

IN THE MATTER OF

J. WALTER THOMPSON USA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3622. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

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

Appearances

For the Commission: *David M. Newman.*

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

COMPLAINT

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

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

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

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

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

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

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

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

(d) "National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding
'completely satisfied' or 'very satisfied':

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

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

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

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

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

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

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

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

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

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

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

Chairman Pitofsky recused.

Complaint

120 F.T.C.

EXHIBIT A

9 Out Of 10 Clients Would Recommend
Jenny Craig. Who Did They Tell?

		
"I told my hairdresser." Nancy Ruffalo lost 35 lbs.	"I told my coach." Glenn Ockers lost 100 lbs.	"I told my husband." Laurie Sachman lost 30 lbs.
		
"I told my secretary." Kelly Allegretti lost 33 lbs.	"I told my best friend." Cynthia West lost 67 lbs.	"I told my twin sister." Holly Rodriguez lost 36 lbs.
		
"I told my doctor." Joni Lurich lost 53 lbs.	"I told everyone I know." Carol Pickett lost 100 lbs.	"I told my best friend." Nelson Harvey lost 35 lbs.

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

CALL NOW 1-800-97-JENNY

JENNY CRAIG
Weight Loss Center

Pay As You Go
\$6
A Week Program Fee

Jenny's Cuisine additional • Individual results may vary • Maintenance/Products optional • Open Saturdays and evenings • © 1991 Jenny Craig International

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

EXHIBIT A

829

Complaint

EXHIBIT B



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

Job No. JCI-GEN-422062
 Client JENNY CRAIG
 Product
 ISCI No YJCJ 0527
 CORPORATE

Title Statistics/L5
 Status AS PRODUCED
 Length :30
 Date 4/16/92

VIDEO

TITLE: WHAT TO YOU LIKE ABOUT LOSING WEIGHT WITH JENNY CRAIG?

CUT TO MARIA GENOVESE

CUT TO LAURA BECK

TITLE: 86% LIKED THE COUNSELING NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991

CUT TO MARIA GENOVESE

CUT TO PHIL MCDERMOTT

CUT TO LAURA BECK

TITLE: 89% LIKED THE PROGRAM NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991

CUT TO PHIL MCDERMOTT

CUT TO MARIA GENOVESE

CUT TO PHIL MCDERMOTT

TITLE: 94% RECOMMEND TO A FRIEND NATIONAL SURVEY OF JENNY CRAIG CLIENTS OCT-DEC 1991

CUTS OF MARIA, PHIL, AND LAURA

TITLE: Lose all you want.
 \$39
 Program Fee
 (LOGO)
 Jennv's Cuisine additional.

TITLE: Get back a dollar a pound
 once you reach your goal weight.
 (LOGO)
 Some restrictions apply.

TITLE: Get back a dollar a pound.
 1-800-92-JENNY
 (LOGO)
 Some restrictions apply.

AUDIO

AVO: What do Jenny Craig clients like about Jenny Craig?

MARIA: My Jenny Craig counselor is wonderful.

LAURA: She was always encouraging.

AVO: 86% liked the counseling.

MARIA: The Lifestyle classes are so important.

PHIL: The food was great.

LAURA: The Jenny Craig Program works in real life.

AVO: 89% liked the program.

PHIL: If you want to lose weight.

MARIA: Go to Jenny Craig.

PHIL: Right away.

AVO: And 94% would recommend us to a friend.

Now. What could be more impressive than that?
 Lose all you want for \$39.

Then get back a dollar for every pound you lose.

Call 1-800-92-JENNY. How much would you like to get back?

EXHIBIT B

Complaint

120 F.T.C.

EXHIBIT C



R A D I O

SAN FRANCISCO CREATIVE DEPARTMENT

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

WOMAN:

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

LIVE ANNCR:

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

EXHIBIT C

829

Complaint

EXHIBIT D

National Survey of Jenny Craig Clients
Oct-Dec 1991

Percentage of Jenny Craig clients responding "completely satisfied" or "very satisfied":

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

**YOU'RE PROBABLY WONDERING
WHAT ELSE WE COULD POSSIBLY
DO TO IMPRESS YOU.**

FREE PROGRAM FEE.
We're so sure you'll be satisfied with the Jenny Craig program, that when you bring this coupon in, we'll waive your program fee. Jenny's Cuisine is a required additional purchase.

JENNY CRAIG
Weight Loss Centers
THE REAL LIFE ANSWER

DIAL DIRECT 1-800-92-JENNY

MEMBERSHIP: \$24.95 a month. *Diet, counseling and program fee. © 1991 Jenny Craig, Inc. All rights reserved.

Statistics
Ad #122081 4 Oct x 15.75"

EXHIBIT D

Complaint

120 F.T.C.

EXHIBIT E-1



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

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

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

VIDEO

TITLE: IF YOU DISCOVERED A
 WAY TO CONTROL YOUR WEIGHT...

TITLE: WHO WOULD YOU TELL?

SUPER: DORI GREEN LOST 24 LBS. IN 6
 MONTHS

SUPER: SHELLY BENEDICT LOST 27
 LBS. IN 5 MONTHS

SUPER: LESLIE BALDWIN LOST 36 LBS.
 IN 8 MONTHS.

SUPER: MARK HACKBARTH LOST 66
 LBS. IN 13 MONTHS.

TITLE: THAT'S WHAT THESE
 SUCCESSFUL JENNY CRAIG
 CLIENTS DID.

SUPER: JOANNE WALTON LOST 32
 LBS. IN 10 MONTHS.

SUPER: Nanci PORTER LOST 31 LBS.
 IN 4 MONTHS

AUDIO

ANNCR VO: If you discovered a way to
 control your weight...

Who would you tell?

DORI: My mom and dad.

SHELLY: My doubles partner.

LESLIE: The guy at the doughnut shop.

SHELLY: Half the girls at the club.

MARK: My mechanic.

DORI: My daycare lady.

VO: That's what these successful Jenny
 Craig clients did.

JOANNE: My dog trainer.

DORI: My father.

Nanci: My aunt.

EXHIBIT E-1

EXHIBIT E-2



T E L E V I S I O N

SAN FRANCISCO CREATIVE DEPARTMENT

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

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

VIDEO

TITLE: 9 OUT OF 10 JENNY CRAIG
CLIENTS. INDIVIDUAL WEIGHT LOSS
AND MAINTENANCE MAY VARY.

TITLE: WOULD RECOMMEND JENNY
CRAIG TO THEIR FRIENDS.
INDIVIDUAL WEIGHT LOSS AND
MAINTENANCE MAY VARY.

TITLE: NEW PRICING POLICY
PAY AS YOU GO

TITLE: \$6 A WEEK
PROGRAM FEE
JENNY'S CUISINE ADDITIONAL

TITLE: 1-800-92-JENNY
(LOGO)

AUDIO

SHELLY: My chiropractor.

YO: In fact, 9 out of 10 Jenny Craig clients
would recommend Jenny Craig to their
friends.

DORI: There are so many.

COUNSELOR: Get personal weight
management at Jenny Craig.

Pay as you go for just \$6 a week.

Call 1-800-92-JENNY.

DECISION AND ORDER

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

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

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

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

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

ORDER

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

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

I.

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

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

II.

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

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

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

III.

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

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

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

IV.

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

V.

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

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

VI.

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

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

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

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

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

VII.

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

Chairman Pitofsky recused.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Complaint

120 F.T.C.

IN THE MATTER OF

SUMMIT COMMUNICATIONS GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3623. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

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

Appearances

For the Commission: *Jill M. Frumin.*

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

COMPLAINT

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

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