

**8:90-cv-00838-WTH** USA v. Calistri, et al

Wm. Terrell Hodges, presiding

**Date filed:** 07/06/1990**Date terminated:** 08/01/1990**Date of last filing:** 04/19/2001

## History

Doc. No.	Dates	Description
	<i>Filed:</i> 07/06/1990	Summons issued
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> SUMMONS(ES) issued for Robert A. Calistri, George L. Carapella, Raymond J. Carapella . Consent(s) issued. (rjc)	
	<i>Filed:</i> 07/06/1990	Case Referred to Magistrate Judge
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> CASE REFERRED to Judge Elizabeth A. Jenkins for discovery (rjc)	
1	<i>Filed:</i> 07/06/1990	Complaint
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> VERIFIED COMPLAINT filed for Injunctive Relief (rjc)	
2	<i>Filed:</i> 07/06/1990	Affidavit
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> AFFIDAVIT of Wayne Callaway by USA Re: [1-1] complaint (rjc)	
3	<i>Filed:</i> 07/06/1990	Affidavit
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> AFFIDAVIT of Thomas D. Bazley by USA Re: [1-1] complaint (rjc)	
4	<i>Filed:</i> 07/06/1990	Motion for preliminary injunction
	<i>Entered:</i> 07/18/1990	
	<i>Terminated:</i> 08/01/1990	
	<i>Docket Text:</i> MOTION by USA for preliminary injunction (rjc)	
5	<i>Filed:</i> 07/06/1990	Motion for temporary restraining order
	<i>Entered:</i> 07/18/1990	
	<i>Terminated:</i> 07/06/1990	
	<i>Docket Text:</i> MOTION by USA for temporary restraining order (rjc)	
6	<i>Filed:</i> 07/06/1990	Memorandum in support
	<i>Entered:</i> 07/18/1990	
	<i>Docket Text:</i> MEMORANDUM by USA in support of [5-1] motion for temporary restraining order, [4-1] motion for preliminary injunction (rjc)	
7	<i>Filed:</i> 07/06/1990	Order
	<i>Entered:</i> 07/19/1990	

	<i>Docket Text:</i> ORDER granting [5-1] motion for temporary restraining order, Motion hearing set for 5:00 7/16/90 for [4-1] motion for preliminary injunction ( Signed by Judge Wm. T. Hodges ) (rjc)	
8	<i>Filed:</i> 07/09/1990 <i>Entered:</i> 07/19/1990 <i>Terminated:</i> 07/10/1990	Motion for Miscellaneous Relief
	<i>Docket Text:</i> MOTION by USA to amend temporary restraining order (rjc)	
9	<i>Filed:</i> 07/10/1990 <i>Entered:</i> 07/19/1990	Order
	<i>Docket Text:</i> ORDER granting [8-1] motion to amend temporary restraining order Amended TRO issued.( Signed by Judge Wm. T. Hodges ) (rjc)	
10	<i>Filed:</i> 07/10/1990 <i>Entered:</i> 07/19/1990	Summons returned executed
	<i>Docket Text:</i> RETURN OF SERVICE executed as to George L. Carapella 7/6/90 Answer due on 7/26/90 for George L. Carapella (rjc)	
11	<i>Filed:</i> 07/10/1990 <i>Entered:</i> 07/19/1990	Summons returned executed
	<i>Docket Text:</i> RETURN OF SERVICE executed as to Raymond J. Carapella 7/9/90 Answer due on 7/30/90 for Raymond J. Carapella (rjc)	
12	<i>Filed:</i> 07/10/1990 <i>Entered:</i> 07/19/1990	Summons returned executed
	<i>Docket Text:</i> RETURN OF SERVICE executed as to Robert A. Calistri 7/6/90 Answer due on 7/26/90 for Robert A. Calistri (rjc)	
13	<i>Filed:</i> 07/13/1990 <i>Entered:</i> 07/19/1990 <i>Terminated:</i> 07/16/1990	Motion to extend time
	<i>Docket Text:</i> JOINT MOTION by USA, Robert A. Calistri, George L. Carapella to extend time for Preliminary Injunction Hearing to 07/30/90 (rjc)	
14	<i>Filed:</i> 07/16/1990 <i>Entered:</i> 07/19/1990	Order
	<i>Docket Text:</i> ORDER granting [13-1] joint motion to extend time for Preliminary Injunction Hearing to 07/30/90, Motion hearing set for 4:00 7/30/90 for [4-1] motion for preliminary injunction ( Signed by Judge Wm. T. Hodges ) (rjc)	
15	<i>Filed:</i> 07/16/1990 <i>Entered:</i> 07/19/1990	Proof of service
	<i>Docket Text:</i> PROOF of Service of TRO Order to Raymond J. Carapella (rjc)	
16	<i>Filed:</i> 07/16/1990 <i>Entered:</i> 07/19/1990	Proof of service
	<i>Docket Text:</i> PROOF of Service of TRO Order to George L. Carapella (rjc)	
17	<i>Filed:</i> 07/16/1990 <i>Entered:</i> 07/19/1990	Proof of service

	<i>Docket Text:</i> PROOF of Service of TRO ORDER to Robert A. Calistri by USA (rjc)	
18	<i>Filed:</i> 07/30/1990 <i>Entered:</i> 08/06/1990	Minute entry
	<i>Docket Text:</i> Minute entry: Clerk's Minutes of Hearing on Motion for Preliminary Injunction before Judge William Terrell Hodges on July 30, 1990. Court Reporter: Carol Jacobs (grk)	
19	<i>Filed:</i> 07/30/1990 <i>Entered:</i> 08/06/1990	*Remark
	<i>Docket Text:</i> PERMANENT INJUNCTION. 1. The defendants are permanently enjoined from engaging in the diet product business and any activities related thereto. 2. The defendants are permanently enjoined from the use of false or misleading advertising in any commercial enterprise. 3. The plaintiffs will have three months to complete all business dealings that are related to the termination of their present business. 4. The defendants shall not sell their diet pills to anyone who will or may in turn sell them as weight loss aids. 5. Defendants are permitted to use their telephones during the 3 month termination period to assist in the process of closing their business. Defts. are not to use the telephones for the sale of any diet pills or diet aid products. s/WTH/07/30/90 /Notified. MFR98/D2318. (grk)	
	<i>Filed:</i> 08/01/1990 <i>Entered:</i> 08/08/1990	Terminated Case
	<i>Docket Text:</i> Case closed (rjc)	
20	<i>Filed:</i> 08/20/1990 <i>Entered:</i> 08/22/1990 <i>Terminated:</i> 05/20/1991	Motion for Default Judgment
	<i>Docket Text:</i> MOTION by USA for default judgment against Robert A. Calistri, George L. Carapella, Raymond J. Carapella (amw)	
21	<i>Filed:</i> 08/20/1990 <i>Entered:</i> 08/22/1990 <i>Terminated:</i> 08/31/1990	Motion to dismiss
	<i>Docket Text:</i> JOINT MOTION by USA, Robert A. Calistri, George L. Carapella to dismiss and settlement agreement, with proposed order. (amw)	
22	<i>Filed:</i> 08/24/1990 <i>Entered:</i> 08/27/1990 <i>Terminated:</i> 08/27/1990	Motion for entry of clerk's default
	<i>Docket Text:</i> MOTION by USA for entry of default as to Raymond J. Carapella (amw)	
23	<i>Filed &amp; Entered:</i> 08/27/1990	Clerk's Entry of Default
	<i>Docket Text:</i> CLERK'S ENTRY OF DEFAULT as to Raymond J. Carapella granting [22-1] motion for entry of default as to Raymond J. Carapella (amw)	
	<i>Filed &amp; Entered:</i> 08/31/1990	Order
	<i>Docket Text:</i> ENDORSED ORDER granting [21-1] joint motion to dismiss and settlement agreement as to defts Robert Calistri and George Carapella only. ( Signed by Judge Wm. T. Hodges ) (amw)	
24	<i>Filed &amp; Entered:</i> 04/03/1991	Order

<i>Docket Text:</i> ORDER, permanent injunction (see file) ( Signed by Judge Wm. T. Hodges ) MFR Number 100/873,874 (amw)		
<i>Filed &amp; Entered:</i>	04/19/2001	FRC record data
<i>Docket Text:</i> FRC record data: accession # 021 93 0536; agency box # 175; location # F0242751 (sak)		

RECEIVED

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

90 JUL -6 AM 10:40

CLERK U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT A. CALISTRI,

GEORGE L. CARAPELLA,

RAYMOND J. CARAPELLA,

Defendants.

Civil Action No.

90-838-Civ-T-10C

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

**Jurisdiction and Venue**

1. This Court has jurisdiction under 28 U.S.C. § 1345 and 18 U.S.C. § 1345.

2. Venue lies in this district under 28 U.S.C. § 1391(b).

**Parties**

3. Plaintiff, the United States of America, is a sovereign entity with the power to sue in its official name.

4. Defendant Robert S. Calistri is an individual who resides at 504 Apache Trail, Brandon, Florida 34299.

5. Defendant George L. Carapella is an individual who resides at 4508 Country Gate Court, Valrico, Florida 33594.

6. Defendant Raymond J. Carapella is an individual who resides at 3910 Rosedale Drive, Brandon, Florida 34299.

### **Scheme**

7. Defendants are involved in an ongoing scheme to defraud members of the public through the promotion and sale of weight loss products.

8. Defendants' advertisements for these weight loss products are patently false. There is absolutely no credible scientific or medical evidence to support the major claims made in the advertisements; moreover, information provided by defendants themselves flatly contradicts some of the claims made in the advertisements.

9. Defendants were given notice of the falsity of their advertisements by a series of actions brought by the United States Postal Service pursuant to the postal false representation statutes, 39 U.S.C. §§ 3005, 3007.

10. On July 18, 1988, the General Counsel of the United States Postal Service ("General Counsel") filed an administrative complaint charging defendants Robert Calistri and George Carapella with falsely advertising the DIETOL-7 weight loss program. At this time, Robert Calistri and George Carapella were directors of Overeaters, Inc., a Florida corporation.

11. Proceedings in the DIETOL-7 case were settled on October 7, 1988, when Robert Calistri and George Carapella entered into an agreement in which they consented to the issuance of a cease and desist order against them. They signed the agreement as the directors of both Overeaters, Inc. and Fat

Busters, Inc. Fat Busters is a Florida corporation that sells the BODI-TRIM weight loss program.

12. Instead of removing the false representations from their advertisements, Robert Calistri and George Carapella replaced the mail order form with instructions on how to order DIETOL-7 by phone. However, they continued to print a mailing address on the advertisements. On January 22, 1990, the General Counsel filed an administrative petition alleging that Robert Calistri and George Carapella were breaching the consent agreement by continuing to invite consumers to order DIETOL-7 by mail.

13. On February 23, 1990, Robert Calistri and George Carapella signed a supplemental agreement requiring them to omit a mailing address from future weight loss advertisements and to place in its stead the phrase: "No Mail Orders Accepted."

14. Robert Calistri and George Carapella continue to advertise DIETOL-7 and BODI-TRIM by means of the same patently false representations they were making before the Postal Service initiated proceedings against them.

15. Robert Calistri and George Carapella have also established and are co-directors of a new corporation, Richfield Pharmaceuticals. Richfield sells BELDOXINOL weight loss tablets through advertisements that are even more blatantly false than the DIETOL-7 and BODI-TRIM advertisements. Orders for BELDOXINOL are currently accepted by phone only.

16. Raymond Carapella became the subject of postal proceedings on November 22, 1989, when the General Counsel charged him and Firm-X Corporation, of which he is the sole director, with making false representations in advertisements for the Wate-Gon diet program.

17. On November 28, 1989, the Postal Service obtained from this Court a Temporary Restraining Order detaining Firm-X's incoming mail pursuant to 39 U.S.C. § 3007. Raymond Carapella failed to present a defense, and Judge Kovachevich issued a Preliminary Injunction on December 8, 1989. Raymond Carapella also failed to oppose the administrative charges, and a cease and desist order was issued against him and Firm-X by default on December 27, 1989.

18. Raymond Carapella aids and abets Robert Calistri and George Carapella in perpetrating the fraud described in this complaint and in circumventing Postal Service orders. He established Firm-X on August 24, 1988, just one month after the Postal Service brought charges against Overeaters, Inc. He rented a post office box on behalf of both Firm-X and O.E.I. (Overeaters, Inc.). Similarly, approximately one month after the Postal Service brought charges against Firm-X, Raymond Carapella rented a post office box on behalf of Richfield Pharmaceuticals that was used to receive mail orders for BELDOXINOL.

19. Although the postal proceedings described above gave defendants unambiguous notice that their advertisements are false, they continue to market DIETOL-7, BODI-TRIM, and



BELDOXINOL by means of substantially similar advertisements. By so doing, defendants have shown a reckless disregard for the truth.

20. The fact that defendants reacted to the postal proceedings described above by circumventing the Postal Service's jurisdiction rather than by halting their fraudulent scheme shows that defendants are extremely likely to perpetrate their fraudulent scheme in the future.

#### **Violation of 18 U.S.C. § 1345**

21. Pursuant to 18 U.S.C. § 1345 (Supp. IV 1986), the United States may bring an action for injunction relief "[w]henver it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute" mail fraud (18 U.S.C. § 1341) or wire, radio, and television fraud (18 U.S.C. § 1343).

22. Defendants are engaged in an ongoing scheme to defraud members of the public through the promotion and sale of weight loss products by means of false representations. Defendants either know these representations are false or are recklessly indifferent to the truth.

23. Defendants' fraudulent scheme involves the use of the mails to disseminate newspaper and magazine advertisements.

24. Defendants' fraudulent scheme involves the use of telephone wires to arrange for the receipt of money from members of the public via authorization to charge credit card accounts.

25. Therefore, injunctive relief against defendants is warranted under 18 U.S.C. § 1345.

**Request for Relief**

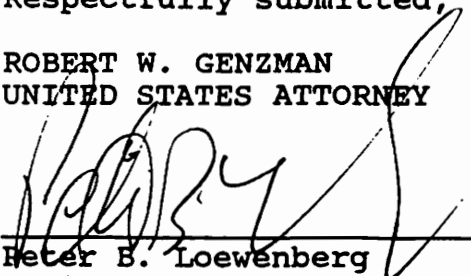
26. The United States respectfully requests the Court to:

- Grant the attached motion for temporary restraining order, and issue the proposed temporary restraining order attached to this verified complaint;
- Set a time for a hearing on the attached motion for preliminary injunction;
- After such a hearing, issue the proposed preliminary injunction attached to this verified complaint; and
- At the conclusion of proceedings in this matter, issue a permanent injunction prohibiting defendants from using the mails and telephone wires to perpetrate their fraudulent scheme.

Respectfully submitted,

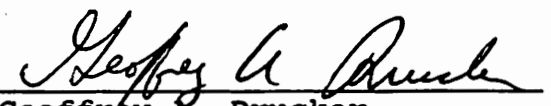
ROBERT W. GENZMAN  
UNITED STATES ATTORNEY

By:



Peter B. Loewenberg  
Assistant U.S. Attorney  
Florida Bar 170488

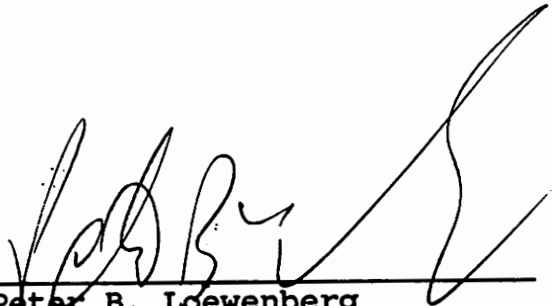
500 Zack Street, Room 410  
Tampa, FL 33602  
(813) 225-7450



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475 L'Enfant Plaza, S.W.  
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(202) 268-5121

VERIFICATION

I, Peter B. Loewenberg, am the attorney who is chiefly responsible for this litigation, and I am familiar with the contents of the attached Verified Complaint For Injunctive Relief. I declare under 28 U.S.C. § 1746 and under the penalties of perjury that the information contained in this pleading was furnished to me by appropriate government sources, and, based on information and belief, that the Complaint's allegations are true.



Peter B. Loewenberg  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

FILED

90 JUL -6 AM 10:10

CLERK'S OFFICE  
U.S. DISTRICT COURT  
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT A. CALISTRI,

GEORGE L. CARAPELLA,

RAYMOND J. CARAPELLA,

Defendants.

Civil Action No.

90-838-CV-T-10C

MEMORANDUM OF LAW IN SUPPORT OF  
APPLICATION FOR TEMPORARY RESTRAINING ORDER  
AND MOTION FOR PRELIMINARY INJUNCTION

**Preliminary Statement**

This is an action for injunctive relief against three individuals who are conducting an ongoing scheme to defraud the public through patently false advertisements for weight loss products.

Defendants are circumventing a series of Postal Service cease and desist orders issued against them by accepting for their weight loss products payment via telephone. To halt this intentional evasion of federal authority, the United States seeks injunctive relief under 18 U.S.C. § 1345 (Supp. IV 1986), which permits a district court to enjoin the commission of mail fraud

(18 U.S.C. § 1341) and wire, radio, and television fraud  
(18 U.S.C. § 1343).

### Statement of Facts

Defendants Robert A. Calistri, George L. Carapella, and Raymond J. Carapella sell weight loss products through fraudulent advertising. The products they are currently marketing are BELDOXINOL, BODI-TRIM, and DIETOL-7.

#### I. BELDOXINOL

The central message of the BELDOXINOL advertisement is precisely what the typical person would most like to hear: you can lose weight without diet or exercise. Defendants convey this message in dramatic language:

BELDOXINOL has . . . scientists totally astounded on how it makes people lose weight without changing their eating habits, without exercise and without keeping track of calories.

. . . .

Researchers are amazed at how people who take BELDOXINOL can go on eating unlimited portions of their favorite foods and still lose weight.<sup>1/</sup>

The representation that scientists are astounded and amazed by BELDOXINOL strongly implies that BELDOXINOL contains a new formulation. This representation is bolstered by the following

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<sup>1/</sup> Declaration of Postal Inspector Thomas D. Bazley ("Bazley Declaration"), Exhibit P.

passages:

"We are going to blow away every weight loss product on the market because they won't be able to compete with us."

BELDOXINOL is simply the most effective weight loss product ever.<sup>2/</sup>

Nowhere in the advertisement does it state what the BELDOXINOL tablets contain.

The Government sought an opinion on the effectiveness and safety of BELDOXINOL from Dr. C. Wayne Callaway, an Associate Clinical Professor of Medicine at the George Washington University Medical Center. From 1981-1986, Dr. Callaway was the Director of the Nutrition Consulting Services, the Nutrition Clinic, and the Lipid Clinic at the Mayo Clinic in Rochester, Minnesota. His extramural activities include six years on the Board of Directors of the American Board of Nutrition, including two years as Vice-President, and five years of service on the Editorial Board of the American Journal of Clinical Nutrition.<sup>3/</sup>

Dr. Callaway received his medical training at Northwestern University Medical School, the Mayo Graduate School of Medicine, and Harvard Medical School. He has authored or co-authored numerous articles and book chapters on obesity, weight control, and dietary disorders.<sup>4/</sup>

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<sup>2/</sup> Bazley Declaration, Exhibit P.

<sup>3/</sup> Declaration of C. Wayne Callaway ("Callaway Declaration") ¶¶ 1-4.

<sup>4/</sup> Callaway Declaration ¶¶ 2, 4.

According to Dr. Callaway, phenylpropanolamine ("PPA"), the ingredient in BELDOXINOL,<sup>5/</sup> is a known appetite suppressant. PPA makes some people feel less hungry for a short period of time, so it may help those who tend to overeat adhere to a calorie-restricted diet.<sup>6/</sup> But defendants do not market BELDOXINOL as an appetite suppressant; rather, they hype it as a miracle pill that makes fat disappear quickly and effortlessly, regardless of diet. No credible medical or scientific evidence suggests that someone who uses BELDOXINOL without dieting or exercising will lose a detectable amount of weight. For this reason, Dr. Callaway believes "the representation in the BELDOXINOL advertisement that a consumer can lose as much weight as he chooses to without dieting or exercising is unequivocally false."<sup>7/</sup>

Regarding safety, Dr. Callaway notes that over-the-counter weight loss products containing PPA carry the following warning:

If you are being treated for high blood pressure or depression, or have heart disease, diabetes, or thyroid disease, do not take this product, except under the supervision of a physician.<sup>8/</sup>

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<sup>5/</sup> Bazley Declaration, chart.

<sup>6/</sup> Callaway Declaration ¶¶ 10-12.

<sup>7/</sup> Callaway Declaration, Exhibit 13.

<sup>8/</sup> Callaway Declaration ¶ 15. Defendants's telemarketers inform consumers that BELDOXINOL is unsafe for use by people with these common ailments, but only if they specifically ask for further information on safety. Bazley Declaration ¶ 26. Since the advertisement states that BELDOXINOL is 100% safe, consumers are unlikely to ask for such information.



According to Dr. Callaway, this warning is extremely important because high blood pressure (hypertension), heart disease, and diabetes are common afflictions among the obese. For people with hypertension, a further elevation in blood pressure is potentially life-threatening. Since the BELDOXINOL advertisement fails to warn them of the potential dangers of PPA, many consumers may purchase the product without realizing it is unsafe for them to use.<sup>9/</sup>

Equally false, in Dr. Callaway's opinion, is the representation in the BELDOXINOL advertisement that the pill is unique. Appetite-control products containing PPA have been sold over-the-counter in the United States since the 1960's. Today, Dexatrim and Acutrim, both of which contain PPA, are sold in drug stores and pharmacies across the country without a prescription. Dr. Callaway finds it "very difficult to believe that the promoters of BELDOXINOL are unaware of all the other PPA products on the market."<sup>10/</sup>

It is also difficult to believe that defendants' false claim of approval by the United States Food and Drug Administration ("FDA") is an honest mistake. The advertisement states:

**DIET PILL APPROVED FOR SALE IN U.S.**

**FDA CONSIDERS . . . 100% SAFE AND EFFECTIVE**

**. . . . .**

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<sup>9/</sup> Callaway Declaration ¶ 15.

<sup>10/</sup> Callaway Declaration ¶ 14.

This tablet's main ingredient has been approved by the FDA and is considered 100% safe and effective.<sup>11/</sup>

According to an FDA official, "neither the product nor the active ingredient [phenylpropanolamine HCL] have been approved by the FDA."<sup>12/</sup>

## II. BODI-TRIM and DIETOL-7

The BODI-TRIM and DIETOL-7 advertisements convey the same central message as the BELDOXINOL advertisements: you can lose as much weight as you desire while consuming as much food as you want:

**NOW YOU CAN EAT ALL YOU WANT WHILE EXTRA WEIGHT  
DISAPPEARS<sup>13/</sup>**

**NO SELF CONTROL NEEDED AS 20-30-60-100 UNWANTED  
POUNDS & INCHES MELT AWAY<sup>14/</sup>**

**FASTEST & MOST PERMANENT WEIGHT-LOSS PROGRAM  
KNOWN<sup>15/</sup>**

Yes, Dietol-7 is the only true all-you-can-eat diet program. You don't have to count calories or starve yourself.<sup>16/</sup>

Examples of the foods one may eat in unlimited amounts in

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<sup>11/</sup> Bazley Declaration, Exhibit P.

<sup>12/</sup> Exhibit 1 to this memorandum.

<sup>13/</sup> Bazley Declaration, Exhibit J.

<sup>14/</sup> Bazley Declaration, Exhibits H, J.

<sup>15/</sup> Bazley Declaration, Exhibit J.

<sup>16/</sup> Bazley Declaration, Exhibit H.

conjunction with BODI-TRIM and DIETOL-7 are: bacon, roast beef, cheese, butter, heavy cream, and eggs.<sup>17/</sup>

Like the BELDOXINOL advertisements, the BODI-TRIM and DIETOL-7 advertisements promise not only unbounded effectiveness, but complete safety as well:

You will be amazed at this doctor's program that helps you lose as much weight as you wish faster and more safely than anything you've ever tried.<sup>18/</sup>

"[D]ue to its safety and fast action, [this program] is now available to the general public in this country without a doctor's prescription."<sup>19/</sup>

The advertisements do not explain what the program consists of, and given that the advertisements promise "no calorie counting," "no self-control needed," and "you can eat all you want," consumers have no reason to suspect that the program is a restricted diet.

What consumers actually receive if they respond to either advertisement is a supply of pills containing guar gum<sup>20/</sup> and a ketonic diet. Guar gum may be an effective appetite suppressant if administered in large daily doses (10-20 grams), but no scientific or medical evidence suggests that it is effective in the small amounts provided by BODI-TRIM and DIETOL-7. Each BODI-

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<sup>17/</sup> Bazley Declaration, Exhibits H, J.

<sup>18/</sup> Bazley Declaration, Exhibit H.

<sup>19/</sup> Bazley Declaration, Exhibit J.

<sup>20/</sup> Bazley Declaration, chart. None of the other ingredients are associated in any manner with weight loss. Callaway Declaration ¶ 16-20, 22-23.

TRIM tablet contains 200 mg of guar gum, and the recommended dosage is one per meal. Thus, even if the user eats up to six meals per day, as the BODI-TRIM advertisement suggests, he will ingest a maximum of only 1.2 grams of guar gum per day. Each DIETOL-7 tablet contains, at most, 500 mg of guar gum, and the recommended dosage is no more than three tablets per day--a maximum of 1.5 grams per day. Thus, BODI-TRIM and DIETOL-7 supply less than 1/6 of the amount of guar gum required for an effective appetite suppressant.<sup>21/</sup>

The diet program permits the consumer to eat all the protein and fat he desires, but virtually no complex carbohydrates (such as beans and grains) or simple carbohydrates (such as sugar and honey). When deprived of carbohydrates, the body must use fat and protein for energy. As this happens, ketone bodies (acidic compounds found in blood and urine) are formed, and they can "increase in the blood and exert a toxic action on the central nervous system."<sup>22/</sup>

Cognizant of the dangers of ketosis, defendants include the following warnings in the DIETOL-7 diet program:

This discussion of ketosis, of course, assumes you are in good health. If you are diabetic, or have other health impairments (including alcoholism), for you, ketosis might not be a desirable condition. **Always consult your physician before embarking on this or any diet program.**

. . . .

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<sup>21/</sup> Callaway Declaration ¶¶ 21, 24.

<sup>22/</sup> 3A Attorneys' Textbook of Medicine ¶ 74.53 (1984).

PLEASE OBSERVE: Because drastic changes are produced in your metabolism under this diet, like any diet, this one too should be accompanied by your doctor's supervision. This is especially true if you are on any form of medication.<sup>23/</sup>

Thus, defendants own words prove that two key claims in the BODI-TRIM and DIETOL-7 advertisements are false. First, the advertisements emphasize that "no doctor's prescription" is necessary for the program, and consumers will take this to mean that they need not consult with a physician before starting this program. The DIETOL-7 program, however, warns that everyone should consult with a physician first and should remain under a doctor's supervision while following the diet.

Second, the advertisements stress that the program is safe, but the DIETOL-7 program makes it quite clear to purchasers that a ketonic diet is not safe. Obviously, if everyone, including those in normal health, must consult a physician before commencing the ketonic diet, the diet is risky.<sup>24/</sup>

Incredibly, defendants do not include a health warning in the BODI-TRIM program even though it is also a ketonic diet.

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<sup>23/</sup> Bazley Declaration, Exhibit R.

<sup>24/</sup> An additional misrepresentation in the advertisements is that consumers may eat whatever high-calorie foods they like and need not exercise any self-control. The ketonic diet forbids the consumption of high-calorie yummys such as pancakes, pasta, cookies, cake, candy, and pastries because of their carbohydrate content. The Court is invited to take judicial notice that, for most people, staying away from these tempting foods requires a great deal of self-control.

This omission demonstrates defendants' callous disregard for the health and safety of consumers.

### III. Circumvention of Postal Service Administrative Orders

Defendants' outrageous claims attracted the attention of postal authorities, and on July 18, 1988, the General Counsel of the United States Postal Service ("General Counsel") filed an administrative complaint charging defendants Robert Calistri and George Carapella with falsely advertising the DIETOL-7 weight-loss tablet. At this time, Robert Calistri and George Carapella were directors of Overeaters, Inc., a Florida corporation.<sup>25/</sup>

Before any orders were issued in this matter, defendants were already scheming to circumvent them. On August 24, 1988, Raymond James Carapella established Firm-X, Inc., listing himself as the president and sole director. He also rented a post office box on behalf of Firm-X and O.E.I. (Overeaters, Inc.).<sup>26/</sup>

Proceedings in the DIETOL-7 case were settled on October 7, 1988, when Robert Calistri and George Carapella entered into an agreement in which they authorized the issuance of a cease and desist order against them. They signed the agreement as the directors of both Overeaters, Inc. and Fat Busters, Inc. Fat Busters sells the BODI-TRIM weight loss pill.<sup>27/</sup>

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<sup>25/</sup> Bazley Declaration ¶ 4, Exhibit A.

<sup>26/</sup> Bazley Declaration ¶¶ 12-13.

<sup>27/</sup> Bazley Declaration ¶ 5, 9; Exhibits B, I.

Through Firm-X, defendants were able to circumvent the cease and desist order until November 22, 1989, when the General Counsel charged Raymond Carapella and Firm-X with making false representations in advertisements for Wate-Gon diet pills. Six days later, the Postal Service obtained from this Court a Temporary Restraining Order detaining Firm-X's incoming mail pursuant to 39 U.S.C. § 3007. Raymond Carapella did not present a defense to either the administrative or district court action, and a cease and desist order was issued against him by default on December 27, 1989.<sup>28/</sup>

In the meantime, defendants prepared to circumvent the Postal Service again by establishing yet another corporation. Richfield Pharmaceuticals ("Richfield") came into being on December 22, 1989 with Robert Calistri and George Carapella as directors. Raymond Carapella rented a post office box for Richfield in Riverview, Florida, and defendants began soliciting mail orders for BELDOXINOL.<sup>29/</sup>

Defendants also continued to market DIETOL-7 by replacing the mail order form that had appeared in their advertisements with instructions on how to order DIETOL-7 by phone. However, they continued to print a mailing address on their advertisements. On January 22, 1990, the General Counsel filed an administrative petition alleging that Robert Calistri and George Carapella were breaching the consent agreement of October

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<sup>28/</sup> Bazley Declaration ¶¶ 12-15; Exhibit M.

<sup>29/</sup> Bazley Declaration ¶¶ 18-19.

7, 1988 by continuing to invite consumers to order DIETOL-7 by mail.<sup>30/</sup>

On February 23, 1990, Robert Calistri and George Carapella signed a supplemental agreement requiring them to omit a mailing address from all future weight loss advertisements and place in its stead the phrase: "No Mail Orders Accepted."<sup>31/</sup> Prior to the February 23 agreement, BELDOXINOL advertisements stated:

Since the demand for BELDOXINOL is so great, the company has decided to allow BELDOXINOL to be purchased through the mail.<sup>32/</sup>

The advertisements provided a mailing address but no phone number. Defendants have now incorporated this phrase into their advertisements in characteristic form: by lying about it.

Current BELDOXINOL advertisements state:

Since the demand for BELDOXINOL is so great, the company has decided to allow BELDOXINOL to be purchased by phone order only.<sup>33/</sup>

A toll-free number is provided, but no address is listed. Thus, in addition to all their other lies, defendants now falsely represent that the reason why they accept no mail orders is the popularity of their product.<sup>34/</sup>

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<sup>30/</sup> Bazley Declaration ¶¶ 6-7, Exhibits D, E.

<sup>31/</sup> Bazley Declaration, Exhibit G.

<sup>32/</sup> Bazley Declaration, Exhibit N.

<sup>33/</sup> Bazley Declaration, Exhibit O.

<sup>34/</sup> It is also worth noting a recent decision by this Court finding that George Carapella engaged in "blatant" tax evasion. Carapella v. United States, \_\_\_ B.R. \_\_\_, 1990 Lexis 6553 (M.D. Fla. May 22, 1990).



## Argument

### To Protect The Public, The Court Should Enjoin Defendants From Committing Mail And Wire Fraud

A new statute, 18 U.S.C. § 1345 (Supp. IV 1986), authorizes a district court to enjoin ongoing violations of the mail fraud and wire fraud statutes "[w]henever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of" Title 18, Chapter 63.<sup>35/</sup> Chapter 63 encompasses the mail fraud (sections 1341 and 1342); wire, radio, and television fraud (section 1343); and bank fraud (section 1344) statutes. As is shown below, defendants are engaged in mail and wire fraud, and they are likely to continue their scheme unless the Court enjoins them under section 1345.

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<sup>35/</sup> 18 U.S.C. § 1345 states in full:

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of this chapter, the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such violation. The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

I. The Government Need Only Show Probable Cause To Believe That Preliminary Injunctive Relief Under 18 U.S.C. § 1345 Is Warranted

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To obtain preliminary injunctive relief under 18 U.S.C. § 1345, the Government must show "probable cause to believe that the defendants are currently engaged or are about to engage in a fraudulent scheme violative of the federal mail, wire or bank fraud statutes." United States v. Belden, 714 F. Supp. 42, 45-46 (N.D.N.Y. 1987). See also United States v. George W. Davis, 1988 Westlaw 168,562 (S.D. Fla. September 23, 1988) (following Belden).<sup>36/</sup>

The legislative history reveals that Congress enacted 18 U.S.C. § 1345 because it found that the relief provided by the postal false representations statutes, 39 U.S.C. §§ 3005, 3007 was too limited. Id. (citing S. Rep. No. 225, 98th Cong., 2d Sess. 402, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3540 ("Senate Report")); see also United States v. Cen-Card Agency, 724 F. Supp. 313, 318 (D.N.J. 1989). All that a district court can do under 39 U.S.C. § 3007 is temporarily detain a promoter's incoming mail upon a showing of probable cause to believe he is making false representations. To stop a promoter from using the mails to disseminate advertisements, or from accepting orders by telephone, a Court must invoke 18 U.S.C. § 1345. Belden, 714 F. Supp. at 45.

Since Congress enacted section 1345 "to provide the government a means 'to put a speedy end' to a fraudulent scheme"

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<sup>36/</sup> A copy of this decision is attached as Exhibit 2.

that cannot be stopped under section 3007, "it is unlikely that Congress intended to hold the government to a more stringent standard than that of probable cause when relief under § 1345 was sought . . . ." Belden, 714 F. Supp. at 45 (quoting Senate Report at 402, 1984 U.S. Code Cong. & Admin. News at 3540); accord Davis, 1988 Westlaw 168,562 (following Belden). In light of the legislative history of section 1345, the Court should award preliminary injunctive relief against defendants upon a showing of probable cause to believe such relief is warranted.

II. There Is Probable Cause To Believe That Preliminary Injunctive Relief Under Section 1345 Is Warranted

Injunctive relief under section 1345 is warranted where the Government can establish that the defendants are engaged or are about to engage in a fraudulent scheme violative of the federal mail, wire or bank fraud statutes. Belden, 714 F. Supp. at 45-46. "The essential elements of a mail fraud prosecution are (1) a scheme to defraud and (2) the use of the mails in execution or furtherance of that scheme." United States v. Italiano, 837 F.2d 1480, 1482 (11th Cir. 1988). Similarly, "[a] wire fraud offense under section 1343 requires proof of two essential elements: (1) scheme to defraud; (2) use of, or causing the use of, wire communications in furtherance of the scheme." United States v. Herron, 825 F.2d 50, 53-54 (5th Cir. 1987) (quoted in United States v. Schardar, 850 F.2d 1457, 1461 (11th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 109 S. Ct. 326 (1988)).

A. Defendants Are Engaged In A Scheme To Defraud

That defendants are engaged in a scheme to defraud is beyond doubt. "Fraudulent conduct that will establish a 'scheme to defraud' includes knowingly making false representations, or concealing material facts. It also includes statements made with reckless indifference to their truth or falsity." United States v. Sawyer, 799 F.2d 1494, 1502 (11th Cir. 1986) (citations omitted), cert. denied, 479 U.S. 1069 (1987). See also Securities & Exchange Commission v. Carriba Air, Inc., 681 F.2d 1318, 1324 (11th Cir. 1982). There is overwhelming evidence that defendants either know the representations in their weight loss advertisements are false or are recklessly indifferent to the truth.

1. BELDOXINOL

The BELDOXINOL advertisement proclaims in a banner headline that the FDA has approved the pill for sale in the United States. In fact, the FDA has approved neither the BELDOXINOL tablets themselves nor their ingredient, PPA. This is not the sort of mistake that could result from inadvertence. Either defendants knew the FDA had not given its approval, or they were so recklessly indifferent to the truth that they did not even bother to check.

Furthermore, defendants' concealment of the safety risks associated with PPA is intentional. Only when a Postal Inspector phoned a toll-free number printed in a recent BELDOXINOL advertisement and asked specifically about safety was he then

told that BELDOXINOL was not appropriate for people with certain health conditions. Thus, defendants know PPA is not safe for use by some people; and they have chosen, nevertheless, to claim in their advertisement that it is 100% safe.

Finally, defendants represent that BELDOXINOL is a new, unique formula even though PPA products are on the shelves of drug stores all across the country. As Dr. Callaway observes, it is very difficult to believe that defendants are unaware of all these weight loss products.

## 2. BODI-TRIM and DIETOL-7

Since the key representations in the BODI-TRIM and DIETOL-7 advertisements are contradicted by the DIETOL-7 program, defendants must know these representations are false. The advertisements represent that the diet program is safe and that no doctor's prescription is necessary; however, the DIETOL-7 program states that the diet may be unsafe for persons with a variety of ailments, and it advises everyone to consult with a physician before and during the course of a ketonic diet.

With reckless disregard for health and safety, defendants do not include a safety warning in the BODI-TRIM program.

## 3. Effect Of Postal Service Proceedings

Defendants' current advertisements, by themselves, are outrageous enough to furnish a sufficient basis for preliminary injunctive relief under section 1345. And when these advertisements are considered in light of the series of administrative actions brought by the Postal Service, the case

for preliminary relief becomes even more compelling. These actions put defendants on clear notice that numerous representations in their advertisements are false. Instead of changing their advertisements, defendants changed the manner in which they do business to circumvent Postal Service cease and desist orders. Defendants' intent to defraud is beyond dispute.

B. Use Of The Mails

Some of the newspapers and magazines in which defendants advertise are delivered by mail to subscribers.<sup>37/</sup> This delivery to subscribers constitutes use of the mails in furtherance of a scheme within the meaning of 18 U.S.C. § 1341. See United States v. Buchanan, 544 F.2d 1322, 1324 (5th Cir.), cert. denied, 432 U.S. 907 (1977).<sup>38/</sup>

C. Use Of The Wires

Defendants presently receive all orders for BELDOXINOL, BODI-TRIM, and DIETOL-7 by telephone.<sup>39/</sup>

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<sup>37/</sup> Bazley Declaration ¶ 25.

<sup>38/</sup> In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981 (en banc) the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

<sup>39/</sup> Bazley Declaration ¶ 3.

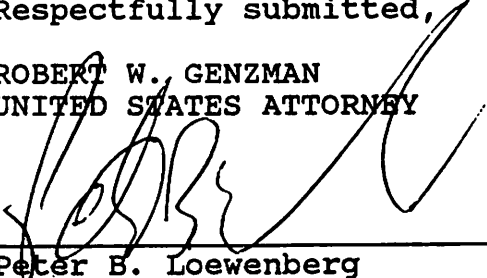
### Conclusion

In conclusion, there is much more than probable cause to believe defendants are committing mail and wire fraud. For this reason, the Court should protect the public by issuing a temporary restraining order and a preliminary injunction against defendants pursuant to 18 U.S.C. § 1345.


Respectfully submitted,

ROBERT W. GENZMAN  
UNITED STATES ATTORNEY

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475 L'Enfant Plaza, S.W.  
Washington, DC 20260-1144  
(202) 268-5121



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

JUN - 8 1990

Food and Drug Administration  
Rockville MD 20857

Geoffrey Drucker  
U.S. Postal Service  
475 L'Enfant Plaza, S.W.  
Washington, DC 20260-1144

Dear Mr. Drucker:

This is in response to your telephone request of June 6, 1990 regarding the marketing status of a product called Beldoxinol as an over-the-counter (OTC) weight control drug.

This product entered the market early this year and the Food and Drug Administration (FDA) began its investigation in February. Review of the actual product labeling and formulation for Beldoxinol revealed that the labeling and the active ingredient, phenylpropanolamine HCl, are both permitted at the present time under the current marketing policy for OTC appetite suppressants. It is in the advertising of this product that the egregious claims are found, i.e. "approved by the FDA", "most effective weight loss product ever", "One of our very safest drugs", etc. It is important to note that neither the product nor the active ingredient have been approved by the FDA; rather they are deferred to the OTC Drug Review as are similarly formulated and labeled OTC weight loss products and ingredients. The final decision regarding the safety and efficacy of this product and similar OTC phenylpropanolamine HCl containing weight loss preparations will be made with the publication of the final rule covering this class of drugs. At that time marketing conditions including allowable labeling will be determined.

We hope you find this information helpful.

Sincerely yours,

*Robert M. Montague*

Robert M. Montague  
Assistant to the Director  
Division of Drug Labeling Compliance  
Office of Compliance  
Center for Drug Evaluation and Research

EXHIBIT 1



subsequently charging the victims' accounts. Western Union also has been involved in the payments.

The advertisements invited victims to send resumes through the mail to Universal, or to contact Universal by telephone. Once the victims contacted Universal, they were given a sales pitch, both by mail and over the telephone, containing various representations regarding Universal's services. The representations included promises that Universal was in constant contact with U.S. and foreign corporations looking for overseas jobs, that Universal would forward resumes to those companies, that Universal could deliver the resumes to the "right person at the right time", that anyone dissatisfied with the results could obtain a full refund of the placement fee, and that experienced job counsellors were available to assist the victims in obtaining jobs.

Once the victims have paid their money, no job offers are forthcoming. In at least two cases, Universal arranged "job interviews" for victims, but no interview or other contact would occur at the designated time and place. Most victims simply never heard again from Universal. Those victims who called to complain were given a variety of false excuses as to why the company was unable to make refunds. No victim was ever placed in a job; no money was ever refunded. Victims were never referred to job counselors, and never informed of the companies to which their resumes allegedly had been sent.

Although the number of complaints before the Florida Consumer Fraud Division number only nine as before this Court at

this time, the Court finds that they are representative of a larger number of complaints that have not yet been fully investigated and are not, therefore, before the Court.

The Court finds that in fact the defendants have been making false representations. The Court finds that George W. Davis is associated with Universal Placement, Inc., and he has participated in these false representations which were enumerated by the testimony of the Postal Inspector and which were alluded to in part previously in the findings of fact. The interests of the public should be protected and the public is at this moment exposed to false representations. The operation which is under way and which constitutes the basis of this complaint is a scam that is of major significance and importance to the many people who have been affected by it.

#### CONCLUSIONS OF LAW

The Postal Service seeks an injunction, pursuant to 39 U.S.C. § 3007, permitting it to hold Defendants' incoming mail pending the outcome of Postal Service administrative proceedings against the Defendants. The Postal Service, for the first time in any reported case, also seeks an injunction, pursuant to 18 U.S.C. § 1345, permitting it to cause the disconnection of Defendants' telephone service.

The standards for obtaining an injunction under 39 U.S.C. § 3007 are well established. The Postal Service need not prove the traditional common law standards for obtaining relief. Instead, the Postal Service is entitled to relief upon a showing of probable cause that Defendants are receiving money through the

mails by means of false representations. United States Postal Service v. Stimpson, 515 F. Supp. 1149, 1150 (N.D. Fla. 1981); United States Postal Service v. Oriental Nurseries, 491 F. Supp. 1265 (S.D. Fla. 1980). The test is whether the facts and circumstances are sufficient to justify a reasonable belief Defendants are engaging in the proscribed conduct, Stimpson supra. 515 F.Supp. 1150. Probable cause may be established through evidence not admissible at trial, including hearsay evidence, Id.

The Court finds without hesitation that there is ample probable cause for this Court to make a determination, as it now does, that the defendants have made false representations and have violated statute 39 U.S.C. Section 3007 as well as 3005 and likewise have been involved in violations of the wire fraud statute, 18 U.S.C. § 1345.

The Court finds that the sale pitches and solicitations by telephone for the payments through credit cards are as equally important in the operation of this scam as are the payments that are made and received through the mails by postal money orders, checks and other means and devices.

The United States is also seeking preliminary injunctive relief pursuant to 18 U.S.C. § 1345. This statute permits the United States to enjoin any conduct which constitutes a violation of the mail, wire, or bank fraud statutes. Section 1345, unlike 39 U.S.C. § 3007, is a relatively new statute (enacted in 1984), and is not the subject of any meaningful interpretation in published opinions.

The United States, however, submitted an unpublished opinion in the case of United States v. Belden, et. al., No. 86-Cv-659- (S.D.N.Y. Nov..23, 1987). The Belden court examined the legislative history, purpose, and language of 18 U.S.C. § 1345, comparing the purpose to that of 39 U.S.C. § 3007. The court concluded that, since the statutes are designed and intended to halt similar types of conduct before the public can be extensively harmed, the same standards govern granting injunctions under both statutes.

This Court is convinced that the Belden approach is correct. In these times of high technology and resulting computer and telephone fraud, simply stopping mail is not sufficient to protect the public. The operator of the fraud may still use the telephone both to continue to pressure interested victims who have responded by mail, and to collect payments by obtaining credit card numbers.

Accordingly, this Court concludes that an injunction may issue pursuant to 18 U.S.C. § 1345 upon a showing of probable cause, in accordance with the same standards set forth in the cases cited above construing 38 U.S.C. § 3007. As to the scope of the injunctive relief, the Court finds that the best, and perhaps only, way to effectively stop the telephone fraud is to cause the disconnection of the Defendants' telephone services.

Accordingly, since the Government has established that there are administrative proceedings lately filed and now pending, as required by law, the proper predicate exists for this Court to enter and grant the relief requests.

It is therefore ORDERED and ADJUDGED as follows:

A preliminary injunction is hereby entered, until a further order of this Court, whereby the Postal Service is authorized and directed to detain the defendant's incoming mail addressed to Universal Placement, Inc., 1440 Kennedy Causeway, Suite 319, North Bay Village, Florida, 33141-4135. The Postal Service is also directed to cause the disconnection of telephone service to the telephones subscribed at those locations and Southern Bell, and any other telephone company doing business with the Defendants, are hereby directed and ordered to cooperate fully in the implementation of this Order.

This injunction shall remain in effect until the conclusion of the Postal Service administrative proceedings against defendants. The Court requests that such proceedings be completed with all possible dispatch.

DONE AND ORDERED this 23 day of September, 1988,  
in Chambers, Miami, Dade County, Florida.

  
UNITED STATES DISTRICT JUDGE

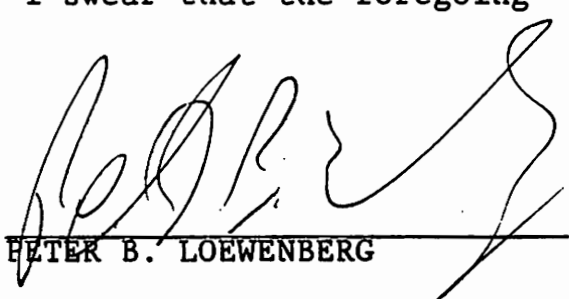
cc. Counsel of Record

DECLARATION

I, Peter B. Loewenberg attempted to call either of the Carapella brothers or Mr. Calistri on July 6, 1990, at 9:30 a.m., at telephone number 813/623-6200. Subsequently I spoke to Grey Gibbs, the attorney for the Carapella Brothers, and advised him of my intention to file this action.

Under penalty of perjury I swear that the foregoing is true and correct.

7/6/90

  
\_\_\_\_\_  
PETER B. LOEWENBERG