letter on this subject, has been placed on the public record for the benefit of interested persons.

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[9] The Energy Policy Act of 1992, Pub. L. No. 102-486 (1992).

Re: The application of the Non-Profit Institutions Act to sales of pharmaceuticals by non-profit hospitals to related non-profit long-term care facilities. *[Presentation Health System, P934006]*

December 21, 1993

Dear Ms. Lee:

This letter responds to your September 1, 1993, letter requesting an advisory opinion from the Commission on the application of the Non-Profit Institutions Act, 15 U.S.C. 13c, to sales of pharmaceuticals by non-profit hospitals to related non-profit long-term care facilities.

According to your letter, your client, Presentation Health System, manages hospitals and long-term care facilities that are separate corporate non-profit entities controlled and sponsored by a single religious order, The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota. You ask whether the hospitals, which own and operate in-house pharmacies and receive preferential price treatment that is exempt from the Robinson-Patman Act, 15 U.S.C. 13, by virtue of the Non-Profit Institutions Act, may resell pharmaceuticals at cost to their long-term care affiliates. Based on the information provided in your letter, we believe that the sales you describe would be similarly exempt under the Non-Profit Institutions Act, as long as the long-term care facilities purchase the pharmaceuticals for their own use.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by . . . hospitals, and charitable institutions not operated for profit." Although the phrase "for their own use" limits the categories of individuals to whom the supplies can be resold, *see Abbott Laboratories v. Portland Retail Druggists Ass'n,* 425 U.S. 1 (1976), the Commission has said that the "own use" limitation is not "intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable

institution's own use." Commission Opinion Letter, 89 FTC 689 (1977).[1] The Commission further stated that:

> A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman application all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose.

Id.

In the situation that you describe, where the hospitals and long-term care facilities are affiliated, the Commission believes that there is a further basis for exemption under the Non-Profit Institutions Act. The Presentation organization may be regarded as a unit having purchased the pharmaceuticals for its "own use," comprised of the use by its hospitals and its long-term care facilities.

In light of the above, the Commission believes that the resales of pharmaceuticals as you describe would be exempt from the Robinson-Patman Act, provided that the pharmaceuticals are acquired for the long-term care facilities' "own use," as interpreted in Abbott Laboratories.

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. The Commission retains the right to reconsider the questions involved and, with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion, if the public interest so requires.

Copies of your request and this response are being placed on the public record pursuant to Section 1.4 of the Commission's Rules of Practice.

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[1] This opinion letter was issued in response to a request for advice from St. Peter's Hospital of the City of Albany. The request described a situation where a non-profit hospital receiving preferential price treatment permitted by the Non- Profit Institutions Act wished to resell pharmaceuticals, at cost, to a non-profit nursing home that was purchasing its drugs at retail from local drug stores.

Letter of Request

September 1, 1993

Dear Sir:

As legal counsel for the Presentation Health System (hereinafter referred to as "PHS"), a nonprofit corporation organized and existing under the South Dakota Nonprofit Corporation Act, I am hereby requesting an advisory opinion, pursuant to 16 CFR 1.1, *et. seq.* from the Commissioner with regard to the following proposed sales of pharmaceuticals by nonprofit hospitals which are part of the Presentation Health System.

Facts

The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota, a 501(c)(3) religious order corporation, sponsors and controls certain nonprofit hospitals and nonprofit long-term care, nursing home entities within the State of South Dakota. The Presentation Health System, a nonprofit corporation, is delegated the managerial responsibilities for these health institutions (hospitals and long-term care facilities).

The hospitals own and operate pharmacies within the walls of the respective hospital institutions, and as such are entitled to the preferred price treatment permitted to such hospitals by virtue of the Nonprofit Institutions Act exemption under the Robinson-Patman Act. 15 U.S.C. 13c.

The hospitals referred to are all organized and exist under the South Dakota Nonprofit Corporation Act. The hospitals are each situated in separate communities within the State of South Dakota, and in each community wherein a hospital is located there is also, separately located, a long-term care institution.

It should be noted that the hospitals and long-term care facilities are separate corporate entities, however, all are controlled and sponsored by the Religious Order.

The hospitals are members of a group purchasing organization which enables purchasing of pharmaceuticals at discounts.

Issue

The hospitals wish to sell pharmaceuticals within this related group of long-term care facilities for the same reduced cost that the hospitals purchase from the pharmacy suppliers. The long-term care facilities do not have their own pharmacies and must purchase from local retail pharmacies at higher prices.

(1) Would proposed sales of pharmaceuticals from these hospitals to the long-term care facilities, which are related, be considered permissible sales under the Nonprofit Institutions Act exemption set forth in the Robinson-Patman Act?

(2) If it would not be a sale deemed to be permissible can such sale be justified on the grounds that the long-term care facility would in and of itself be entitled to preferential price treatment if it elected to own and operate a pharmacy within the long-term care facility?

Thank you for your time and attention to this matter. You may send the Advisory Opinion to me at the above address.

Very truly yours,

Tamara D. Lee
Office of General Counsel

Re: Diamond Rug & Carpet Mills, Inc. Petition to Quash or Limit Civil Investigative Demands and for Alternative Relief. File No. 912-3409.

January 29, 1993

Dear Mr. Steele:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash or Limit Civil Investigative Demands and for Alternative Relief ("Petition"), which you filed on behalf of your client, Diamond Rug & Carpet Mills, Inc. ("Diamond" or "Petitioner"), in the above-referenced matter.

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). Pursuant to Rule 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return date in this ruling, unless the Commission otherwise specifies.

The Petition is denied in part and granted in part for the reasons stated below.

I. Background

On April 23, 1992, the staff of the Federal Trade Commission Dallas Regional Office ("DRO") informed attorneys representing Diamond that the DRO was conducting a non-public inquiry to determine whether Diamond was violating the Textile Fiber Identification Act ("Textile Act") and the (Federal Trade Commission Act ("FTC Act") in its labeling, invoicing, and advertising of carpet fiber content and weight. In a letter of that date to Diamond's attorneys, the staff of the DRO requested a listing of Diamond's customers, which showed the name, address, telephone number and

dollar purchases for each of the years 1990, 1991, and 1992 to date.[1]

After an exchange of communications, the DRO staff offered, by letter of May 4, 1992, to narrow the requested information to a simple list of the names and addresses of all Diamond's customers, and, for Diamond's customers who purchased either of two specified carpet lines, a second list showing each customer's purchases of those two product lines. Diamond did not produce the requested information.[2]

On August 3, 1992, the Commission issued two Civil Investigative Demands ("CIDs") for the production of documents and written interrogatories to Diamond. The CIDs were issued pursuant to a Resolution Directing Use of Compulsory Process in Nonpublic Investigation, dated August 4, 1982. On August 17, 1992, counsel for Diamond contacted the DRO staff concerning the CIDs.[3] Diamond objected to the CIDs on various grounds and requested an extension of time to respond to the CIDs. The DRO extended the return date until August 31, 1992. Counsel for Diamond and the DRO staff were unable to resolve Diamond's objections to the CIDs. On August 31, Diamond filed this Petition. On September 17, 1992, Commissioner Owen heard oral presentations from Diamond and the DRO on the Petition.

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[1] Petitioner's claim that the request was for information on two styles of carpet is incorrect. Memorandum in Support of Petition to Quash or Limit Civil Investigative Demands or for Alternative Relief ("Memorandum" or "Mem.") at 3. The initial request was for all styles of carpet. The DRO later narrowed the request to two styles of carpet. *See*, Mem., Exhibits B and F.

[2] Petitioner's claim to have voluntarily produced a list of customer names, Mem. at 3, was in error. The names were not produced until after the oral presentation before Commissioner Owen on September 17, 1992. Transcript of Oral Presentation before Commissioner Owen ("Tr.") at 50, 72.

[3] Robert Steele, Esq. was retained by Diamond after the receipt of the CIDs. DRO staff's previous contacts had been with other attorneys representing Diamond.

II. Specific Objections

A. Petitioner asserts that the CIDs do not state the nature of the conduct constituting the alleged violation which is under investigation.

Petitioner correctly notes that the Commission is required to satisfy certain statutory standards when it issues CIDs. Section 20 of the FTC Act, 15 U.S.C. 57 b-l(c)(2), provides:

> Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

Petitioner then asserts that "there is not one word in this Civil Investigative Demand about the nature of the conduct under investigation." Mem. at 7. Petitioner further asserts that the "[r]esolution does not even authorize an investigation under the Federal Trade Commission Act . . . ." *Id.* The Petitioner is incorrect in these assertions; the CIDs appropriately state the nature of the violation under investigation, and appropriately cite the provisions of applicable law.[4]

The CIDs note that the subject of the investigation is Diamond Rug and Carpet Mills, Inc., and incorporate by reference an attached Resolution Directing Use of Compulsory Process in Nonpublic Investigation. Mem., Exhibit D. The resolution states that the "Nature and Scope of Investigation" are:

> To determine whether or not importers, importer-manufacturers, various firms and others are or may be engaged in acts or practices which may be in violation of the Wool Products Labeling Act, the Textile Fiber Products Identification Act and Rules and Regulations promulgated under these Acts, and the Federal Trade Commission Act, as amended, including misbranding,

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[4] The Commission's CID authority is modeled after the Antitrust Civil Process Act, 15 U.S.C. 1311-1314. Under that statute, courts have upheld similar CIDs against the same attacks that are made here. *See* Petition of Gold Bond Stamp Company, 221 F. Supp. 391, 397 (D. Minn. 1963), aff'd, 325 F.2d 1018 (8th Cir. 1964); *Hyster Co. v. United States*, 338 F.2d 183, 185-186, (9th Cir. 1964); and 339 F.2d 346, 347 (7th Cir. 1964)

deceptive invoicing, improper record-keeping or false advertising of wool and textile fabrics and other products in or affecting commerce.

Mem. Exhibit E.

Thus, the specific conduct under investigation -- misbranding, deceptive invoicing, improper record-keeping, and false advertising -- are all listed. In addition, the provisions of applicable law are cited -- the Textile Fiber Products Identification Act and the Federal Trade Commission Act.[5] Accordingly, Petitioner's claim that no information is given as to the nature of, or legal basis for, the investigation is incorrect. Furthermore, Petitioner has not provided sufficient basis for its assertion that "a more specific description of Diamond's conduct is required." Mem. at 5. The resolution which is incorporated by reference into the CID identifies four specific types of conduct under investigation. At the early stage of an investigation, before the Commission staff has had access to the fruits of compulsory process, this is a reasonably specific rendition of the conduct under investigation.

B. Petitioner asserts that the CIDs deprive Petitioner of due process and constitute an unreasonable search and seizure.

This argument is also based on Petitioner's assertion that the description in the CIDs of the conduct under investigation lacks the specificity required by Section 20 of the FTC Act. In this case, the Petitioner argues that because the CIDs lack a description of the conduct under investigation, a federal court could not determine whether "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." Mem. at 8, *quoting United States v. Morton Salt*

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[5] While the resolution also mentions the Wool Products Labeling Act, the DRO staff made clear, as early as their letter of April 23, 1992, that they were investigating Diamond only for possible violations of the Textile Act and FTC Act.

Petitioner argues that the reference to the Federal Trade Commission Act in the resolution is limited to rules and regulations promulgated thereunder. Tr. at 10. The better reading of the resolution is that it is intended to cover violations of the Act itself.

Co., 388 U.S. 632, 652-653.[6] For the reasons discussed in connection with our determination on the Section 20 issue above, we find the CIDs to be sufficiently specific to enable a court to make the determination required under Morton Salt.[7]

C. Petitioner asserts that the CIDs are so overboard as to deprive respondent of constitutional protection.[8]

Petitioner asserts that the CIDs are constitutionally overboard, and that "compliance . . . would virtually cripple it. Mem. at 14.

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[6] A similar argument raised against CIDs issued under the Antitrust Civil Process Act has been rejected by the courts. *See* note 4 *supra*, and cases cited therein.

[7] The Petitioner argues that the resolution description is constitutionally infirm, in part, because no sitting Commissioner voted on it, Mem. at 10; however, the resolution continues to be valid and binding. Petitioner also argues that the resolution does not specify a particular product or geographic market. Mem. at 11. The resolution specifies that the investigation covers "wool and textile fabrics and other products in or affecting commerce." Mem. Exhibit E. Within these confines, the investigation is thus coextensive with Petitioner's product line (carpets) and geographical sphere of operation (nationwide).

Since Petitioner does not manufacture multiple lines of products unrelated to the focus on the investigation, such as china or screwdrivers, it is unclear how Petitioner has insufficient notice as to the nature of the investigation. This is particularly so, in light of staff's willingness to initially limit the styles of carpets involved.

[8] Petitioner frames its overall objection to the CIDs with a broad attack on the Commission and Commission staff, suggesting that the CIDs may be "reprisals" against Diamond and part of a "fishing expedition," . . . triggered by the actions of a malcontent distributor located in Dallas, Texas." Mem. at 12-13. It would be inappropriate at this point in the investigation to detail any evidence that staff may have accumulated regarding allegations that Diamond has engaged in misbranding, deceptive invoicing, improper record-keeping, and false advertising in violations of the Textile Act and the FTC Act. However, it must be noted that Petitioner has cited insufficient basis for its allegations that the DRO staff was not interested in the information the DRO staff requested and may be engaged in "reprisals" against Petitioner, Memo at 12, or that the Commission is using its powers for "harassment and intimidation." Mem. at 13. The DRO staff originally sought information through a voluntary access letter, limited to information concerning Diamond's customers, in order to pursue its investigation. When Diamond's attorneys represented that only some of the information was available, the DRO tailored their request to the information that they were told was available, and further limited their request to two styles of carpet to minimize the burden on Diamond, consistent with the staff's investigative needs.

These attempts by the DRO staff to accommodate Diamond, while obtaining the data they needed for their investigation, proved fruitless. Only after the DRO staff were able to obtain information voluntarily from Diamond, was the production of documents and answers to interrogatories compelled through the issuance of CIDs by the Commission. While the CIDs which the Commission issued were broader than the original voluntary request for information made by the DRO, this is not, in and of itself, evidence of any reprisal or harassment. When the Commission must use compulsory process to obtain information, it is prudent and efficient for the Commission to seek all of the information that it reasonably anticipates will be necessary to the investigation. Thus, Petitioner has provided insufficient basis for the attack on the staff's motives in seeking the issuance of these CIDs.

In reviewing claims of burden, it is instructive to restate the general rules that govern their consideration. First, "the burden of showing that an agency subpoena is unreasonable remains with the respondent." *FTC v. Rockefeller*, 591 F. 2d 182, 190 (2d Cir. 1979), quoting *SEC v. Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047, 1056 (2d Cir.1973), *cert. denied*, 415 U.S. 915 (1974); *accord FTC v. Texaco Inc.*, 555 F. 2d. 862, 882 (D.C.Cir. 1977)(en banc), *cert. denied*, 431 U.S. 974 (1977). In Brigadoon, the Second Circuit added that "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." 480 F. 2d at 1056.

Second, as the court stated in Texaco, "[w]e emphasize that the question is whether the demand is unduly burdensome or unreasonably broad." It added:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest . . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d at 882 (emphasis in original)(footnotes omitted).

Finally, in order to attempt to meet the burden of showing unreasonableness, Petitioners must present something more than unsupported conclusions and unsupported claims of burden. In Rockefeller, for example, respondents prepared and submitted estimates of compliance costs. 591 F. 2d at 190. From this, it should be clear that a challenge to agency compulsory process based upon a claim of burden must be supported by some reasonable, substantial estimate of the cost of compliance and its relationship to the respondent's ongoing business operations. Unsubstantiated, conclusory claims will not meet the test -- they will not even come close. Federal Trade Commission Letter Ruling Re: Petition of Megatrend Telecommunications, Inc. to Limit and/or Quash CID, File No. 902 3281 (June 24, 1991).

Petitioner has objected to various CID specifications on burdensomeness grounds for several reasons, each of which is discussed separately in the following sections.

1. The document requests

a. Specification 1

Specification 1 requests "balance sheets, income statements of retained earnings, statements of changes in financial position, and statements of financial operations for the company" for the years 1989, 1990, 1991, and 1992. Diamond's objection is that this information is unrelated to deceptive practices relating to fiber content and that the request "must be regarded as simply another attempt to harass" Diamond. Mem. at 14.

Information showing the size, scope, and profitability of operations is relevant in any investigation of possible unlawful practices in interstate commerce, and the Commission has been routinely upheld in requesting such general financial background information. *See, e.g., FTC v. Invention Submission Corp*, 965 F.2d 1086 (D.C. Cir. 1992). Petitioner's allegation of harassment is unsupported.

b. Specification 2

Specification 2 calls for the production of certain documents that were provided to, or made available to, Diamond's employees, in connection with certain company procedures. Petitioner argues that this specification would call for the production of "every piece of paper for a three-year period that pertains to the manufacturing and sale of all 150 styles of carpet manufactured by Diamond, throughout the United States" and objects that this specification is too broad to be authorized by the Textile Act. Mem. at 15. Since the investigation is also of violations of the FTC Act, the objection by Petitioner is without merit.

If Petitioner's objection is generally that the specification is burdensome under either act, its argument still fails. Petitioner has provided insufficient substantiation for its burden argument. Petitioner argues that the specification would require production of "every" document pertaining to the manufacture and sale of carpet

during the relevant time period, an allegation that is belied by the examples given in the specification as non-exclusive guidance (*e.g.*, "training manuals and materials, sales manuals, forms, employee manuals, policy manuals, policy bulletins, and policy statements"). Moreover, Petitioner has not given the Commission any estimate of how many documents are involved. Although the Affidavit in Response to Civil Investigative Demands submitted by Mr. Ronald Moreland asserts that the search would take "months," there is no basis provided for that conclusion. Mem., Exhibit A ("Moreland Aff.") at 11. Absent such a specific showing of burden, the Commission declines to quash or modify the specification.

c. Specification 4

This specification calls for the production of all promotional materials relating to carpet used by or provided by Diamond. We understand Petitioner's attack on this specification as "a classic fishing expedition," Mem. at 15, to be an attack on the burdensomeness of the demand and the relevance of this material.

To the extent that Petitioner is arguing burden, the Commission rejects those arguments because Petitioner has provided no basis for such a conclusion. The starting point in analyzing the relevance of information is recognition that courts give "relevance" a broad interpretation in enforcing Commission compulsory process. As the United States District Court for the District of Columbia has stated, "[b]ecause the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections." *Federal Trade Comm. v. Invention Submission Corp.*, 1991-1 Trade Reg. Rep. (CCH) paragraph 69,338 (1991) at 65,351, aff'd, 965 F.2d 1086 (FTC Cir. 1992). More particularly, relevance is measured against the agency's general purpose in gathering the investigative materials as described by the underlying resolution authorizing compulsory process. *FTC v. Texaco,* 555 F.2d at 874.

In this case, the resolution specifies that the subject of the investigation is possible violations of both the Textile Act and the

FTC Act. Promotional materials, which include various representations about products, can be relevant to an investigation of violations of both acts, which cover various types of false representations. Petitioner's relevance argument must be rejected.

d. Specification 5

Specification 5 calls for the production of all documents relating to each sale of carpet by Diamond. Petitioner objects that this specification is "plainly punitive," because of the burden that it imposes. Mem. at 16. Although the Petition asserts that Diamond has over 25,000 customers, and "millions of documents" must be brought together to comply with this specification, *id.*, the Petition lacks the specificity and substantiation required to support a claim of undue burden.[9] If files are well organized and easily accessible, mere volume of documents may not necessarily substantiate a burden claim. Here we have only unsubstantiated allegations of burden, with no explanation of why complying with the specifications will unduly burden the Petitioner. Petitioner's argument must be rejected.

The DRO staff have agreed to initially limit this request to two styles of Diamond carpet, SP 099 and 429 High Society. In determining an appropriate time period within which to order compliance with these CIDs, the Commission has taken into consideration this offer by the DRO staff to require only documents relating to these two styles in the initial document production. Should further production, relating to other styles of carpet, prove necessary, Petitioner shall have until 30 days following the staff's written request for such production.

e. Specification 6

Specification 6 calls for the production of all documents relating to customer complaints concerning carpet. Petitioner

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[9] It is instructive to compare the lack of detail in this Petition and the Affidavit of Mr. Moreland with the level of detail in Petition of Center Art Galleries-Hawaii, Inc., to Limit or Quash the Civil Investigative Demand, File No. 872-3209, and the affidavit attached thereto.

objects that this specification is "a classic example of overbreadth," giving examples of customer complaints that would not be relevant to the inquiry, such as complaints about discourteous sales people, incorrect invoicing, and late shipments.

There may be some complaints encompassed in the specification that are unrelated to the subject matter of this investigation.[10] First, complaints about carpet other than that marketed or manufactured by Diamond would appear to be irrelevant to this investigation. The Commission therefore limits the specification to customer complaints concerning carpet manufactured or marketed by Diamond. In addition, the DRO staff agreed that there could be types of customer complaints that are irrelevant to their investigation, and agreed to modify the request to limit it to complaints about carpet "characteristics and quality."

Petitioner objects that DRO's proposed modification is also overboard, because the complaints could relate to some aspect of carpet quality unrelated to fiber content. While it is true that some complaints about quality of carpet may be unrelated to violations of the Textile Act or the FTC Act, it is not possible to segregate customer complaints into categories that fit neatly into what is or is not evidence relevant to a violation. For example, complaints that do not mention fiber content, such as complaints about color problems, or excessive wear, may in fact be traceable to violations of the Textile Act, such as substituting cheaper, less durable fibers for the fibers claimed on the label.

The Commission therefore modifies this specification to require the production of all documents related to customer complaints concerning the quality or characteristics of carpet manufactured or marketed by Diamond. Characteristics would include any distinguishing trait, quality or property. *See* Webster's New Collegiate Dictionary.

f. Specification 8

Specification 8 calls for the production of all documents acquired by, or provided by, Diamond in any investigation or legal

[10] Petitioner's example of complaints about discourteous sales people is inapposite since the specification expressly relates to complaints about carpet, not personnel behavior.

proceeding to which Diamond is a party, and in which carpet quality, fiber content or weight is an issue. Petitioner's objection to this specification is that it would call for the production of documents relating to pending litigation between Diamond and a former distributor of its carpet. According to Petitioner, there is a court imposed confidentiality requirement in that litigation that would prevent production of some documents. Mem. at 18.

Given the limited objection of Petitioner, the Commission modifies this specification to exclude documents relating to litigation, if Diamond is prohibited from releasing the documents due to a court order.[11] If there are documents which are excluded from production under this specification by this modification, Petitioner must, in lieu of production of the documents, identify the litigation to the DRO staff, including the parties to the litigation.

2. The interrogatories

Petitioner objects to Interrogatories 4, 9, 10(a), 11, 13, 14, 15, and 21 on grounds that they are overboard, irrelevant, and of a harassing nature, based on the Affidavit of Ronald Moreland. Mem. at 18, Exhibit A. Petitioner's objections to the interrogatories are cursory, and Mr. Moreland's Affidavit provides little specific information in support of the claim of undue burden.[12]

The interrogatories go to the heart of an investigation into possible misbranding, deceptive invoicing, improper record- keeping,

[11] Protective orders often prohibit parties from disclosing other parties' documents and information, but not their own. This modification only relieves Petitioner of the obligation to produce those documents which it is prohibited by court order from disclosing. The modification does not relieve Petitioner's obligation to produce its own documents, if the court order permits it, even when the order prohibits Petitioner from disclosing other partie' documents.

[12] The precise nature of Petitioner's objections is difficult to discern in that not all of the interrogatories mentioned in Petitioner's Memorandum are mentioned in the Moreland Affidavit, and not all of the interrogatories mentioned in the Moreland Affidavit are mentioned in the Memorandum. The Moreland Affidavit mentions Interrogatories 4, 5, 6, 8, 9, 10, 13, 14. Moreover, the support provided by Mr. Moreland's affidavit is further complicated by the fact that he has sworn to matters of which he had no personal knowledge. For example, he swore that Petitioner had already turned over a list of 3,000 customer names to the DRO. Moreland Aff. paragraph 9 f. In fact, the Commission learned at the oral presentation that Petitioner had not turned over any such list. Tr. at 72.

or false advertising. One central theme of an investigation of this nature is whether the carpet produced and sold matches the description on the labels of the carpet. The interrogatories seek information necessary to determine how carpet is produced by Diamond, including what fibers are used, and how it is then labeled, including how the fiber content is labeled. Some of the interrogatories seek the identification of potential witnesses, and some seek descriptive explanations of what transpires in the Diamond production facilities. In contrast to these legitimate rationales for the information requested, Petitioner has provided no support in its Memorandum for its allegations as to the burden imposed by the interrogatories.

To the extent that the Moreland Affidavit does not add any particulars to the general argument in the Memorandum, we reject Petitioner's argument as unsupported. We now examine those objections for which the Moreland Affidavit provides additional detail.

a. Interrogatory 4

Interrogatory 4 calls for the identification of each individual who perform machine set-up duties, and for information on the individual's employment history with Petitioner. The information is potentially relevant to the investigation. By identifying and then interviewing, or taking testimony from, employees actually involved in setting up Diamond's machines, the staff may be able to determine how Diamond's machines were actually configured to produce carpet, *e.g.*, the identity of the fibers selected, the proportion of each type of fiber used, and the weight of the carpet. This information, combined with information from employees who actually label Diamond's carpet, may help determine if there were violations of the Textile Act or the FTC Act.

Furthermore, if the staff discover violations of the Textile Act or the FTC Act due to improper labeling, information from the employees identified through this interrogatory may enable the Commission to determine whether such violations were widespread

and systematic, or whether they were isolated. If the Commission were to find reason to believe that any violations had taken place, such information could assist the Commission in drafting appropriate relief.

Petitioner argues that answering this interrogatory would require Diamond to interview and study the employment records of 2,000 employees. Moreland Aff. paragraph 9a. The Affidavit does not identify how many of these employees actually fall within this interrogatory, or how long it would take to identify them.[13] We are not persuaded that this interrogatory is unduly burdensome. Nonetheless, the Commission is sensitive to the burdens imposed by its subpoenas and wishes to avoid requiring the production of more information than the staff can reasonably digest at one time. The Commission will therefore stagger the obligation to answer this interrogatory, limiting Petitioner's initial obligation to answer this interrogatory, within the time specified in part II.G below, to employees whose names begin with the letters A through H. In the event that staff requests later production with respect to the remaining employees of Diamond, Petitioner is to be afforded not less than 30 days to comply, following staff's written request.

b. Interrogatory 5

Interrogatory 5 calls for the same type of information as Interrogatory 4, with respect to employees who perform fiber, yarn, or carpet labeling duties. As with Interrogatory 4, this information is potentially relevant to the investigation of discrepancies between the labels and actual fiber content, and could lead to the discovery of other relevant information. There is less information given by

[13] Counsel for Petitioner indicated at the hearing that 2000 of Petitioner's 2700 employees would be encompassed by this interrogatory, and that the employment records of each such employee would have to be retrieved. However, Petitioner's counsel based this estimate on the assumption that Interrogatory 4 would encompass "all our people." Tr. at 66, 68. However, the interrogatory clearly limits the demand to persons who perform machine set-up duties, a clear subset of the universe of Petitioner's manufacturing personnel. Accordingly, counsel's estimate would not be a reliable basis for a showing of burden, nor has Petitioner provided any basis for concluding that it would be unable to identify such employees absent a manual search of the employment records of all of Petitioner's employees.

Petitioner concerning the burden of this interrogatory than for Interrogatory 4, although the Affidavit does indicate that "dozens of persons" would be involved, "including probably all persons who are involved in the shipping department of the company." Moreland Aff. paragraph 9 b.

Counsel for Petitioner, in the oral presentation before Commissioner Owen, represented that "labels are stuck on the back of carpet, out in the shipping room." He suggested that anyone in the shipping department could have labeling duties. Tr. at 69. If that is true, then how the process of matching appropriate labels with carpet is accomplished, what individuals are instructed to do with respect to labeling, and what they actually do, become highly relevant to an investigation of allegations of label violations. Thus, the interrogatory becomes highly relevant, and the generalized burden claim is not a sufficient basis to quash or limit this interrogatory.

c. Interrogatory 6

Interrogatory 6 calls for a narrative explanation of Diamond's process for manufacturing and labeling yarn and carpet. The concern stated in the Moreland Affidavit is that Diamond "can see no valid Commission purpose" in requesting this information. Moreland Aff. paragraph 9 c. Assuming that this is an objection on relevance, we must reject it. As noted above, one central theme of the allegations under investigation is that the carpet produced and sold by Diamond did not match the description of the labels on the carpet. Understanding the process for converting fibers and yarn into carpet permits Commission staff to identify areas on which to focus further investigation.

d. Interrogatory 8

Interrogatory 8 requests a narrative explanation of any quality control program, policy or procedure, and also asks for identification of "each individual responsible for quality control." The

Moreland Affidavit claims that identifying all of the employees responsible for quality control is burdensome, harassing, and serves no purpose. Moreland Aff. paragraph 9 d. Given the nature of the investigation into allegations, among others, that the carpet produced and sold by Diamond did not match the description of the labels on the carpet, the purpose of obtaining the identification of individuals responsible for quality control is clear. If all 75 employees engaged in quality control are "responsible for quality control," then Diamond must identify them in the manner requested. Petitioner has provided no basis for finding that this is unduly burdensome.

e. Interrogatory 9

Interrogatory 9 calls for information about each style of carpet manufactured by Diamond, including sales data. According to the Moreland Affidavit, this would take several months to compile, and Diamond may not be able to provide sales data by year for each style of carpet. Moreland Aff. paragraph 9 e. The second concern is easily dismissed. If Petitioner cannot provide sales by year for each style of carpet, then it has no obligation to do so. Impossibility is a satisfactory reason for non-compliance. With respect to the remainder of Petitioner's concern, the Commission is provided with no factual basis for evaluating the assertion that compliance would take several months. Absent a greater factual showing, there is simply no basis to limit or quash this interrogatory.

f. Interrogatory 10

Interrogatory 10 calls for information about customers of Diamond. According to the Moreland Affidavit, Diamond has some 25,000 customers, and compiling an answer would take weeks. Moreland Aff. paragraph 9 f. Petitioner, however, does not explain why this would be the case. Furthermore, staff have already modified this interrogatory to require an answer initially for only two styles of carpet, SP 99 and 429 High Society. Mem. Exhibit

F-6, Tr. at 49. At the oral presentation before Commissioner Owen, Petitioner's counsel asked that the response be further narrowed to include only three geographic areas, but provided no additional support for further limitation. Tr. at 36.[14] The Commission therefore finds insufficient basis to further narrow the scope of this request. In the event that staff requests later production with respect to the remaining styles, Petitioner is to be afforded not less than 30 days following staff's written request to comply.

g. Interrogatory 13

Interrogatory 13 calls for information concerning customer complaints. The DRO has agreed to limit this interrogatory to customer complaints relating to carpet characteristics and quality. Tr. at 49. The Moreland Affidavit notes two concerns with this interrogatory. The first is that it calls for information about customer complaints unrelated to the subject matter of this investigation, and the second is that it would require review of "many thousands of documents." Moreland Aff. paragraph 9 h. These concerns roughly parallel Petitioner's objections to Specification 6 of the CID for the production of documents. The first concern is satisfied by the limitation the DRO staff offered on the interrogatory, limiting it to customer complaints relating to carpet characteristics and quality. Petitioner has provided no support as to the number of potential complaints, or search costs, and Petitioner's second concern therefore is insufficiently supported by factual basis. Therefore, the Commission finds no basis to further limit or quash this interrogatory, as modified by the DRO.

h. Interrogatory 14

Interrogatory 14 calls for information concerning legal proceedings to which Diamond was a party. The DRO has agreed to limit

[14] Indeed, counsel for Petitioner could not describe how Petitioner would be able to easily sort out the information from its files on a state-by-state basis. Tr. at 41.

this interrogatory to proceedings relating to carpet characteristics and quality. Tr. at 49. As with Interrogatory 13, the Moreland Affidavit also notes two concerns with this request: first, that this would require review of counsel's files in jurisdictions throughout the United States; and second that legal proceedings unrelated to the subject matter of this investigation are included in the interrogatory. Moreland Aff. paragraph 9g. With respect to the first concern, Petitioner has provided no information with respect to how many of counsel's files are involved, and what the search costs may be. Furthermore, the concern is ameliorated by the offer of the DRO to limit the interrogatory. The second concern is also addressed by the limitation on the interrogatory that the DRO staff has offered. Therefore the Commission finds no basis to further limit or quash this interrogatory, as modified by the DRO.

D. Petitioner asserts that there is no guarantee in the CID for interrogatories for confidentiality of documents or answers.

Petitioner asserts that the Commission has provided no guarantee for confidentially of its documents or answers. Moreland Aff. paragraph 8 f. Although Petitioner does not mention the basis of its concern, we assume it to be a concern for the protection of trade secrets and confidential business information.

The confidential nature of certain information does not place it beyond the reach of the Commission's compulsory process. As the United States District Court for the District of Columbia has stated:

> Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and [the subpoena] must be complied with.

Invention Submission Corp., 1991-1 Trade Reg. Rep. at 65,353 (footnote omitted).

The Commission held similarly in the matter of Wiggins Teape Appleton.[15] There, the Commission noted that the statutory safeguards for confidential information, obtained either voluntarily or by compulsory process during the course of a Commission investigation, were enacted, in part, to confirm and facilitate the Commission's ability to obtain confidential information in the course of its investigations.

Thus, the statutes, rules and procedures by which the Commission safeguards information were put in place in contemplation that the Commission would be able to obtain, either voluntarily or by compulsory process, trade secrets and privileged or confidential commercial or financial information. Paraphrasing and applying the test as stated by the Court above, as the Commission finds elsewhere herein that the CIDs issued to Petitioner meet the requirements of the FTC Act, that they were properly authorized, and that they are within the bounds of relevance and reasonableness, the confidential information is properly requested and must be provided.

E. Petitioner asserts that enforcement of these CIDs is not in the public interest.

Petitioner objects that the DRO staff is engaged in prosecuting a private controversy involving a Dallas customer of the Petitioner, and that the Commission CIDs will enhance the discovery interests of a party involved in private litigation against Petitioner. Mem. at 19-20. This is incorrect. The DRO is investigating possible violations of the Textile Act and FTC Act which are matters of public, not private, interest. The fact that any private party may have initiated litigation against Diamond based on alleged acts of omission or commission by Diamond, which might also be the basis of violations of the Textile Act or FTC Act, does not alter the public interest in enforcing the Textile Act and the FTC Act.

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[15] File No. 911-0006 (Commission Ruling on Petition of Third Party The Mead Corporation, Letter to Alan M. Wiseman, Esquire, Jan. 7, 1991).

Furthermore, any Commission action for violations of the Textile Act or FTC Act does not alter the rights of any private party, who may proceed irrespective of the Commission.

Finally, a litigant's private discovery rights are unaffected by the Commission's investigative efforts. Petitioner has not described any impediment to a litigant requesting such information in the absence of the Commission's request. We therefore decline to grant Diamond's request to exclude from the investigation all matters pertaining to the litigation between Diamond and its former distributor. If that litigation uncovers relevant evidence concerning any violation of the Textile Act or the FTC Act, the Commission should have the opportunity to consider it.

F. Petitioner asserts that enforcement of these CIDs is a waste of the Commission's resources.

Petitioner advances two arguments to explain why pursuing this investigation would be a waste of the Commission's resources. The first argument is that the Commission has asked for the names of customers of Diamond. Mem. at 22. Petitioner claims that it has 25,000 customers and suggests that the DRO will contact all 25,000 which, in its view, would be an inefficient use of Commission resources. The modification proposed by DRO addresses this concern. Furthermore, DRO may need all of the names to serve as a basis for selecting a representative sample.

In addition, Petitioner contends that an investigation into the weight and quality of carpet is a waste of Commission resources, because those factors cannot be the basis of a violation of the Textile Act. The investigation is also based on possible violations of the FTC Act; furthermore, as previously noted, issues of quality may be evidence of misbranding. Accordingly, this argument is also without merit.

G. Petitioner asserts that the return date did not allow sufficient time to comply with CIDs.

Petitioner argues that, on its face, twenty days to respond to the requests is unreasonable, but did not provide evidence upon which the Commission could so conclude. Petitioner provided little or virtually no information on the number of files that would have to be searched for responsive information, the number of employees that would be devoted to assist in the search, or even how its files and records are maintained. Petitioner did assert that its attorneys would take longer than twenty days to produce logs of privileged documents withheld from production.

Nonetheless, the Commissions recognizes that the CIDs require the compilation of a substantial amount of material. The DRO staff has offered to cooperate with Diamond to provide additional time, if necessary, to compile the requested information. In the interest of providing sufficient time for responses to the CIDs, while insuring that there are firm deadlines, the Commission allows Petitioner thirty days from the date of the receipt of this letter to produce the required documents and the answers to the interrogatories, as modified in this letter ruling. The Commission grants Diamond an additional thirty days (until sixty days from the date of receipt of this letter) to produce the required log of material withheld from production on the basis of privilege. As previously noted, in the areas where staff has agreed initially to accept less than full compliance, Petitioner shall be afforded 30 days from the date of staff's written demand to achieve full compliance.

H. Petitioner asserts that immunity from prosecution should be granted for persons providing information to answer CIDs.

Petitioner notes that the Textile Act provides for criminal sanctions in some circumstances, and that the resolution upon which this investigation is based is broad enough to encompass individuals. Mem. at 25-26. Petitioner expresses concern that "hundreds" of its employees could conceivably be targets for criminal action, and that these employees may be called upon to provide information to answer the CIDs. Therefore, Petitioner

The Commission has determined that the request for full Commission review does not raise any other new issues regarding grounds for the requested quashing or limiting of the CIDs and that the Petition was properly denied in part and granted in part, for the reasons stated in the January 29 ruling. The Commission denies the request for oral argument. The Commission also denies the request for a stay on the return date for the CIDs. Accordingly, the full Commission concurs with, and hereby adopts, the January 29, 1993 letter ruling in this matter, and Diamond Rug & Carpet Mills, Inc, is directed to comply with the CIDs by the dates mandated therein, beginning on March 2, 1993.

Re: Petition of Metropolitan Art Associates and Metropolitan Art Sales, Inc., to Quash Civil Investigative Demands. File No. 872-3209.

February 19, 1993

Dear Mr. Stutchin:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Civil Investigative Demands (the "Petition"), which you filed, on behalf of your clients, Metropolitan Art Associates and Metropolitan Art Sales, Inc., ("Petitioners") in the above-referenced matter.[1]

The ruling set forth herein has been made by Commissioner Deborah Owen pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 CFR 2.7(d)(4) (1992). Pursuant to Rule 2.7(f), 16 CFR 2.7(f) (1992), within three days after service of this decision, Petitioners may file with the Secretary of the Commission a request for full Commission review. The timely filing of such a request shall not stay the return dates in this ruling, unless the Commission otherwise specifies.

The Petition is denied in part, and granted in part, as specified below.

I. Background

The Civil Investigative Demands challenged here were issued to Metropolitan Art Associates ("MAA") and Metropolitan Art

[1] This ruling, and the Petition to Quash addressed herein, cover Petitioner's objections to two CIDs with return dates of February 19, 1992. Under the Commission Rules of Practice, a petition to quash or limit a CID must be filed within 20 days after service of the CID (or, if the return date is less than 20 days after service, before the return date). 16 CFR 2.7(d)(1) (1993). If a person to whom a particular CID is issued fails to file a timely petition to quash that particular CID, in writing, that person remains under a continuing obligation to comply with that particular CID in all respects. Certain members of the Commission staff are, however, authorized "to negotiate and approve the terms of satisfactory compliance with . . . civil investigative demands . . . ." 16 CFR 2.7(c) (1993), and in doing so may be guided in part by Commission rulings on petitions to quash substantively similar CIDs.

Sales, Inc. ("MAS, Inc."), pursuant to the Commission's Resolution of October 24, 1991, directing the use of compulsory process in its investigation to determine whether unnamed persons, partnerships or corporations selling fine art prints may be engaged in violations of Section 5 of the Federal Trade Commission Act, "including but not limited to, misrepresenting the origins, authorship, edition size, or value of fine art prints." The resolution also states that the investigation is to determine whether action to obtain redress would be in the public interest. A return date of February 19, 1992, was specified for the two CIDs.

Commissioner Owen has carefully reviewed the Petition and the Affidavit in support of the Petition, which was submitted therewith.[2] She also has considered the oral presentation on the Petition conducted on February 25, 1992. Each of Petitioners' objections is discussed separately below.

II. Specific Objections

A. *Petitioners allege that documents are privileged from production by the Fifth Amendment privilege against self-incrimination.*

In support of the Petition, Richard Greenberg represented that he was the "sole officer, director and shareholder" of MAS, Inc., and the "proprietor" of MAA. He further represented that MAS, Inc., was dissolved "on [sic] or about" 1985,[3] and that he currently operated the business as a sole proprietorship under the name of

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[2] Although submitted under a separate heading, the Affidavit is attached, and its pagination sequential, to the Petition. Thus, for ease of reference, this opinion cites the two documents collectively as "the Petition."

[3] Some question exists whether the corporation continued to operate after 1985. Records of the State of New York show that the corporation was not technically dissolved until 1991. Because the corporation was not legally dissolved in the eyes of the state until 1991, it is possible that the corporation conducted business after 1985, despite any lapse in filing tax returns or payments. It is also possible that no business was conducted by the corporation after that time. The Commission need make no finding of fact on this point. For purposes of this proceeding, if Mr. Greenberg has possession, custody or control of any responsive documents that have been, at any time, documents of the corporation, those documents must be produced in compliance with the CIDs and this opinion.

MAA. Petition ("Pet.") at 3. Mr. Greenberg asserted that the Fifth Amendment's privilege against self-incrimination applied to this civil investigation because his interests were "inextricably intertwined" with those of MAA as a sole proprietorship. Mr. Greenberg contends that complying with the demand for production of business records that tend to confirm purchases, sales or possession of allegedly forged or counterfeit items might tend to incriminate and expose him to prosecution for miscellaneous criminal laws. *Id.* at 4.[4]

The law is well settled that an individual custodian of the documents of a collective entity, such as a corporation or partnership, has no Fifth Amendment privilege with respect to those documents. *Braswell v. United States,* 487 U.S. 99 (1988); *Fisher v. United States,* 425 U.S. 391, 408 (1976); *Bellis v. United States,* 417 U.S. 85 (1974). Even if the partnership or corporation has dissolved, the documents must be produced. *See Bellis,* 417 U.S. at 96, n.3 ("[T]his Court's decisions have made clear that the dissolution of a corporation does not give the custodian of the corporate records any greater claim to the Fifth Amendment privilege. . . . We see no reason why the same should not be true of the records of a partnership after its dissolution."). Moreover, the documents of a collective entity are not protected from production by their custodian even if the documents might implicate the custodian personally. *Fisher,* 425 U.S. at 411-12.

In his capacity as custodian of records for a "collective entity" (a partnership or corporation), Mr. Greenberg must produce records of the entity and may not assert a Fifth Amendment privilege for such records either on his own behalf or on behalf of the collective entity. *See Braswell,* 487 U.S. at 105-113; *Matter of Grand Jury Subpoenas,* 959 F.2d 1158, 1163 (2d Cir. 1992); *United States v. Wujkowski,* 929 F.2d 981, 983-84 (4th Cir. 1991).

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[4] At the oral presentation, Commission staff argued that Mr. Greenberg's assertion of a Fifth Amendment privilege wasprocedurally defective because he did not comply with Commission Rule 2.7(d)(2), requiring that a petitioner first attempt to resolve issues with staff before filing a petition to quash. Counsel for Petitioners disputed the assertion that the issue was never raised. Transcript of Oral Argument (Feb. 25, 1992)("Tr.") at 19. Though Petitioners' procedural compliance is disputed, the Commission has nevertheless addressed this issue on its merits.

We now turn to the issue of the sole proprietorship. The party asserting a Fifth Amendment privilege bears the burden of showing that there is a real -- not a remote or speculative -- danger of self-incrimination. *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990). The petitioner must show both a reasonable fear of self-incrimination and at least some minimal evidence that he has reasonable cause to apprehend danger of self-incrimination from providing each requested document to the Commission. *In re J.M.V.,Inc.*, 90 B.R. 737 (Bankr. E.D. Pa. 1988). Petitioners have not made such a showing here.[5]

Even if Mr. Greenberg may have some basis for fearing incrimination from the instant investigation, a reasonable fear of incrimination is not by itself sufficient to justify withholding business documents. The Fifth Amendment's protection "applies only when the accused is compelled to make a testimonial communication that is incriminating." *Fisher*, 425 U.S. at 408 (emphasis in original). "When the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].'" *Baltimore City Dep't. of Social Services v. Bouknight,* 493 U.S. 549, 554-55 (1990) (quoting *Fisher*, 425 U.S. at 410 n.ll). So long as a document was voluntarily created, Petitioners "may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded." *Bouknight*, 493 U.S. at 555; *United States v. Doe,* 465 U.S. 605, 612 n.10 (1984). The CIDs in this case do not require the creation of any documents. Because the CIDs request only documents created in the course of business, their contents are not privileged from protection on Fifth Amendment grounds.

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[5] Indeed, statements by Petitioners' counsel raise questions as to the validity of Mr. Greenberg's Fifth Amendment claim. During the February 25 oral presentation, counsel stated that Petitioners would produce all material from 1986 to the present, if the Commission withdrew requests for older documents (Tr. at 27-28). However, the Petition itself asserts (at 7) that pre-1986 materials could not support a cause of action for any conceivable civil or criminal violation, because of statutes of limitations. These contradictory assertions undermine Petitioners' sweeping Fifth Amendment claims. It is also curious that Mr. Greenberg would be willing to provide documents covering the post-1985 period -- during which he contends that the business operated as a sole proprietorship -- given that any available Fifth Amendment privilege protects only documents belonging to the sole proprietorship.

Mr. Greenberg argues that the act of producing certain unspecified documents could expose him to a charge of criminal possession of a forged instrument. It is true that the compelled production of a document by a sole proprietor would constitute compelled testimony that the proprietor possesses that document. But it is difficult to see how mere possession of any of the documents demanded by the CIDs could constitute a crime, and Petitioners have not identified any specific criminal law that would be violated by possession of any identified category of documents requested by the CIDs.[6]

The Petitioners have failed totally to distinguish collective entity records from personal records or records of the sole proprietorship operated by Mr. Greenberg in recent years. Nor have they identified the potentially incriminating effect that producing particular classes of sole-proprietorship documents might have. Indeed, they have expressed a willingness to produce all demanded sole-proprietorship documents covering 1986 to the present. We find that Mr. Greenberg has not made the requisite showing that the mere act of producing the requested documents would infringe his Fifth Amendment privilege. The Petition to Quash is denied on these grounds, and Mr. Greenberg is directed to produce the responsive documents, in accordance with this opinion.

B. *Petitioner Greenberg alleges that he may be immune in part from prosecution.*

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[6] Although counsel for Petitioners cited "possession of forged instruments, grand larceny, RICO violations and other violations of State and Federal law," this recitation of possible criminal actions does not provide enough specificity for the Commission to determine how the mere act of producing the particular documents demanded by the CIDs could constitute a violation. For example, Specifications 3 and 6 request documents that identify (1) persons who purchased art from Petitioners, and (2) all of Petitioners' employees. There is nothing incriminating about the act of producing a pre-existing list of customers, employees, or co-workers, even if individuals listed therein might provide damaging testimony. *See Bouknight,* 493 U.S. at 555. Likewise, Specification 1 seeks, among other things, catalogues. Nothing in the Petition suggests that such documents could possibly be incriminating. Similarly, Specification 5 merely seeks documents disclosing the contents and location of Petitioners' inventory of art prints. The Petition does not establish that there is anything incriminating in the existence, location, or contents of an inventory of art prints. It follows that there could be nothing incriminating in producing and authenticating documents relating to the inventory.

Mr. Greenberg asserts that he "may" be immune from prosecution as to certain aspects of the FTC's investigation, by virtue of a prosecution conducted by postal authorities in 1985 in which Mr. Greenberg testified before a federal grand jury.

Mr. Greenberg's claimed grant of immunity is unsubstantiated. The Petition provided no evidence that immunity was ever granted, nor was any provided at the oral presentation. In fact, the assertion of this claim was so tentative and lacking in specificity that it is difficult to give it any weight at all. In addition, Petitioners provided no explanation as to how the alleged grant to Mr. Greenberg of immunity from criminal prosecution would apply in this investigation. The issue is simply not ripe for review because no action by the FTC has yet been initiated. The Commission finds Petitioners' claim on this ground to be without merit.[7]

C. *Petitioners allege that certain documents are not in their possession, custody or control.*

Petitioners assert that "many" of the documents requested by the CIDs were surrendered during the course of discovery in a civil lawsuit and were not returned. As the instructions to the CIDs specify, Petitioners need only provide responsive documents that are within their possession, custody, or control. Section 20(c)(10) of the FTC Act requires the production only of "all the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed." 15 U.S.C. 57b-1(c)(10). To the extent that any responsive documents do not fit within these categories, Petitioners need not produce them.[8]

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[7] Mr. Greenberg's claim of immunity as to certain aspects of the investigation could be viewed as inconsistent with his perceived need to assert the Fifth Amendment privilege against self-incrimination. Counsel for Mr. Greenberg denied that the two arguments were inconsistent because the immunity claim applied only to the works or purported works of certain artists that were the subject matter of the postal investigation, and did not concern all of the works or purported works of the artists in question here. However, counsel failed to articulate which artists, and to explain how the scope of the alleged immunity bars the FTC's investigation of sales of works purporting to be by those, or any other, artists, giving the Commission even less grounds on which to make a determination. Tr. at 23.

[8] It should be noted that the CIDs do not apply only to original documents, but also to copies of documents. Thus, if Petitioners have transferred originals, but retained copies in their files, those copies are subject to the demand, regardless of the fact that the originals are no longer in the possession, custody or control of the Petitioners.

D. *Petitioners allege that the CIDs lack definiteness and certainty.*

Petitioners argue that they cannot fairly identify which documents are covered because the CIDs do not specify, by either title or medium, which works of art are the subject of the investigation. Pet. at 5. They assert that each of the seven named artists in the definition of "relevant art works" has produced perhaps "tens of thousands" of artworks in various media, and that the government cannot suspect that each of these works has been the subject of forgery. At the oral presentation, counsel added that the CIDs also require production of documents relating to artists not named because the CID instructions require that documents relating to a named artist be produced in their entirety even if other parts of the document relate to an unnamed artist. Tr. at 8.

As the Commission staff noted at the oral presentation, the CIDs are definite in naming specific artists whose works or purported works are covered by the CIDs. There can be no ambiguity as to which artists are covered. There also can be no ambiguity as to which works are covered -- any artworks by or purportedly by the named artists. We thus conclude that the CIDs are sufficiently definite for Petitioners to be able to determine which documents in their possession, custody or control must be produced.

Although cloaked in the guise of "definiteness," Petitioners' arguments on this point appear more akin to a claim of burden.[9] Staff urged at the oral presentation that the definition of relevant art works not be narrowed because they could not say that certain titles were not relevant, implying that all titles by each of the seven named artists may be relevant, to the extent Petitioners' business involved them. We agree. If the Commission were to modify the CIDs to specify only certain works of art on which suspicions have centered in the investigation to date, the Commission might unduly restrict its ability to gather information relevant to the full breadth

[9] The nature of this argument as one of burden is indicated by the Petition's claim that the failure to identify particular artworks constitutes "economic coercion."

of possible illegal activities in connection with sales of artworks not specified. The Petition to Quash on this basis is denied.

E. *Petitioner MAA alleges that the CIDs are burdensome.*

Petitioner MAA asserts that the burden of complying with the CIDs would drive it into bankruptcy. Our analysis of a claim of burden is guided by several standards. First, "the burden of showing that an agency subpoena is unreasonable remains with the respondent." *Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979), *quoting SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915, (1974); *accord Federal Trade Commission v. Texaco Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc), *cert. denied*, 431 U.S. 974 (1977). In Brigadoon, the Second Circuit added that "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." 480 F.2d at 1056.

Second, as the court stated in Texaco, "[w]e emphasize that the question is whether the demand is unduly burdensome or unreasonably broad." It added:

> Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest . . . . Thus, courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

555 F.2d at 882 (emphasis in original) (footnotes omitted).

Here, Petitioner claims that the cost of assembling and copying the relevant material is "oppressively high" because MAA consists solely of Mr. Greenberg, a secretary and a part-time bookkeeper, and because the CIDs demand over 200,000 items. Petitioner notes that its files are organized alphabetically by customer so each file, pertaining to over 100,000 transactions, would have to be searched. Petitioner also estimates that more than 10,000 canceled checks would have to be individually reviewed. Pet. at 6.

During the oral presentation on the Petition, the staff offered to modify the CIDs in three specific ways to lessen the asserted burden. Tr. at 17-18. We find the staff's offer to be reasonable, and in order to reduce the cost of complying with the CIDs, consistent with the Commission's need for the material, we have modified the CIDs in the following manner:

(1) Petitioners are not required to produce records of posters sold for $50 or less. It is our understanding that a significant portion of Petitioners' business has been comprised of such sales; thus, this modification should significantly reduce the amount of time and effort necessary to comply.[10]

(2) Petitioners are not required to produce invoices relating solely to works by Noyer.[11]

(3) Petitioners are not required to produce copies of canceled checks, so long as that same information is contained in ledgers, which are produced.

In addition, consistent with our prior rulings in some related matters,[12] the Commission has determined to further refine the definition of relevant art works in the CIDs by limiting it to fine art prints, as specified in the compulsory process resolution. This should also help to reduce the burden of compliance on Petitioners.

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[10] Petitioner argued that the staff's earlier offer to modify the CID in this manner was "meaningless" because the organization of files required review of every file anyway. We do not view this as a meaningless modification; even though files may need to be examined initially, the modification removes the need potentially to copy and assemble a great many documents.

[11] Petitioners also argued that this modification would be meaningless. We disagree because, as noted above, this will reduce significantly the amount of time spent on customer files containing documents relating to this artist.

[12] *See*, Letter Ruling on the Petition of Brana Publishing, Inc. to Limit or Quash Civil Investigative Demand, Petition of Art Source International, Inc. to Limit or Quash Civil Investigative Demand, and Petition of Brana Enterprises, Inc. to Limit or Quash Civil Investigative Demand, File No. 872-3209 (March 26, 1992), *reprinted* in 5 Trade Reg. Rep. (CCH) ¶ 23,165; Letter Ruling on the Petition of Center Art Galleries-Hawaii, Inc. to Limit or Quash Civil Investigative Demand, File No. 872-3209 (June 22, 1992), *reprinted* in 5 Trade Reg. Rep. (CCH) ¶ 23,223; Letter Ruling on the Petition of Hang-Ups Art Enterprises, Inc., to Limit or Quash Civil Investigative Demand, File No. 872-3209 (March 31, 1992), *reprinted* in 5 Trade Reg. Rep. (CCH) ¶ 23,169.

Accordingly, Definition 4 of the CIDs shall be limited to artworks incorporating, in whole or in relevant part, the process of intaglio (*e.g.*, etchings, engravings, drypoints), aquatint, lithography, serigraphy, silkscreen, woodcut, poster printing, or photographic photomechanical, or photochemical reproduction, or any combination of the above media, by, after, or attributed to one of the seven artists listed in the CIDs, including any reproductions, facsimiles, or composites of images, by or purportedly by the above artists.

We note that Instruction 8 of the CIDs allows production of the documents at the Petitioners' place of business for inspection and copying by the Commission staff. This option would further reduce Petitioners' burden. Finally, to address Petitioners' concern that the amount of time allowed to comply with the CIDs (twenty days) is unreasonable, we will extend the return date to 40 days from the date of this letter.

As they are herein modified, we find that the CIDs do not impose a burden on Petitioners that is unreasonable in light of the Commission's need for the documents. Except as modified, the Petitioners are directed to produce all relevant documents.

F. *Petitioners argue that the relevant time period is excessive.*

Petitioners argue that the CIDs' "relevant time period," which dates from January 1, 1983, a period in excess of nine years, is "*per se* excessive." They assert that nine years exceeds applicable statutes of limitations, and that no cause of action could lie for acts prior to six years ago. They also contend that neither the laws of New York, nor the Internal Revenue Service, requires retention of records for more than six years. Petitioners further claim that they are being "singled out" because, according to Petitioners, CIDs served on other art dealers in similar investigations have covered only six years. Pet. at 7.

During the oral presentation, counsel for Petitioners conceded that the FTC Act does not contain a statute of limitations regarding violations of that Act. He argued, however, that the absence of

such a provision is not controlling, and that the time period is *per se* unreasonable. Tr. at 11-12.

We disagree. First, it is irrelevant that there may be no state or federal law requiring the retention of records. The fact that no law requires the retention of records does not mean that, if records are kept, they are shielded from production because their retention was voluntary. Second, the information sought during the entire specified time period is relevant to the investigation. Petitioners' actions during the earlier period may be just as important to a successful resolution of the matter as those within later periods. In fact, older information may provide evidence that is probative of the existence of violations in later periods. In addition, Petitioners have not been "singled out"; other CID respondents in Commission cases, and some in similar cases, have been subject to relevant time periods in excess of six years. Moreover, investigations must be tailored to the facts of the particular case, and thus, it is the circumstances of the case that determine the appropriate relevant time period, not whether differing time periods were applied under different, unrelated facts. For these reasons, we find that the request for the materials during the specified time period is reasonable.

If Petitioners' primary concern is the economic burden imposed by the necessity to produce documents covering a nine-year period, we note that that burden must be weighed against the public interest in uncovering any law violations that may have occurred during the entire period. Moreover, as we have modified the CIDs, Petitioners' compliance burden has been significantly reduced. We decline to reduce the number of years covered by the relevant time period.

G. *Relevance of the request for the most recent computer backup tape or disk backup tape or disk.*

Specification 8 of the CIDs requests a copy of Petitioners' most recent computer backup tape or disk(s). Although Petitioners did not question the relevance of this specification, we nevertheless address the issue in order to be consistent with our prior rulings in several related matters.[13]

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[13] *See* Letter Rulings cited in note 11 *supra*.

Definition 5 of each CID defines the term "documents" to include "computer data storage materials (including magnetic tapes or disks)." Therefore, each CID already calls for the production of specified relevant material on any computer backup tape not otherwise produced, which falls under Specifications 1 through 7 (as previously modified herein), even if the documents are only available in the form of computer (machine) readable code on a magnetic tape, disk, or other computer storage device. In addition, Specification 8 calls for all information on the backup tape or disk that is not included in one of the other specifications. So long as the other information is relevant to the investigation, this request is permissible. However, Specification 8 does not include any limitations to restrict its scope to relevant information. Thus, it does not meet the test set out in *Federal Trade Commission v. Invention Submission* Corp., 965 F.2d 1086 (D.C. Cir. 1992). *See also, Texaco*, 555 F.2d at 874 (1977).

The Commission therefore modifies Specification 8, limiting it to all documents stored on the most recent backup tape or disk(s) that relate, reflect, or refer to the purchase of, sale of, or trade in, any relevant artwork included in Definition 4, the definition of relevant artwork, as that definition is modified above. For the purposes of this request, any data bases, data compilations, or spreadsheets included on the backup tape or disk(s) that contain any data entries that relate, reflect, or refer to the purchase of, sale of, or trade in such artworks, shall be considered a single document, and the entire data base or data compilation shall be produced. By this modification, the Commission does not intend to limit the obligations of Petitioners to search any backup tape or disk(s) for information relevant to Specifications 1 through 7. It may be noted that Direction 7 of the CID requires that documents responsive to more than one specification need not be submitted more than once. Therefore, to the extent that documents contained on the most recent backup tape or disk(s) are produced in response to one of the previous specifications, they need not be produced again.

Except as modified herein, the Petition to Quash is denied and Petitioners are directed to comply with the CIDs.

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