IN THE MATTER OF

MONTGOMERY WARD CREDIT CORPORATION, ET AL.

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

Docket C-3839. Complaint, Dec. 11, 1998--Decision, Dec. 11, 1998

This consent order prohibits, among other things, two corporations, that extend credit to consumers, from misrepresenting that any reaffirmation agreement has been or will be filed with the bankruptcy court, or that any reaffirmation agreement is binding.

Participants

For the Commission: *John C. Hallerud and C. Steven Baker.*

For the respondents: *Max Shulman* and *Elizabeth Grayer, Cravath, Swaine & Moore*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Montgomery Ward Credit Corporation, a corporation, and General Electric Capital Corporation, a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Montgomery Ward Credit Corporation is a Delaware corporation with its principal office or place of business at 4246 South Riverboat Road, Taylorsville, Utah.

2. Respondent General Electric Capital Corporation is a New York corporation with its principal executive office or place of business at 260 Long Ridge Road, Stamford, Connecticut.

3. Respondents are engaged in, among other things, the offering and servicing of credit cards, including private label credit cards. In the course and conduct of their businesses, respondents have regularly extended credit (hereinafter referred to as "consumer credit accounts").

4. 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.

THE UNITED STATES BANKRUPTCY CODE

5. Under the United States Bankruptcy Code (11 U.S.C. 1-1330), a debtor may be granted a discharge in a Chapter 7 bankruptcy proceeding from debts that have arisen prior to the filing of the bankruptcy petition (hereinafter referred to as "pre-petition debts"), meaning that the debtor is no longer individually liable for these debts. The granting of a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. 524(a)(2). The purpose of the injunction is to protect the debtor's "fresh start" by ensuring that no debt collection efforts are taken against the debtor personally for pre-petition debts.

6. The United States Bankruptcy Code provides, however, that a debtor may agree with a creditor that the creditor can enforce what would otherwise be a discharged debt. In other words, a debtor may reaffirm his or her pre-petition debts, as long as certain requirements are met. These so-called "reaffirmation agreements" are enforceable only if, among other things, the agreement is filed with the bankruptcy court. If the debtor is not represented by an attorney, the bankruptcy court must hold a hearing to determine that the reaffirmation agreement would not impose an undue hardship on the debtor and is in the best interest of the debtor, and must approve the reaffirmation agreement before it becomes enforceable. 11 U.S.C. 524(c) and (d).

7. If the requirements of 11 U.S.C. 524(c) and (d) are not met, an agreement to reaffirm a debt is not binding and a creditor violates the bankruptcy code if it attempts to collect that debt. 11 U.S.C. 524(a).

VIOLATIONS OF SECTION 5(a) OF THE FEDERAL TRADE COMMISSION ACT

8. From at least January 1, 1993, to June 30, 1997, respondents regularly solicited consumers who had filed for protection under Chapter 7 of the United States Bankruptcy Code to enter into agreements reaffirming some or all of their debt arising from pre-petition consumer credit accounts that would otherwise be discharged through bankruptcy proceedings.

9. In numerous instances, respondents represented, expressly or by implication, to consumers that their reaffirmation agreements

would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code.

10. In truth and in fact, in many cases respondents did not file the reaffirmation agreements with the bankruptcy courts. Therefore, the representation made in paragraph nine was, and is, false or misleading.

11. In numerous instances, respondents represented, expressly or by implication, to consumers that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts.

12. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts for reasons including, but not necessarily limited to, the following: (a) respondents did not file the reaffirmation agreements with the bankruptcy courts; or (b) respondents filed the reaffirmation agreements, but the agreements were then not approved by the bankruptcy courts. Therefore, the representation made in paragraph eleven was, and is, false or misleading.

13. In the course and conduct of their businesses relating to consumer credit accounts, respondents regularly collected from consumers debts that had been legally discharged in bankruptcy proceedings and that respondents were not permitted by law to collect. Respondents' actions have caused or were likely to cause substantial injury to consumers that is not offset by any countervailing benefits and is not reasonably avoidable by these consumers. 15 U.S.C. 5(n). Therefore, respondents' collection of debts that they were not permitted by law to collect was, and is, unfair.

14. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent Montgomery Ward Credit Corporation is a Delaware corporation with its principal office or place of business at 4246 South Riverboat Road, Taylorsville, Utah.

1.b. Respondent General Electric Capital Corporation is a New York corporation with its principal executive office or place of business at 260 Long Ridge Road, Stamford, Connecticut.

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

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 purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "*respondents*" shall mean Montgomery Ward Credit Corporation, a corporation, General Electric Capital Corporation, a corporation, their successors and assigns, and their officers, agents, representatives, and employees.

2. "*Debt*" shall mean any obligation or alleged obligation of a consumer to pay money arising out of an extension of open-end credit under a plan to finance the purchase of goods or services, such goods or services not including real estate or motor vehicles.

3. "*Debtor*" shall mean any person who owes or is claimed to owe a Debt.

4. "*Reaffirmation Agreement*" shall mean any written agreement between a respondent and a Debtor who has filed a petition under Chapter 7 of the Bankruptcy Code, the consideration for which, in whole or in part, is based on all or a part of any dischargeable prepetition Debt incurred by a Debtor.

5. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of any Debt, shall not:

A. Misrepresent, expressly or by implication, to Debtors who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that Reaffirmation Agreements have been or will be filed in bankruptcy court;

B. Misrepresent, expressly or by implication, to Debtors who have filed petitions for bankruptcy protection under the United States Bankruptcy Code that any Reaffirmation Agreement is legally binding on the consumer; or

C. Collect any Debt (including any interest, fee, charge, or expense incidental to the principal obligation) that has been legally discharged in bankruptcy proceedings and that respondents are not permitted by law to collect.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, shall not make any material misrepresentation, expressly or by implication, in the collection of any Debt subject to a pending bankruptcy proceeding.

III.

It is further ordered, That respondents, for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to all Reaffirmation Agreements in connection with Debt and records sufficient to show that such Reaffirmation Agreements were filed in bankruptcy courts and were subsequently approved by bankruptcy courts as part of the underlying bankruptcy proceedings, if required by the United States Bankruptcy Code.

IV.

It is further ordered, That respondents, for five (5) years after the date of issuance of this order, shall deliver a copy of this order to all current and future officers, directors, managerial employees, and bankruptcy court representatives having responsibilities for the collection of any Debt subject to a pending bankruptcy proceeding ("Covered Persons"), and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall, for five (5) years after each such statement acknowledging receipt of the order is signed and dated, maintain and upon request make available to the Federal Trade Commission for inspection and copying such statements. Respondents shall deliver this order to current Covered Persons within thirty (30) days after the date of service of this order, and to future Covered Persons before any new Covered Person makes contact with a respondent's customer or a respondent's customer's attorney for the collection of any Debt subject to a pending bankruptcy proceeding.

V.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) in each case that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or

a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VI.

It is further ordered, That respondents shall provide notification of all proposed settlement terms relating to allegations made by the Attorneys General of various states, any other legal actions by government entities not cited herein, and all class action lawsuits against respondents or any of their predecessors or affiliates, pending on the date that proposed respondents sign this order, that challenge conduct similar to that challenged by the Commission in this proceeding, to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, in writing, at least ten (10) days before any such proposed settlement is submitted to a court for final approval.

VII.

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

VIII.

This order will terminate on December 11, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) 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 Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondents 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 Part as though the complaint had never been 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.

IN THE MATTER OF

CARE TECHNOLOGIES, INC.

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

Docket C-3840. Complaint, Dec. 14, 1998--Decision, Dec. 14, 1998

This consent order prohibits, among other things, a Connecticut-based corporation, that manufactures and distributes pharmaceuticals, from making unsubstantiated claims concerning the efficacy of its over-the-counter head lice treatments. The consent order requires the respondent to make certain disclosures in advertisements concerning the use and effectiveness of its head lice treatment products. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, or interpretations of any test, study, or research.

Participants

For the Commission: *Linda Badger, Kerry O'Brien, Jeffrey Klurfeld, and Carolyn Cox.*

For the respondent: *Daniel Manelli, Farkas & Manelli*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Care Technologies, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Care Technologies, Inc. is a Connecticut corporation with its principal office or place of business at 10 Corbin Drive, Darien, Connecticut.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter pharmaceuticals to the public, including "Clear Lice Killing Shampoo" and "Clear Lice Egg Remover." Clear Lice Killing Shampoo and Clear Lice Egg Remover are "drugs," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

4. Respondent has disseminated or has caused to be disseminated advertisements for the Clear Lice Killing Shampoo and the Clear Lice Egg Remover, including but not necessarily limited to the attached Exhibits A through E. These advertisements contain the following statements:

A. "LICE KILLING SHAMPOO PEDICULICIDE
Kills **BOTH** lice and their eggs." (Exhibit A).

B. "Clear® Lice Egg Remover is a vegetable derived enzyme system that makes nits easier to remove after treatment by loosening the glue that bonds nits to hair.
....
Clear® Killing Shampoo - a pyrethrum extract from chrysanthemum flowers - effectively kills lice and their nits." (Exhibit B).

C. "Clear Lice Egg Remover; to save you hours of combing and tears.... Special enzymes only in Clear actually loosen lice eggs that can hide in your child's hair. . . . Trust Clear to get lice out of your life. Fast!" (Exhibit C).

D. "**Clear**® Lice Egg Remover is the fastest way to finish the hard work of removing lice eggs. Only **Clear** Lice Egg Remover has natural enzymes to un-glue lice eggs for easier comb-out. The **Clear**® System with Lice Egg Remover does the complete job. Kills lice and removes eggs. It's all you need. **Trust Clear® to get lice out of your life...fast.**" (Exhibit D).

E. "**Clear** Rinse is *quick*. It loosens lice eggs in less than 3 minutes. Nits easily slide off hair when combed.... **Clear** Rinse has been thoroughly laboratory and field tested and meets all standards for safety and effectiveness. **Clear** Rinse is *easy*. A targeted enzyme solution, it rapidly attacks and loosens lice egg cement." (Exhibit E).

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Clear Lice Egg Remover loosens or unglues lice eggs from the hair.

B. Clear Lice Killing Shampoo kills one hundred percent of lice eggs.

6. In truth and in fact:

A. Clear Lice Egg Remover does not loosen or unglue lice eggs from the hair.

B. Clear Lice Killing Shampoo does not kill one hundred percent of lice eggs. Clear Lice Killing Shampoo is based on a pesticide which is not one hundred percent effective against lice eggs. As a result, purchasers are instructed to use an egg-removing comb, and to apply a second treatment in seven to ten days to kill any newly hatched lice.

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

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

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

9. Through the means described in paragraph four, respondent has represented, expressly or by implication, that laboratory and field testing proves that Clear Lice Egg Remover loosens or unglues lice eggs from the hair.

10. In truth and in fact, laboratory and field testing does not prove that Clear Lice Egg Remover loosens or unglues lice eggs from the hair. Therefore, the representation set forth in paragraph nine was, and is, false or misleading.

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.

EXHIBIT A

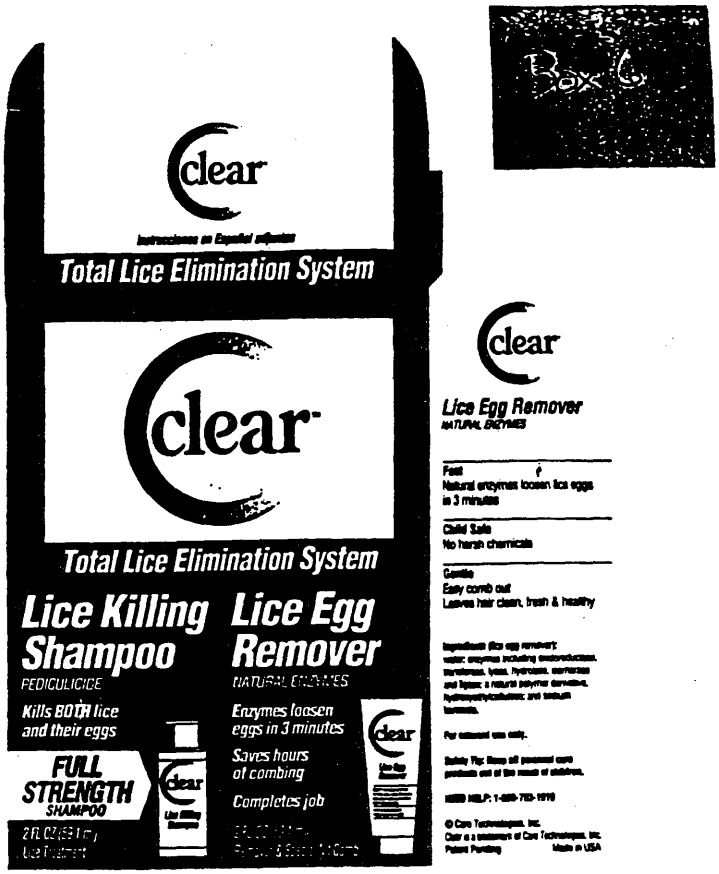
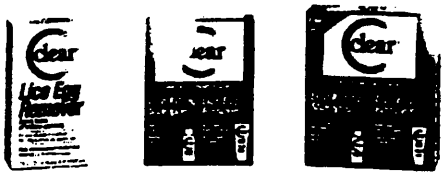

Box C
clear
Total Lice Elimination System
clear
Total Lice Elimination System
Lice Killing Shampoo
PEDICULICIDE
Kills BOTH lice and their eggs
FULL STRENGTH SHAMPOO
Lice Egg Remover
NATURAL ENZYMES
Enzymes loosen eggs in 3 minutes
Saves hours of combing
Completes job
clear
Lice Egg Remover
NATURAL ENZYMES
Fast
Natural enzymes loosen lice eggs in 3 minutes
Child Safe
No harsh chemicals
Gentle
Easy comb out
Leaves hair clean, fresh & healthy
Made in USA

EXHIBIT B

clear®

(ear® Products



- **Clear® Lice Egg Remover is a vegetable derived enzyme system that makes nits easier to remove after treatment by loosening the glue that bonds nits to hair. An excellent nit comb is included. Clear® Lice Egg Remover contains no harsh chemicals and can be used as frequently and safely as soap and water.**
- **Clear™ Total Lice Elimination System (available in 2 oz. regular and z. family size) contains:**
  - **Clear® Killing Shampoo - a pyrethrum extract from chrysanthemum flowers - effectively kills lice and their nits.**
  - **Clear® Lice Egg Remover (nit comb also included - same as above).**

***Clear®* does the complete job so kids can get back to school...Fast!**

EXHIBIT C

Client: Care Technologies

Product: Clear Systems/LER

Title: "Confusion"

Length: :30

Date: 1/23/97

Agency: Petray Consulting

Commercial No. CTCL-0013

Oh no!

Head lice on your child? Now what?

Clear ends the confusion! Because only Clear has the system -- Clear shampoo, to kill lice fast. And Clear lice egg remover, to save you hours of combing and tears.

Here's how! Special enzymes only in Clear actually loosen lice eggs that can hide in your child's hair. It's safe, it's effective, it's Clear!

Trust Clear to get lice out of your life! Fast!

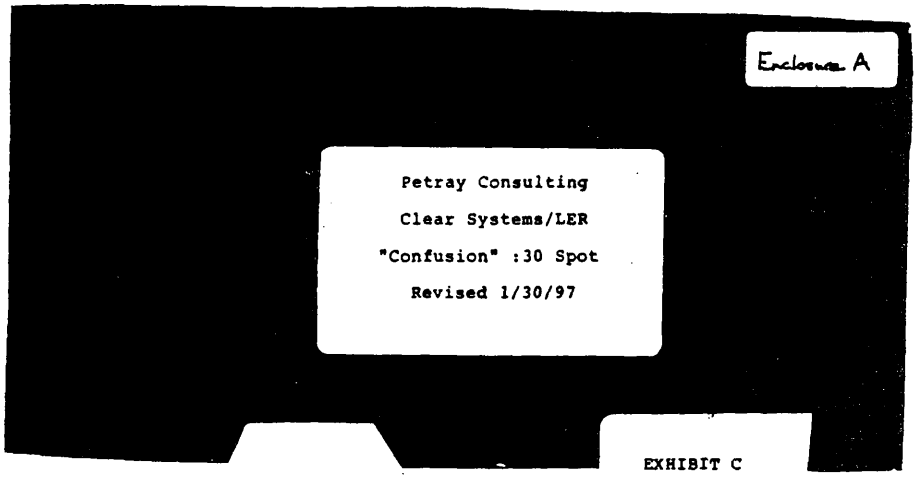


EXHIBIT D

KIDS, LICE and PARENTS.

If your child is sent home from school with head lice, don't panic.
It's not your fault but you have to solve the problem.
That means killing lice and removing their eggs. In fact, many parents don't know lice egg removal is the hardest and longest part of the job.

Clear® Lice Egg Remover is the fastest way to finish the hard work of removing lice eggs. Only **Clear** Lice Egg Remover has natural enzymes to un-glue lice eggs for easier comb-out.

The **Clear®** System with Lice Egg Remover does the complete job.
Kills lice and removes eggs.
It's all you need.

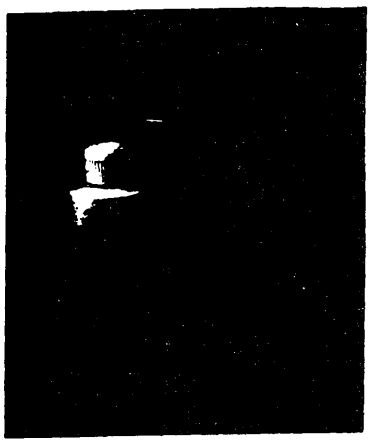
Trust Clear® to get lice out of your life...fast.

For information call 800-783-1919 or contact http://www.clearcare.com

EXHIBIT D

EXHIBIT E

At last, the first real solution for lice egg removal that is *quick, safe and easy*.



Introducing **Clear™** cleansing rinse

For new sales and happy customers you can feel good about recommending **Clear**.

Clear Rinse is a post-pediculicide cleansing rinse for the quick and easy removal of lice eggs. It is a natural, non-toxic liquid enzyme solution. And it works. **Clear** is the first *real* solution to nit picking since the comb.

Clear Rinse is *quick*. It loosens lice eggs in less than 3 minutes. Nits easily slide off hair when combed. And **Clear** Rinse leaves the hair silky, clean smelling, and manageable.

Clear Rinse is *safe*. A natural, vegetable derived enzyme, it is chemical-free and non-toxic. **Clear** Rinse has been thoroughly laboratory and field tested and meets all standards for safety and effectiveness.

Clear Rinse is *easy*. A targeted enzyme solution, it rapidly attacks and loosens lice egg cement. **Clear** Rinse also acts on toxins left by pediculicides, helping speed their removal.

Care Technologies, Inc. 55 Holly Hill Lane Greenwich, CT 06830

Clear is a trademark of Care Technologies, Inc.

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 Care Technologies, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 10 Corbin Drive, Darien, Connecticut.

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

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has 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.

2. "*Clear Lice Killing Shampoo*" shall mean the pediculicide marketed by respondent which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide.

3. "*Lice egg removal product*" shall mean any product that is sold to loosen, unglue, biodegrade, or otherwise aid in the detachment of lice eggs from hair shafts.

4. "*Substantially similar product*" shall mean any pediculicide marketed by respondent which contains the active ingredients of pyrethrum extract and piperonyl butoxide, and is covered by the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products.

5. Unless otherwise specified, "*respondent*" shall mean Care Technologies, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

7. "*Drug*" and "*device*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55, including, but not limited to, any lice egg removal product.

8. "*Pesticide*" shall mean as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u).

9. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In

addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement or promotional material, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Egg Remover or any lice egg removal product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product loosens, unglues, or otherwise detaches lice eggs from the hair, unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the Clear Lice Killing Shampoo or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product kills one hundred percent of lice eggs, unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with

the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Killing Shampoo or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in print advertisements or promotional materials about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in such advertisements or promotional materials containing the triggering representation:

Reapplication and egg removal are required
to ensure complete effectiveness.
See label for important information.

Provided, however, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

Provided, further, that the above disclosure shall not be required in a particular piece of promotional material if such promotional material constitutes "labeling of a pediculicide drug product" subject to the labeling requirements of the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products, 21 CFR 358.650.

IV.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Clear Lice Killing Shampoo or any other substantially similar product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in advertisements communicated through an electronic medium, about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in the video portion of such advertisements (or in the audio portion if the advertisement is audio only) containing the triggering representation:

Two Treatments Required.

Provided, however, that if the respondent makes any representation, in any manner, expressly or by implication, about directions for use of such product in advertisements communicated through an electronic medium utilizing both video and audio, the disclosure shall be presented in both the video and the audio portions of such advertisements.

Provided, further, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates the representation.

VI.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

VII.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VIII.

It is further ordered, That respondent Care Technologies, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

It is further ordered, That respondent Care Technologies, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondent Care Technologies, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address.

Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent Care Technologies, Inc. and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

XII.

This order will terminate on December 14, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) 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 Part.

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 Part as though the complaint had never been 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.

STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONERS ANTHONY AND THOMPSON

We write to express our views about the concerns Commissioner Swindle raises regarding the disclosure remedy in these cases. The orders require that, for two years, whenever a claim is made regarding the efficacy of the lice removal products, the respondents include a disclosure about the necessity for a second application of their product. The disclosure remedy in these cases is fencing-in relief, designed to prevent purchasers of respondents' products from being deceived by *future* advertising.[1] The triggered disclosure about the need for two treatments provides additional assurance that consumers will not be misled by future ads. We are satisfied that the triggered disclosures in these orders are appropriate and reasonable.

STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of issuance of the final orders in these cases because there is reason to believe that the respondents have violated the law and most of the relief contained in the orders is necessary and appropriate. However, I continue to have concerns with regard to the need for and scope of one of the disclosure requirements contained in the orders.

The complaints include the allegation that the respondents claimed that their respective lice products eradicate a lice infestation after a single treatment. In truth, reapplication and careful combing are required to complete the treatments. To address this allegedly false claim, the orders prohibit the respondents from making, expressly or by implication, any claim that their lice treatment products work in only one treatment, unless that claim is true and substantiated. I agree that this prohibition is necessary and appropriate.

The orders, however, go further. For a period of two years, whenever the respondents make any efficacy claim for one of their lice treatment products, they must disclose "Two Treatments Required." The majority of the Commission has cast this provision as a "triggered disclosure requirement" and concluded that it is "appropriate and reasonably related to the alleged violations of

---

[1] It is also worth noting that the Commission has distinguished triggered disclosures such as those in these cases from corrective advertising, which is required regardless of the contents of the ad. *Removatron Int'l Corp.*, 111 FTC 206, 311-12 n. 28 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). *See also American Home Prods. Corp. v. FTC*, 695 F.2d 681, 700 (3rd Circ. 1982).

Section 5." Even if this is a triggered disclosure requirement,[1] I do not believe that it is either necessary or appropriate.

The majority apparently believes that consumers will be misled if the respondents do not disclose that two treatments are required whenever they make an efficacy claim for their products. However, if a respondent makes a one-treatment claim that is false or unsubstantiated, the Commission can bring an action for violating the injunctive provisions of the order, and thus the two-treatment disclosure requirement would be unnecessary. On the other hand, if a respondent makes a one-treatment claim that is true and substantiated, the disclosure itself -- "Two Treatments Required" -- would be false, because the product would require only one treatment to be effective. Consequently, the disclosure requirement is not needed to prevent the respondents from making the misleading claim that their lice products work in one treatment.

Even if some sort of disclosure requirement were needed to prevent deception, the disclosure requirement imposed here is not appropriate. It appears both overbroad and inadequate in duration. The triggered disclosure must be made whenever an efficacy claim is made, but not every efficacy claim (*e.g.*, the product "works") creates the impression that the product will work in only one treatment. Without such an impression, there may well be no need to disclose that two treatments are required. Moreover, the triggered disclosure requirement is inadequate because it terminates after two years. If the disclosure in fact is necessary to prevent deception, then why does it end after two years? If the Commission decides to impose a triggered disclosure requirement to prevent future ads from being deceptive, it should be triggered by a claim that would be deceptive in the absence of the information to be disclosed and should continue as long as necessary to prevent deception.

I support the Commission's move toward stronger remedies. The injunctive provisions of these orders, together with the FDA-mandated labeling,[2] should ensure that consumers have truthful and accurate information before and after purchase. The disclosure requirement here, however, is unnecessary and inappropriate.

---

[1] The majority is correct that the requirement has the form of a triggered disclosure, but the substance of the requirement is indistinguishable from corrective advertising. The disclosure will be required whenever the respondents make any express or implied claim that their products are efficacious, which likely would include all or virtually all of the ads they run for their lice treatment products. The disclosure also is required for only a limited period of time, which is also consistent with being a corrective advertising measure.

[2] The FDA requires the following statement on the label of any shampoo formulated to treat head lice: "Apply to affected area until all the hair is thoroughly wet with product. Allow product to remain on area for 10 minutes but no longer. Add sufficient warm water to form a lather and shampoo as usual. Rinse thoroughly. A fine-toothed comb or special lice/nit removing comb may be used to help remove dead lice or their eggs (nits) from hair. A second treatment must be done in 7 to 10 days to kill any newly hatched lice."

IN THE MATTER OF

PFIZER INC.

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

Docket C-3841. Complaint, Dec. 14, 1998--Decision, Dec. 14, 1998

This consent order prohibits, among other things, a New York-based corporation, that manufactures and distributes pharmaceuticals, from making unsubstantiated claims concerning the efficacy of its over-the-counter head lice treatments. The consent order requires the respondent to make certain disclosures in advertisements concerning the use and effectiveness of its head lice treatment products. In addition, the consent order prohibits the respondent from misrepresenting the existence, contents, or interpretations of any test, study, or research.

Participants

For the Commission: *Linda Badger, Kerry O'Brien, Jeffrey Klurfeld,* and *Carolyn Cox.*

For the respondent: *Hugh Latimer, Wiley, Rein & Fielding,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pfizer Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Pfizer Inc. is a Delaware corporation with its principal office or place of business at 235 East 42nd Street, New York, New York.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed over-the-counter pharmaceuticals to the public, including "RID Lice Killing Shampoo." RID Lice Killing Shampoo is a "drug," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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.

4. Respondent has disseminated or has caused to be disseminated advertisements for RID Lice Killing Shampoo, including but not

necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. "**RID erases head lice completely.**
MAXIMUM STRENGTH
Kills lice in just the first treatment.*[1]
MAXIMUM STRENGTH RID kills lice completely in minutes. And RID leaves no lasting active residue on the hair. RID rinses away completely. Not all lice treatments do.
The patented RID egg removal comb is proven 100% effective and can leave hair free of lice eggs[1]-a must for many schools when re-admitting children. Many schools also recommend a second treatment. RID directions state to repeat treatment 7 to 10 days later.
RID. Nothing is more effective or safer.
...
*Read label. When used as directed.
[1]Data on file, Pfizer Inc."
[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The box contains the following statement:
"MAXIMUM STRENGTH
RID LICE KILLING SHAMPOO
PEDICULICIDE (LICE TREATMENT)
KILLS LICE & THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
-100% EFFECTI [VE is obscured by the hand]
EGG REMOVAL ['COMB' is obscured by the hand]"]
(Exhibit A)

B. "**New clinical study impacts head lice season.**
MAXIMUM STRENGTH
Proven effective in a single treatment.*[1]"
[The advertisement depicts a graph entitled "Efficacy/Lice Elimination Results at Day 7." The horizontal axis is marked "Percent Cured." The statement "**MAXIMUM STRENGTH RID 100%**" appears above the horizontal axis.]
"A randomized evaluator-blinded clinical study of 190 patients measured the efficacy of MAXIMUM STRENGTH RID, and a competitor product. The results:
• In a single treatment, RID was found 100% effective in controlling head lice (day 7 of the study; n =78).
• RID was also 100% effective after a second treatment (day 14 of the study; n =75). RID directions state to repeat treatment 7 to 10 days after the first treatment. And, RID leaves no lasting active residue.
To eliminate nits, the patented RID egg removal comb provides gentle combing action. It's proven 100% effective.
For unsurpassed efficacy and safety...recommend MAXIMUM STRENGTH RID.

To receive an abstract of the RID study, call 1-800-322-LICE.

...

Nothing is more effective or safer.

[1] 'An evaluator-blinded comparative study of the clinical effectiveness of a pyrethrin-based pediculicide with combing vs a permethrin-based pediculicide with combing.' Presented at the National Association of School Nurses Annual Meeting, June, 1995.

*Read label. When used as directed.

**Estimates of clinical effectiveness were based on percentage of patients with no live lice or nits within .25 inches of the scalp."

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The box contains the following statement:

"MAXIMUM STRENGTH

RID LICE KILLING SHAMPOO

PEDICULICIDE (LICE TREATMENT)

KILLS LICE & THEIR EGGS

(HEAD LICE, CRAB LICE & BODY LICE)

-100% EFFECTI [VE is obscured by the hand]

EGG REMOVAL ['COMB' is obscured by the hand]"]

(Exhibit B)

C. Announcer: "Your child could get lice!"

[The advertisement depicts a blackboard with the word "LICE" written on it.]

Announcer: "To kill lice and their eggs..."

[The advertisement depicts a RID box with the statement "**KILLS LICE & THEIR EGGS**" on the box enlarged. The advertisement contains a statement at the bottom of the screen in a light-colored print: "Read label. Use only as directed."]

Announcer: "get Maximum Strength RID."

[The advertisement depicts a RID box.]

Announcer: "In just the first treatment,"

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard. The advertisement contains a statement at the bottom of the screen in a light-colored print: "Two treatments required."]

Announcer: "it kills lice completely."

[The advertisement depicts the blackboard with the word "LICE" now just a smear on the blackboard, with the statement "Kills lice completely."]

Announcer: "And RID leaves no active residue behind."

[The advertisement depicts a mother hugging her child in front of school bus.]

Announcer: "Nothing"

[The advertisement depicts a woman's hand holding a box of RID as if it were an eraser, wiping the word "LICE" off a blackboard.]

Announcer: "is more effective or safer than RID."

[The advertisement depicts the RID logo on the smeared blackboard, with the statement: "Nothing is more effective."] (Exhibit C)

D. "**MAXIMUM STRENGTH RID**
LICE KILLING SHAMPOO
PEDICULICIDE (LICE TREATMENT)
KILLS LICE & THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
-- 100% EFFECTIVE -- EGG REMOVAL COMB* "
(Exhibit D)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. RID Lice Killing Shampoo cures lice infestations in a single treatment.

B. The RID egg removal comb is one hundred percent effective.

6. In truth and in fact:

A. RID Lice Killing Shampoo does not cure lice infestations in a single treatment. RID Lice Killing Shampoo is based on a pesticide which is not one hundred percent effective against lice eggs. Consequently, a second treatment is required in seven to ten days to kill any lice that have hatched. In addition, consumers are instructed to remove any lice eggs or "nits" from the infested person's hair.

B. The RID comb is not necessarily one hundred percent effective. Lice eggs are difficult to see and to remove. The effectiveness of the comb is largely dependent on the skill and tenacity of the comber.

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

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

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

9. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Clinical studies prove that RID Lice Killing Shampoo cures lice infestations in a single treatment.

B. Clinical studies prove that the RID egg removal comb is one hundred percent effective.

10. In truth and in fact:

A. Clinical studies do not prove that RID Lice Killing Shampoo cures lice infestations in a single treatment. The study relied upon to make this claim included the application of a single treatment along with a thorough combing that removed all lice eggs.

B. Clinical studies do not prove that the RID comb is one hundred percent effective. The studies relied upon to make this claim employed individuals trained in egg removal to comb patients' hair. There is no evidence that the same results are achievable by an average consumer.

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

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.

EXHIBIT A

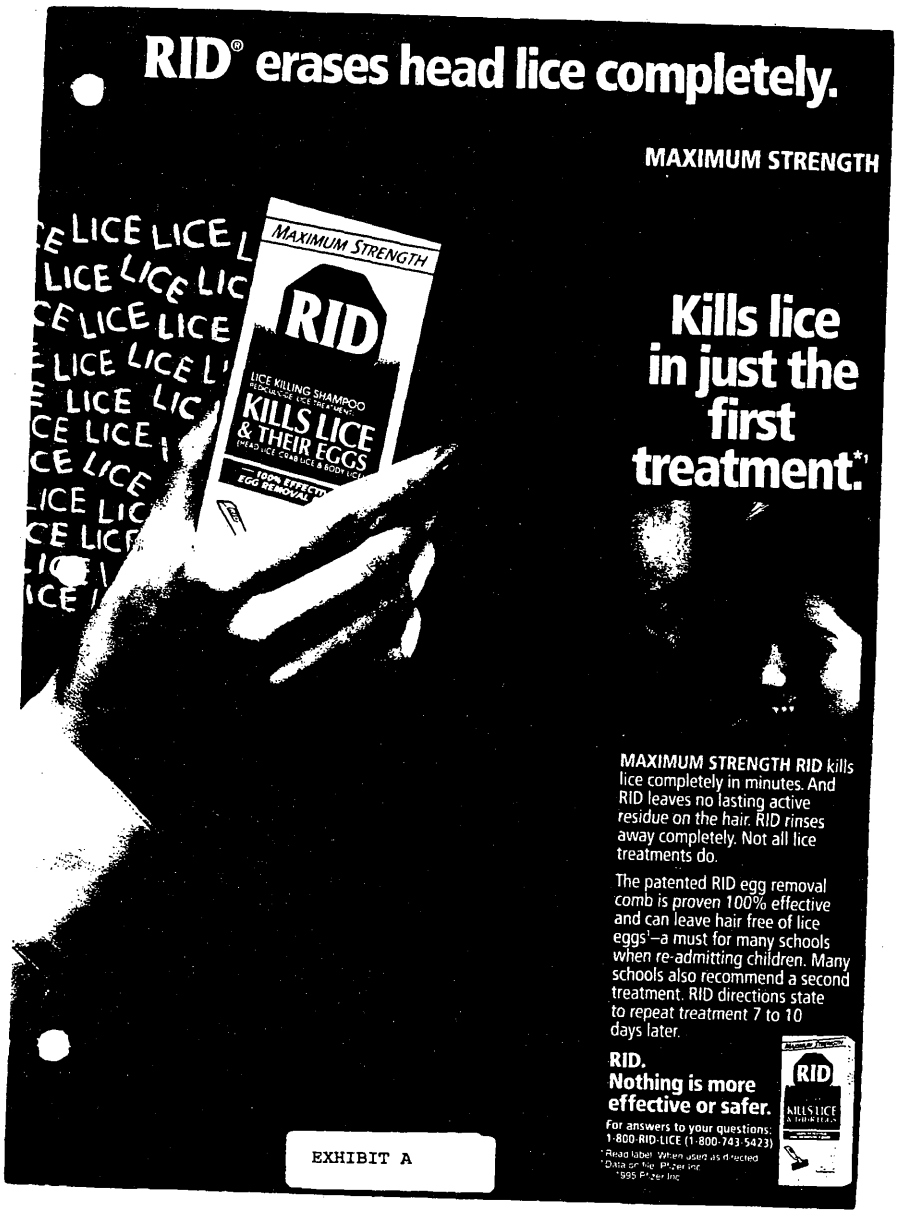

RID® erases head lice completely.
MAXIMUM STRENGTH
LICE LICE LICE
MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
KILLS LICE & THEIR EGGS
100% EFFECTIVE EGG REMOVAL
Kills lice in just the first treatment.*1
MAXIMUM STRENGTH RID kills lice completely in minutes. And RID leaves no lasting active residue on the hair. RID rinses away completely. Not all lice treatments do.
The patented RID egg removal comb is proven 100% effective and can leave hair free of lice eggs†—a must for many schools when re-admitting children. Many schools also recommend a second treatment. RID directions state to repeat treatment 7 to 10 days later.
RID.
Nothing is more effective or safer.
For answers to your questions: 1-800-RID-LICE (1-800-743-5423)
* Read label. When used as directed
† Data on file. Pfizer Inc
©1995 Pfizer Inc
RID
KILLS LICE & THEIR EGGS
EXHIBIT A

EXHIBIT B

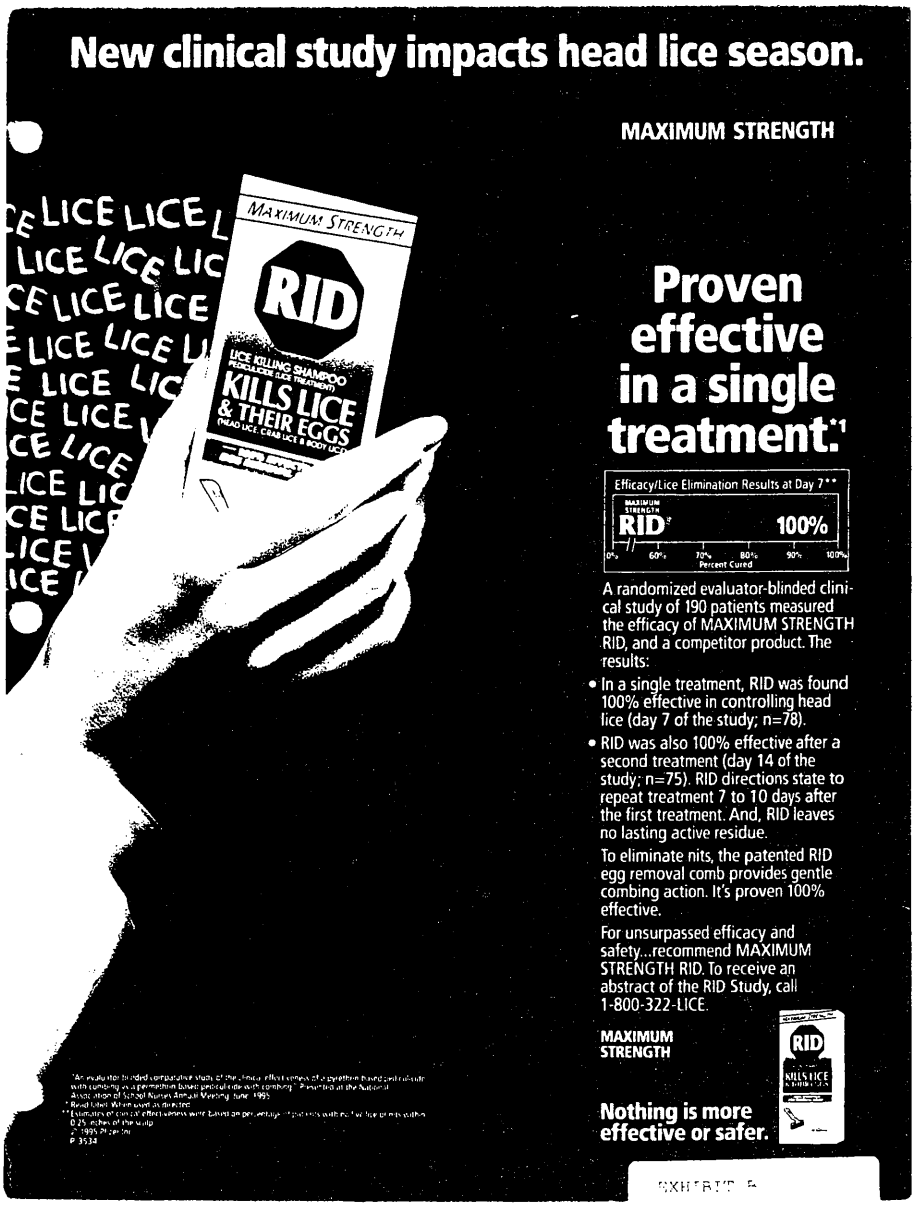
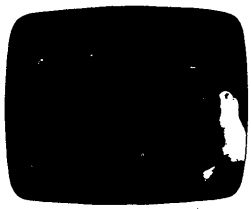

New clinical study impacts head lice season.
MAXIMUM STRENGTH
LICE LICE LICE
MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
KILLS LICE & THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
Proven effective in a single treatment.*1
Efficacy/Lice Elimination Results at Day 7**
MAXIMUM STRENGTH RID
100%
0%
60%
70%
80%
90%
100%
Percent Cured
A randomized evaluator-blinded clinical study of 190 patients measured the efficacy of MAXIMUM STRENGTH RID, and a competitor product. The results:
• In a single treatment, RID was found 100% effective in controlling head lice (day 7 of the study; n=78).
• RID was also 100% effective after a second treatment (day 14 of the study; n=75). RID directions state to repeat treatment 7 to 10 days after the first treatment. And, RID leaves no lasting active residue.
To eliminate nits, the patented RID egg removal comb provides gentle combing action. It's proven 100% effective.
For unsurpassed efficacy and safety...recommend MAXIMUM STRENGTH RID. To receive an abstract of the RID Study, call 1-800-322-LICE.
MAXIMUM STRENGTH
Nothing is more effective or safer.
EXHIBIT A

EXHIBIT C

RID®

"BLACKBOARD" :15 TV

CLIENT: PFIZER INC COMM'L NO.: PFRD-1503



ANNCR VO: Your child could get lice!

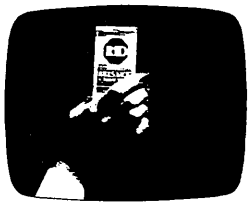
To kill lice and their eggs...

get Maximum Strength RID.

In just the first treatment,

it kills lice completely.

And RID leaves no active residue behind.

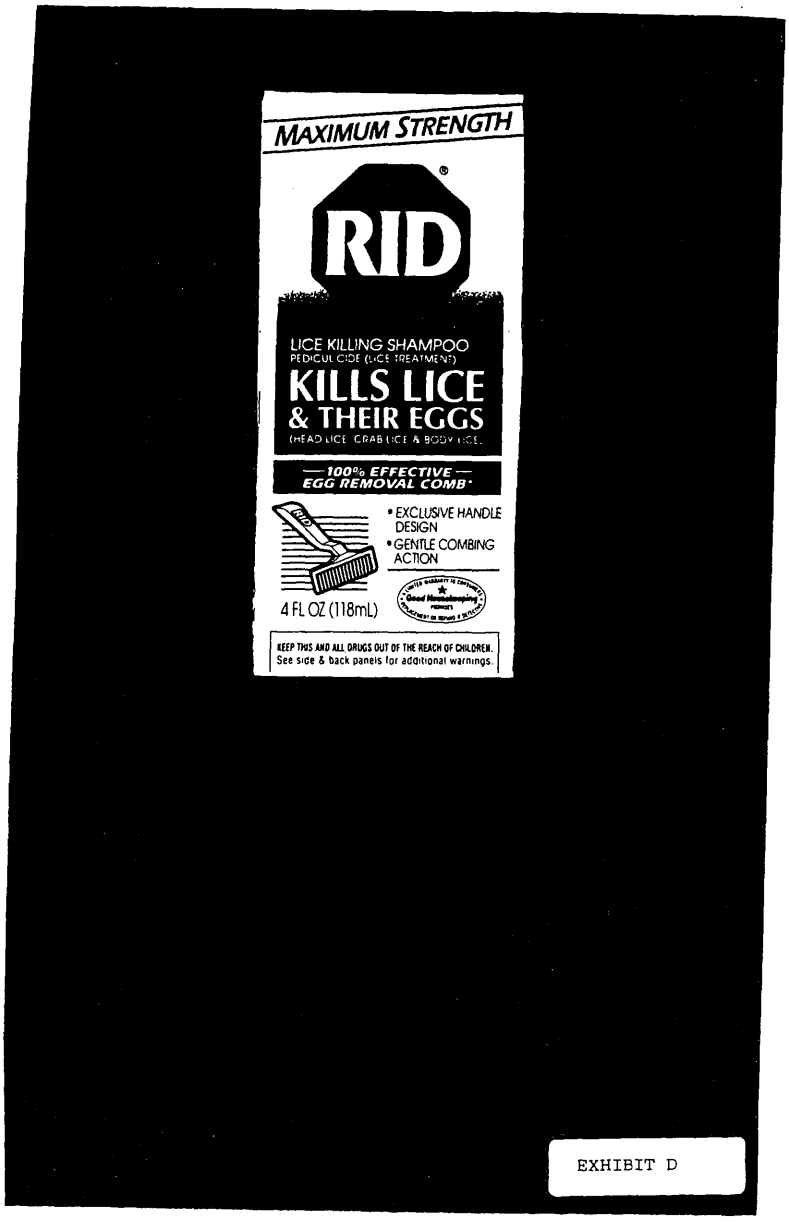


Nothing

is more effective or safer than RID.

SWEENEY & PARTNERS EXHIBIT C

EXHIBIT D


MAXIMUM STRENGTH
RID
LICE KILLING SHAMPOO
PEDICULICIDE (LICE TREATMENT)
KILLS LICE
& THEIR EGGS
(HEAD LICE, CRAB LICE & BODY LICE)
100% EFFECTIVE
EGG REMOVAL COMB*
• EXCLUSIVE HANDLE DESIGN
• GENTLE COMBING ACTION
4 FL OZ (118mL)
KEEP THIS AND ALL DRUGS OUT OF THE REACH OF CHILDREN.
See side & back panels for additional warnings.
EXHIBIT D

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 Pfizer 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 at 235 East 42nd Street, New York, 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

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has 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.

2. "*RID Lice Killing Shampoo*" shall mean the pediculicide marketed by respondent which contains the active ingredients of 0.33 percent pyrethrum extract and 4 percent piperonyl butoxide.

3. "*Substantially Similar Product*" shall mean any pediculicide marketed by respondent which contains the active ingredients of pyrethrum extract and piperonyl butoxide, and is covered by the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products.

4. Unless otherwise specified, "*respondent*" shall mean Pfizer Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees.

5. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

6. "*Drug*" and "*device*" shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

7. "*Pesticide*" shall mean as defined in Section 2 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136(u).

8. "*Clearly and prominently*" shall mean as follows:

A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

B. In a print advertisement or promotional material, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo, or any Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that such product cures a lice infestation in a single application unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo or any other Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in print advertisements or promotional materials about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in such advertisements or promotional materials containing the triggering representation:

Reapplication and egg removal are required
to ensure complete effectiveness.
See label for important information.

Provided, however, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

Provided, further, that the above disclosure shall not be required in a particular piece of promotional material if such promotional material constitutes "labeling of a pediculicide drug product" subject

to the labeling requirements of the Food and Drug Administration's Final Monograph on OTC Pediculicide Drug Products, 21 CFR 358.650.

III.

It is further ordered, That, for a period of two (2) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of RID Lice Killing Shampoo or any other Substantially Similar Product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, in advertisements communicated through an electronic medium, about the efficacy of such product in the removal or elimination of lice or the treatment of lice infestations ("triggering representation"), unless it makes the following disclosure, clearly and prominently, in the video portion of such advertisements (or in the audio portion if the advertisement is audio only) containing the triggering representation:

Two Treatments Required.

Provided, however, that if the respondent makes any representation, in any manner, expressly or by implication, about directions for use of such product in advertisements communicated through an electronic medium utilizing both video and audio, the disclosure shall be presented in both the video and the audio portions of such advertisements.

Provided, further, that the above disclosure shall not be required if respondent possesses and relies upon competent and reliable scientific evidence demonstrating that the product is effective for the complete elimination of all lice and lice eggs in a single application.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

V.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any drug or device for the treatment of lice in humans, or any pesticide for treatment of lice in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding the efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable scientific evidence, that substantiates the representation.

VI.

Nothing in this order shall prohibit respondent from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VII.

It is further ordered, That respondent Pfizer Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent Pfizer Inc., and its successors and assigns shall deliver a copy of this order to each of its

principals, officers, managers, employees, agents, and representatives engaged in the preparation, review or placement of advertising or other materials covered by this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of five (5) years from the date of issuance of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

It is further ordered, That respondent Pfizer Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent Pfizer Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade 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.

XI.

This order will terminate on December 14, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the

order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) 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 Part.

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 Part as though the complaint had never been 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.

STATEMENT OF CHAIRMAN PITOFSKY AND
COMMISSIONERS ANTHONY AND THOMPSON

We write to express our views about the concerns Commissioner Swindle raises regarding the disclosure remedy in these cases. The orders require that, for two years, whenever a claim is made regarding the efficacy of the lice removal products, the respondents include a disclosure about the necessity for a second application of their product. The disclosure remedy in these cases is fencing-in relief, designed to prevent purchasers of respondents' products from being deceived by *future* advertising.[1] The triggered disclosure about the need for two treatments provides additional assurance that consumers will not be misled by future ads. We are satisfied that the triggered disclosures in these orders are appropriate and reasonable.

STATEMENT OF COMMISSIONER ORSON SWINDLE

I have voted in favor of issuance of the final orders in these cases because there is reason to believe that the respondents have violated

[1] It is also worth noting that the Commission has distinguished triggered disclosures such as those in these cases from corrective advertising, which is required regardless of the contents of the ad. *Removatron Int'l Corp.*, 111 FTC 206, 311-12 n. 28 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989). *See also American Home Prods. Corp. v. FTC*, 695 F.2d 681, 700 (3rd Circ. 1982).

the law and most of the relief contained in the orders is necessary and appropriate. However, I continue to have concerns with regard to the need for and scope of one of the disclosure requirements contained in the orders.

The complaints include the allegation that the respondents claimed that their respective lice products eradicate a lice infestation after a single treatment. In truth, reapplication and careful combing are required to complete the treatments. To address this allegedly false claim, the orders prohibit the respondents from making, expressly or by implication, any claim that their lice treatment products work in only one treatment, unless that claim is true and substantiated. I agree that this prohibition is necessary and appropriate.

The orders, however, go further. For a period of two years, whenever the respondents make any efficacy claim for one of their lice treatment products, they must disclose "Two Treatments Required." The majority of the Commission has cast this provision as a "triggered disclosure requirement" and concluded that it is "appropriate and reasonably related to the alleged violations of Section 5." Even if this is a triggered disclosure requirement,[1] I do not believe that it is either necessary or appropriate.

The majority apparently believes that consumers will be misled if the respondents do not disclose that two treatments are required whenever they make an efficacy claim for their products. However, if a respondent makes a one-treatment claim that is false or unsubstantiated, the Commission can bring an action for violating the injunctive provisions of the order, and thus the two-treatment disclosure requirement would be unnecessary. On the other hand, if a respondent makes a one-treatment claim that is true and substantiated, the disclosure itself -- "Two Treatments Required" -- would be false, because the product would require only one treatment to be effective. Consequently, the disclosure requirement is not needed to prevent the respondents from making the misleading claim that their lice products work in one treatment.

[1] The majority is correct that the requirement has the form of a triggered disclosure, but the substance of the requirement is indistinguishable from corrective advertising. The disclosure will be required whenever the respondents make any express or implied claim that their products are efficacious, which likely would include all or virtually all of the ads they run for their lice treatment products. The disclosure also is required for only a limited period of time, which is also consistent with being a corrective advertising measure.

Even if some sort of disclosure requirement were needed to prevent deception, the disclosure requirement imposed here is not appropriate. It appears both overbroad and inadequate in duration. The triggered disclosure must be made whenever an efficacy claim is made, but not every efficacy claim (*e.g.*, the product "works") creates the impression that the product will work in only one treatment. Without such an impression, there may well be no need to disclose that two treatments are required. Moreover, the triggered disclosure requirement is inadequate because it terminates after two years. If the disclosure in fact is necessary to prevent deception, then why does it end after two years? If the Commission decides to impose a triggered disclosure requirement to prevent future ads from being deceptive, it should be triggered by a claim that would be deceptive in the absence of the information to be disclosed and should continue as long as necessary to prevent deception.

I support the Commission's move toward stronger remedies. The injunctive provisions of these orders, together with the FDA-mandated labeling,[2] should ensure that consumers have truthful and accurate information before and after purchase. The disclosure requirement here, however, is unnecessary and inappropriate.

---

[2] The FDA requires the following statement on the label of any shampoo formulated to treat head lice: "Apply to affected area until all the hair is thoroughly wet with product. Allow product to remain on area for 10 minutes but no longer. Add sufficient warm water to form a lather and shampoo as usual. Rinse thoroughly. A fine-toothed comb or special lice/nit removing comb may be used to help remove dead lice or their eggs (nits) from hair. A second treatment must be done in 7 to 10 days to kill any newly hatched lice."

IN THE MATTER OF

MEDTRONIC, INC.

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

Docket C-3842. Complaint, Dec. 21, 1998--Decision, Dec. 21, 1998

This consent order allows Medtronic, Inc., a Minnesota-based corporation that manufactures and sells medical devices, to acquire Physio-Control International Corporation's automated external defibrillator business, and requires, among other things, that Medtronic limit its interest in SurVivaLink to that of a passive investor, and prohibits Medtronic from naming a member to SurVivaLink's Board of Directors.

Participants

For the Commission: *Norman Armstrong, Jr., Andrew J. Topps, Ann Malester, William Baer, Bart Wilson,* and *Jonathan Baker.*

For the respondent: *Philip Larson, Hogan & Hartson*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, Medtronic, Inc. ("Medtronic"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire all of the voting stock of Physio-Control International Corporation ("Physio-Control"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Automated External Defibrillators*" means portable, automated devices used in emergency situations by persons with limited or no medical training to diagnose and treat persons suffering from sudden cardiac arrest.

2. "*SurVivaLink*" means SurVivaLink Corporation, a Minnesota corporation, with its principal place of business located at 5420 Feltl Road, Minnetonka, Minnesota. SurVivaLink is engaged in, among other things, the research, development, manufacture and sale of Automated External Defibrillators.

3. "*Investment Agreements*" means the Investment Agreement, dated April 29, 1994, by and among SurVivaLink Corporation, Medtronic, Inc. and the following shareholders of SurVivaLink: Bryon L. Gilman, Karl J.F. Kroll, Kenneth C. Maki, and Mark W. Kroll; and the Investment Agreement dated October 31, 1996, by and among SurVivaLink Corporation and Medtronic, Inc.

4. "*Respondent*" means Medtronic.

II. RESPONDENT

5. Respondent Medtronic is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Minnesota, with its principal place of business located at 7000 Central Avenue, Northwest, Minneapolis, Minnesota. Respondent is engaged in, among other things, the research, development, manufacture and sale of a wide-range of medical devices.

6. Through the Investment Agreements, respondent owns below ten (10) percent of the overall securities in SurVivaLink, and possesses a number of rights, including but not limited to: (a) the right to receive competitively sensitive non-public information relating to SurVivaLink; (b) the right to appoint one member to SurVivaLink's Board of Directors; and (c) the right to vote on all matters requiring a shareholder vote.

7. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

8. Physio-Control is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Washington, with its principal place of business located at 11811 Willows Road, N.E., Redmond, Washington. Physio-Control is engaged in, among

other things, the research, development, manufacture and sale of Automated External Defibrillators.

9. Physio-Control is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

10. On June 27, 1998, Medtronic entered into an Agreement and Plan of Merger with Physio-Control to acquire all of the voting stock of Physio-Control in exchange for Medtronic voting stock valued at $530 million.

V. THE RELEVANT MARKET

11. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture and sale of Automated External Defibrillators.

12. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

VI. STRUCTURE OF THE MARKET

13. The market for the research, development, manufacture and sale of Automated External Defibrillators is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). SurVivaLink and Physio-Control are two of only three significant suppliers of Automated External Defibrillators in the United States.

14. Medtronic, through its ownership interest in SurVivaLink, and Physio-Control are actual, direct competitors in the relevant market for the research, development, manufacture and sale of Automated External Defibrillators in the United States.

VII. BARRIERS TO ENTRY

15. Entry into the market for the research, development, manufacture and sale of Automated External Defibrillators is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph sixteen, because of, among other things, the time and expense required to design and

develop a competitively viable product, obtain approvals from the United States Food and Drug Administration necessary to manufacture and sell Automated External Defibrillators in the United States, and establish a sales and distribution network.

VIII. EFFECTS OF THE ACQUISITION

16. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct and substantial competition between respondent, through SurVivaLink, and Physio-Control in the relevant market;

B. By increasing the likelihood of collusion or coordinated interaction among the firms in the relevant market;

C. By increasing the likelihood that customers of Automated External Defibrillators would be forced to pay higher prices; and

D. By reducing innovation in the relevant market.

IX. VIOLATIONS CHARGED

17. The Acquisition agreement described in paragraph ten constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

18. The Acquisition described in paragraph ten, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Physio-Control International Corporation ("Physio-Control") and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as

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

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

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

1. Respondent Medtronic, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business located at 7000 Central Avenue, Northwest, Minneapolis, Minnesota.

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

ORDER

I.

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

A. "*Medtronic*" or "*respondent*" means Medtronic, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Medtronic, Inc, not including SurVivaLink Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*SurVivaLink*" means SurVivaLink Corporation, a corporation organized, existing and doing business under the laws of Minnesota with its headquarters located at 5420 Feltl Road, Minnetonka, Minnesota, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by SurVivaLink Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*Physio-Control*" means Physio-Control International Corporation, a corporation organized, existing and doing business under the laws of Washington with its headquarters located at 11811 Willows Road, N.E., Redmond, Washington, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Physio-Control International Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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

E. "*Ownership Interest*" means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of SurVivaLink.

F. "*Voting Agreements*" means the Agreement Regarding The Election of Director by and among SurVivaLink Corporation, the purchasers of the Company's Series A Convertible Preferred Stock and the persons named in Appendix B of that agreement ("the Shareholders") and the Agreement Regarding Election of Directors made on June 12, 1997, by and among SurVivaLink and its stockholders.

G. "*The Rights of First Refusal Agreement*" means the Rights of First Refusal Agreement signed by Medtronic, Inc. on May 8, 1997.

H. "*Contractual Agreements*" means the following agreements: the Investment Agreement made and entered into as of April 29, 1994, by and among SurVivaLink Corporation and Medtronic and the following shareholders of SurVivaLink: Byron L. Gilman, Karl J.F. Kroll, Kenneth C. Maki, and Mark W. Kroll; the Investment Agreement made and entered into as of October 31, 1996, by and among SurVivaLink Corporation and Medtronic, Inc.; Voting Agreements; the Rights of First Refusal Agreement; the Amended and Restated Promissory Note dated May 12, 1997, between Medtronic and SurVivaLink; and any other agreements between Medtronic and SurVivaLink relating to Medtronic's Ownership Interest in SurVivaLink.

II.

It is further ordered, That:

A. Within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall delegate its voting rights held pursuant to all of its Ownership Interests to SurVivaLink in a manner that directs and authorizes SurVivaLink to cast any votes related to such interest in each class of SurVivaLink capital stock in an amount and manner proportional to the vote of all other votes cast by other SurVivaLink shareholders in such class on a particular matter; provided, however, that in any voting matter to which either or both of the Voting Agreements may apply, such delegation shall direct and authorize SurVivaLink to cast any votes related to Medtronic's Ownership Interests in accordance with such Voting Agreement(s). Should any such delegation expire by operation of Minnesota law or otherwise, respondent shall redelegate its rights to SurVivaLink prior to such expiration. Provided, however, that respondent's delegation of its rights as to a particular Ownership Interest may terminate upon respondent's complete and absolute divestiture of that Ownership Interest.

B. Respondent shall not sell or otherwise transfer any of its Ownership Interest to an acquirer without permitting SurVivaLink the opportunity to purchase such interest in accordance with the terms of the Rights of First Refusal Agreement, including Section 6 of such agreement.

C. Respondent shall not join a partnership, limited partnership, syndicate or other group, or otherwise act in concert with any other person, for the purpose of acquiring, holding, voting, or disposing of an Ownership Interest in SurVivaLink.

D. Respondent shall not acquire or exercise any present or contingent right to acquire any additional Ownership Interest in SurVivaLink without providing thirty (30) days' prior written notice to the Commission. In the event that respondent learns that one of its respective employees, agents, or representatives has engaged in such an acquisition or exercise on his or her own initiative and not on behalf of respondent, respondent shall provide written notice of such acquisition or exercise to the Commission within ten (10) days after respondent learns of such acquisition or exercise. Nothing in paragraph II.D shall be construed to prevent Medtronic from receiving stock dividends which are issued to SurVivaLink share-

holders in proportion to their respective voting Ownership Interests. Medtronic shall provide written notice to the Commission of its receipt of any such dividend within ten (10) days of such receipt.

III.

It is further ordered, That respondent shall not:

A. Exercise any right to name, nominate or vote for a member of SurVivaLink's Board of Directors;

B. Participate in the formulation, determination or direction of any business decisions of SurVivaLink;

C. Propose corporate action requiring the approval of SurVivaLink shareholders;

D. Have any of its directors, officers or employees serve simultaneously as an officer or director of SurVivaLink;

E. Inspect or otherwise obtain access to the books and records of SurVivaLink (other than the stock register), even if respondent is entitled to such access pursuant to Minnesota Law, the Contractual Agreements, or otherwise; provided, however, that nothing in paragraph III.E shall prohibit Medtronic, after written notice to the Commission, from seeking or obtaining discovery in any litigation or other proceeding to resolve a claim between SurVivaLink and Medtronic in accordance with the procedures of the forum before which the dispute is pending. With respect to any such discovery, respondent shall enter into a protective order to prevent any information from being used for any purpose other than providing legal representation or evidence as to the particular dispute and to prevent any information from being disclosed to any person(s) not necessary to the resolution of such dispute; and

F. Obtain information from SurVivaLink other than documents available to the general public, except as permitted under paragraph III.E.

IV.

It is further ordered, That respondent shall designate an outside agent to receive such information from SurVivaLink as required to be provided by SurVivaLink pursuant to applicable state law and such additional information as would normally be provided to the other shareholders of SurVivaLink. Such information is limited to information provided to a shareholder by virtue of such shareholder's ownership of the shares of SurVivaLink and not as a result of such

shareholder's position as an officer, director or employee of SurVivaLink. Such information shall not be disseminated to respondent but may only be used by the outside agent to solicit offers for respondent's Ownership Interests or to render an opinion to the respondent as to the overall percentage and value of respondent's Ownership Interests. Such an opinion may disclose the types of information relied upon in formulating such an opinion but shall not disclose any specific information regarding SurVivaLink. Respondent shall notify the Commission and SurVivaLink as to the identity of such outside agent and any change as to the identity of the outside agent to which this information is to be sent.

V.

It is further ordered, That within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall return or submit to SurVivaLink all documents, including all copies, whether created by SurVivaLink or any other person, in the possession of Medtronic that contain any trade secrets or other confidential non-public information, commercial information or financial information, other than the Contractual Agreements, received from or relating to SurVivaLink, including, but not limited to, all documents received from SurVivaLink pursuant to the Contractual Agreements.

VI.

It is further ordered, That within thirty (30) days of the date on which this order becomes final, respondent shall distribute a copy of this order to each of its U.S. based directors, officers and employees.

VII.

It is further ordered, That within ten (10) days of the date on which the Commission accepts the agreement containing consent order for public comment, respondent shall deliver a copy of this agreement to SurVivaLink by certified or registered U.S. mail.

VIII.

It is further ordered, That within sixty (60) days of the date this order becomes final and annually thereafter on the anniversary of the date this order becomes final, Medtronic shall submit to the

Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the provisions of this order. Medtronic shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this order, including a description of all substantive contacts or negotiations with SurVivaLink, including the identity of all parties contacted. Medtronic shall include in its compliance reports copies of all written communications between Medtronic and SurVivaLink, and all written communications between Medtronic and the outside agent designated in paragraph IV.

IX.

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

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

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

X.

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

XI.

It is further ordered, That this order shall terminate on the earliest of: (1) respondent's absolute and complete divestiture of all of its Ownership Interest in SurVivaLink; (2) respondent's absolute and complete divestiture of all of the assets or securities of Physio-Control held by Medtronic; or (3) on December 21, 2018.

IN THE MATTER OF

SHELL OIL COMPANY, ET AL.

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

Docket C-3843. Complaint, Dec. 21, 1998--Decision, Dec. 21, 1998

This consent order requires, among other things, the Texas-based corporation and its subsidiary to divest portions of the ANR pipeline system to an acquirer that receives the prior approval of the Commission. The consent order also requires the respondents to maintain the viability and marketability of the assets, pending the divestiture of the assets.

Participants

For the Commission: *John Hoagland, Kristen Malmberg, W. David Griggs, Thomas Carter, Morris Morkre,* and *Jonathan Baker.*

For the respondents: *Richard Brooks, Baker & Botts*, Houston, TX. and *Dan Wellington, Fulbright & Jaworski*, Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission") having reason to believe that respondents Shell Oil Company ("Shell") and its subsidiary, Tejas Energy, LLC ("Tejas"), through Tejas' subsidiary Transok, LLC ("Transok"), are subject to the jurisdiction of the Commission and that Tejas' acquisition of certain gas-gathering assets of ANR Field Services Company ("ANRFS") and certain gas processing and other facilities of ANR Production Company ("ANRP"), subsidiaries of The Coastal Corporation ("Coastal"), is in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. RESPONDENTS

1. Shell 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 One Shell Plaza, Houston, Texas.

2. Respondent Shell is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

3. Tejas is a limited liability company 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 1301 McKinney, Houston, Texas. Tejas is a wholly-owned subsidiary of Shell.

4. Respondent Tejas is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE PROPOSED ACQUISITION

5. Respondents, pursuant to a Letter of Intent dated January 20, 1998, among Transok, ANRFS and ANRP, entered into an agreement to acquire certain ANRFS assets consisting of natural gas pipelines, compressors and related appurtenances, and certain ANRP assets, consisting of a natural gas processing plant and other facilities.

III. THE RELEVANT MARKETS

6. The relevant line of commerce in which to analyze the effects of the acquisition is natural gas gathering services, *i.e.*, the transportation, for oneself or for other persons, of natural gas from the wellhead or producing area to a natural gas transmission pipeline or a natural gas processing plant.

7. The relevant sections of the country in which to analyze the effects of the acquisition are in the areas in and around the following

townships in Oklahoma (delineated as Township and Range) and Railroad Blocks in Texas:

a. 13N/26W and 12N/26W in Roger Mills County, Oklahoma; 11N/26W in Roger Mills and Beckham Counties, Oklahoma; and Roberts and Eddleman Block RE, Brooks and Burleson Blocks 1 and 2, and Commissioner of the Land Office State of Oklahoma Block in Wheeler County, Texas;

b. 12N/22W and 12N/21W in Beckham and Roger Mills Counties, Oklahoma; and 11N/22W in Beckham County, Oklahoma;

c. 12N/19W in Custer County, Oklahoma; and 11N/19W and 10N/19W in Washita County, Oklahoma;

d. 11N/15W and 11N/14W in Washita County, Oklahoma;

e. 10N/13W, 10N/12W, 9N/12W, 8N/12W and 8N/11W in Caddo County, Oklahoma; and

f. 6N/8W in Grady County, Oklahoma; and 6N/9W and 5N/9W in Caddo County, Oklahoma.

8. The relevant line of commerce is highly concentrated in the relevant geographic markets. The acquisition will significantly increase concentration in the relevant geographic markets set forth in paragraph seven.

9. Respondent Tejas is an actual and potential competitor of Coastal in the relevant line of commerce in the relevant geographic markets.

10. Effective entry in the relevant line of commerce in the relevant geographic markets is unlikely.

IV. EFFECTS OF THE ACQUISITION

11. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant markets in the following ways, among others:

a. Actual and potential competition between Tejas and Coastal to provide natural gas gathering services to existing gas wells will be eliminated;

b. Actual and potential competition between Tejas and Coastal to provide natural gas gathering services for new natural gas wells will be eliminated;

c. The likelihood of collusion or coordinated interaction will be increased or facilitated;

d. Tejas is likely to exact anticompetitive price increases from producers in the relevant geographic market for performance of natural gas gathering services in the relevant geographic markets; and

e. Producers may be less likely to do exploratory and developmental drilling for new natural gas in the relevant geographic markets than prior to the merger.

V. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of certain assets of ANR Field Services Company and ANR Production Company (collectively referred to as "ANR"), subsidiaries of The Coastal Corporation ("Coastal"), by Shell Oil Company ("Shell") and its subsidiary, Tejas Energy, LLC ("Tejas"), and it now appearing that Shell and Tejas, hereinafter sometimes referred to as "respondents," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Acts, and that the 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. Shell 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 One Shell Plaza, Houston, Texas.

2. Tejas Energy, LLC, is a limited liability company 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 1301 McKinney, Houston, Texas.

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

ORDER

I.

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

A. "*Shell*" means Shell Oil Company, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Shell, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Tejas*" means Tejas Energy, LLC, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Shell, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Tejas is a wholly-owned subsidiary of Shell.

C. "*Respondents*" means Shell and Tejas, jointly and severally.

D. "*Coastal*" means The Coastal Corporation, 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 Nine Greenway Plaza, Houston, Texas.

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

F. "*Acquisition*" means the proposed acquisition by respondents of certain assets of ANR Field Services Company ("ANRFS") and ANR Production Company ("ANRP") (sometimes collectively referred to as "ANR"), subsidiaries of Coastal, pursuant to the Letter of Intent dated January 20, 1998, executed by ANRFS, ANRP, and Transok, LLC, a subsidiary of Tejas.

G. "*Gas Gathering*" means pipeline transportation, for oneself or other persons, of natural gas over any part or all of the distance between a well and a gas transmission pipeline or gas processing plant.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

I. "*Related Person*" means a person controlled by, controlling, or under the common control of, another person.

J. "*Relevant Geographic Area*" means all portions of Wheeler County, Texas, within 22 miles of the Hemphill County, Texas, border; all portions of Roger Mills County, Oklahoma, within 25 miles of the Beckham County, Oklahoma, border; all portions of Beckham County, Oklahoma, within 15 miles of the Roger Mills County, Oklahoma, border; all portions of Washita County, Oklahoma, within 18 miles of the Custer County, Oklahoma, border; Custer and Caddo Counties, Oklahoma; and all Townships in Grady County, Oklahoma, within and including the boundaries 4-6N and 5-8W.

K. "*Schedule A assets*" means all of the assets listed in Schedule A of this order.

L. "*Processing*" means the separation of natural gas liquids, including propane, ethane, butanes, and pentanes-plus, from methane.

II.

It is further ordered, That:

A. Following completion of the Acquisition:

1. Prior to the divestiture of the assets listed in Schedule A, respondents shall build an eight (8) inch diameter pipeline to Tejas'

usual specifications connecting pipeline listed in Schedule A as ANR pipeline number 489-0802 and ANR pipeline number 489-0617 in Roger Mills County, Oklahoma, Township 12N 26W, Sections 20, 29, and 30. Respondents shall divest this pipeline with Area 1 assets listed in Schedule A; and

2. Respondents shall divest the Schedule A assets, absolutely and in good faith, at no minimum price, consistent with the provisions of this order, by the later of January 5, 1999, or thirty days after respondents consummate the Acquisition.

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

C. Pending divestiture of the Schedule A assets, respondents shall take such actions as are necessary to maintain the viability, competitiveness and marketability of the Schedule A assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A assets, except for ordinary wear and tear.

D. To ensure the marketability of the assets to be divested, respondents shall offer the purchaser of any of the assets listed in Schedule A the opportunity to enter into an agreement with reasonable terms to process the natural gas gathered in the relevant geographic area in Tejas processing facilities for a term of up to two (2) years, cancelable at the asset purchaser's option with ninety (90) days notice.

E. 1. From the time that respondents acquire the Schedule A assets that are currently owned by ANR until their divestiture has been completed in pertinent part, respondents shall offer to purchase, gather and process gas on those Schedule A assets on the same terms and conditions offered by ANR on the date of their transfer.

2. If a producer, operator, or shipper executes a waiver of its rights under paragraph II.E.1, respondents may contract on such other terms and conditions as they may deem appropriate.

F. The purpose of the divestiture is to ensure the continued use of the Schedule A assets in the same type of business in which the Schedule A assets are used at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. If respondents have not divested the Schedule A assets in accordance with the requirements of paragraph II of this order, the Commission may appoint a trustee to divest the Schedule A assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, Section 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee to divest the Schedule A assets in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under paragraph III shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures of gas gathering assets. If respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A assets. The trustee may, in his or her discretion, or at the direction of the Commission, effect such arrangements and divest (a) any additional gas gathering assets (including, but not limited to, gas gathering lines, compressors, surface equipment, and gas purchase and gathering contracts) of the respondents located in the Relevant Geographic Area and (b) any additional assets necessary to connect

the divested assets to the buyer's existing systems or to a third-party transmission line. The trustee may select such assets pursuant to clauses (a) and (b) of this paragraph to assure the marketability, viability, and competitiveness of the Schedule A assets so as to accomplish expeditiously the remedial purposes of this order.

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

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.3 to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, that the Commission may extend this period only two (2) times.

5. Respondents shall provide the trustee full and complete access to the personnel, books, records and facilities related to the Schedule A assets, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by respondents shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall make reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made to an acquirer(s) that receives the prior approval of the Commission, provided, however, that if the trustee receives bona fide offers for any of the assets to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to

the acquiring entity or entities selected by respondents from among those approved by the Commission.

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

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

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

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

11. The trustee shall have no obligation to operate or maintain the Schedule A assets.

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

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without prior notification to the Commission, directly or indirectly:

A. Acquire the Schedule A assets after their divestiture, or any assets the trustee may divest pursuant to paragraph III.B.2 of this order;

B. Acquire any stock, share capital, equity, or other interest in any person engaged in gas gathering within the Relevant Geographic Area at any time within the two years preceding such acquisition; or

C. Enter into any agreements or other arrangements with any person or with two or more related persons to obtain, within any 18 month period, direct or indirect ownership, management, or control of more than five (5) miles of pipeline previously used for gas gathering and suitable for use for gas gathering within the Relevant Geographic Area.

V.

It is further ordered, That the prior notifications required by paragraph IV of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of Part 803, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents. In lieu of furnishing (1) documents filed with the Securities and Exchange Commission, (2) annual reports, (3) annual audit reports, (4) regularly prepared balance sheets, or (5) Standard Industrial Code (SIC) information in response to certain items in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, respondents shall provide a map showing the location of the pipeline whose acquisition is proposed and other pipelines used for gas gathering in the Relevant Geographic Area and a statement showing, for the most recent 12 month period for which volume information is available, the quantity of gas that flowed through pipeline whose acquisition is proposed. Respondents shall

provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by paragraph IV of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs II or III of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II and III of this order. Respondents shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order is entered, and at such other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VII.

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

VIII.

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

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

B. Upon five (5) days' notice to respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of respondents, who may have counsel present, relating to any matters contained in this order.

IX.

It is further ordered, That this order shall terminate on December 21, 2008.

IN THE MATTER OF

GATEWAY 2000, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3844. Complaint, Dec. 22, 1998--Decision, Dec. 22, 1998

This consent order prohibits, among other things, the South Dakota-based distributor and advertiser, of personal computers and software, from failing to make the text of any written warranty on a consumer product readily available for examination by prospective buyers prior to sale; from failing to provide a full refund of the purchase price of a product, including any shipping costs, insurance, handling or any other fees due to the consumer pursuant to any money-back guarantee offer made by the respondent; and requires the respondent to pay approximately $290,000 to the U.S. Treasury.

Participants

For the Commission: *Michael Rose, Brenda Doubrava, John Mendenhall,* and *Margaret Patterson.*

For the respondent: *Michael Sibarium, Winston & Strawn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act ("the Warranty Act"), 15 U.S.C. 2301 *et seq.*, and Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, and the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gateway 2000, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rules, and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rules 701 and 702, 16 CFR 701.1 and 702, promulgated thereunder shall apply to the terms used in this complaint.

PAR. 2. Respondent Gateway 2000, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 610 Gateway Drive, North Sioux City, SD.

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

PAR. 4. Respondent is now and has been engaged in the direct marketing of personal computers throughout the United States. In the operation of its business, respondent is now and has been distributing, advertising, offering for sale and selling, among other items, IBM-compatible desktop, notebook and subnotebook personal computers, software, printers, modems, and monitors, all of which are consumer products. Therefore, respondent is a supplier of consumer products.

PAR. 5. In the ordinary course and conduct of its aforesaid business, respondent sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

VIOLATIONS OF SECTION 5(a)(1) OF THE FTC ACT

PAR. 6. Respondent has disseminated or has caused to be disseminated advertisements, promotional materials and written warranties for its products, including but not necessarily limited to the attached Exhibits 1 through 9.

Money-back Guarantee Claims

PAR. 7. The advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the attached Exhibits 2 through 6, contain the following statements:

1. GATEWAY 2000'S STANDARD FEATURES AND SERVICES . . . GUARANTEE Thirty-day money back guarantee.
2. 30-Day Money-back Guarantee . . . If you're unhappy with your Gateway 2000 purchase, for any reason, you can return the system within 30 days for a full refund.
3. THE EXTRAS - THAT DON'T COST EXTRA AT GATEWAY . . . 30-day money-back guarantee.
4. INCLUDED WITH EVERY SYSTEM: 30-day money-back guarantee.
5. You get a **30-day money-back guarantee.** If you don't like your system, send it back within 30 days for a refund.

PAR. 8. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph seven, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that purchasers may return merchandise to the respondent within 30 days of its purchase, and obtain a full refund of all money paid to respondent to obtain said merchandise.

PAR. 9. In truth and in fact, when respondent determines the amount of the refund, it is its policy and practice to deduct its stated cost of shipping the merchandise to the purchaser from the money paid by consumers to the respondent. Thus, purchasers who return merchandise to respondent within 30 days of its purchase do not obtain a full refund of all money paid to respondent to obtain said merchandise.

PAR. 10. Therefore, the representations set forth in paragraph eight were, and are, false and misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

On-Site Service Claims

PAR. 11. The advertisements and promotional materials referred to in paragraph six, including but not necessarily limited to the attached Exhibits 7, 8 and 9, contain the following statements:

Standard Features and Services -- Free on-site service to most locations in the nation
THE EXTRAS That Don't Cost Extra At Gateway -- Free on-site service to most locations
INCLUDED WITH EVERY SYSTEM: Free on-site service to most locations

PAR. 12. Through the use of the statements contained in the advertisements and promotional materials referred to in paragraph eleven, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that the purchasers of the warranted products, upon request to the respondent, will receive the free on-site services of a technician, except in certain geographic locations, and that respondent will send a technician regardless of whether respondent first diagnoses the problem over the telephone and whether the consumer can make the repair.

PAR. 13. In truth and in fact, regardless of geographic location, purchasers of the warranted products, upon request to respondent, did

not always receive the free on-site services of a technician; rather, it was the policy and practice of the respondent that it did not send a technician to provide on-site service until the respondent diagnosed the problem over the telephone and determined that the consumer could not make the repair.

PAR. 14. Therefore, the representations set forth in paragraph twelve were, and are, misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

Deceptive Warranty Language About Consumer Remedies

PAR. 15. In the ordinary course and conduct of its business, respondent has disseminated or has caused to be disseminated written warranties, including but not necessarily limited to the attached Exhibit 1, which contain the following language:

Under no circumstances shall Gateway 2000 be liable for any special, incidental, or consequential damages based upon breach of warranty, breach of contract, negligence, strict liability, or any other legal theory . . .

PAR. 16. Through the use of the statement referred to in paragraph fifteen, and other statements not specifically set forth herein, respondent has represented, directly or by implication, that consumers have no remedies regarding claims based upon incidental or consequential damages.

PAR. 17. In truth and in fact, some states do not allow the exclusion or limitation of incidental or consequential damages, and consumers in those states do have remedies regarding claims based upon incidental or consequential damages.

PAR.18. Therefore, the representations set forth in paragraph sixteen were, and are, false and misleading and constitute unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE PRE-SALE AVAILABILITY RULE

PAR. 19. In the ordinary course and conduct of its business as a seller of consumer products, respondent has offered for sale to consumers consumer products with written warranties by means of a

1. The full text of the written warranty; or
2. That the written warranty can be obtained free upon specific written request, and the address where such warranty can be obtained.

PAR. 20. Section 110(b) of the Warranty Act mandates that the failure to comply with a Rule promulgated under the Warranty Act is a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). 15 U.S.C. 2310(b). Therefore, Gateway's failure to comply with the provisions of the Pre-Sale Availability Rule, 16 CFR Part 702, constituted and now constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE DISCLOSURE RULE

PAR. 21. In the ordinary course and conduct of its business, respondent has given or offered to give written warranties, and is therefore a warrantor as that term is defined in Section 701.1(g) of the Disclosure Rule, 16 CFR 701.1(g).

PAR. 22. In the ordinary course and conduct of its business, respondent has provided written warranties excluding incidental or consequential damages, but has failed to make, as required by Section 701.3(a)(8) of the Disclosure Rule, 16 CFR 701.3(a)(8), the following disclosure: "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

PAR. 23. In the ordinary course and conduct of its business, respondent has provided written warranties but has failed to make, as required by Section 701.3(a)(9) of the Disclosure Rule, 16 CFR 701.3(a)(9), the following disclosure: "This warranty gives you specific legal rights, and you may also have other rights which vary from State to State."

PAR. 24. Section 110(b) of the Warranty Act mandates that the failure to comply with a Rule promulgated under the Warranty Act is a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). 15 U.S.C. 2310(b). Therefore, Gateway's failure to comply with the provisions of the Disclosure Rule, 16 CFR 701, constituted and now constitutes an unfair or deceptive act or practice

in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

VIOLATIONS OF THE WARRANTY ACT

PAR. 25. Section 108 of the Warranty Act provides that no supplier may disclaim or modify any implied warranty, except by limiting the duration of an implied warranty to the duration of a written warranty of reasonable duration, if the supplier makes any written warranty to the consumer with respect to a consumer product. 15 U.S.C. 2308.

PAR. 26. In the ordinary course and conduct of its business as a supplier, respondent has made written warranties, including but not necessarily limited to the attached Exhibit 1, which contain the following language:

DISCLAIMER OF WARRANTIES

THE WARRANTY STATED ABOVE IS THE ONLY WARRANTY APPLICABLE TO THIS PRODUCT. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), ARE HEREBY DISCLAIMED . . .

PAR. 27. Respondent's disclaimer of implied warranties constituted and now constitutes a violation of Section 108 of the Warranty Act, 15 U.S.C. 2308, and, pursuant to Section 110(b) thereof, 15 U.S.C. 2310(b), an unfair or deceptive act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Commissioner Anthony recused.

EXHIBIT 1

Gateway 2000 Limited Warranty

Gateway 2000 One-Year Limited Warranty

Gateway 2000, Inc. warrants to the original purchaser that this hardware system will be free from defects in material and/or workmanship for one (1) year from the date of delivery. During the warranty period, Gateway 2000 will correct any defects in material or workmanship, or any failure of the system to conform to specifications, at no charge for labor and materials. Any replacement parts are warranted for the remainder of the original warranty or thirty (30) days, whichever is longer. The warranty period is not extended as a result of purchasing any additional parts from us or upgrading your Gateway 2000 computer. The original owner must promptly notify Gateway 2000, Inc. in writing if there is a defect in material or workmanship. Written notice in all events must be received by Gateway 2000 before expiration of the warranty period. This warranty is not transferable.

International Warranty

The Warranty for international customers is the same as for customers within the United States, with the following exceptions: On all orders for replacement parts, the customer must pay for the parts and shipping costs before the parts are shipped. When the defective parts are returned to Gateway 2000, Gateway 2000 will refund the cost of the parts — shipping charges are not refundable. Gateway 2000 is also not responsible for any customs fees, taxes or VAT that may be due. You must pay all customs fees, taxes, or VAT that may be due.

This One-Year Limited Warranty covers normal use. Gateway 2000 does not warrant or cover:

- damage during shipment other than original shipment to purchaser;
- damage caused by a disaster such as fire, flood, wind, earthquake, or lightning;
- damage caused by unauthorized attachments, alterations, modifications or foreign objects;
- damage caused by peripherals;
- defects caused by failure to provide a suitable installation environment for the hardware system;
- damage caused by the use of the hardware system for purposes other than those for which it was designed;
- damage from improper maintenance;
- damage caused by any other abuse, misuse, mishandling, or misapplication.

Gateway 2000's liability for failure to repair the hardware system to conform to the warranty after a reasonable number of attempts will be limited to a replacement of the hardware system or, at Gateway 2000's option, to a refund not to exceed the purchase price of the hardware system. These remedies are the Purchaser's *exclusive* remedies for breach of warranty.

Under no circumstances shall Gateway 2000 be liable for any special, incidental, or consequential damages based upon breach of warranty, breach of contract, negligence, strict liability, or any other legal theory. Such damages include, but are not limited to, loss of profits, loss of revenue, loss of use of the hardware system or any associated equipment, cost of capital, cost of substitute or replacement equipment, facilities or services, down time, purchaser's time, the claims of third parties, including customers, and injury to property.

DISCLAIMER OF WARRANTIES

THE WARRANTY STATED ABOVE IS THE ONLY WARRANTY APPLICABLE TO THIS PRODUCT. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED (INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), ARE HEREBY DISCLAIMED. NO ORAL OR WRITTEN INFORMATION (INCLUDING BUT NOT LIMITED TO THE 30-DAY MONEY BACK GUARANTEE), OR ADVICE GIVEN BY GATEWAY 2000, ITS AGENTS OR EMPLOYEES SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF THIS WARRANTY.

THIS DISCLAIMER OF WARRANTIES AND LIMITED WARRANTY ARE GOVERNED BY THE LAWS OF THE STATE OF SOUTH DAKOTA.

6 Gateway 2000 Customer Support Guide

396

EXHIBIT 2

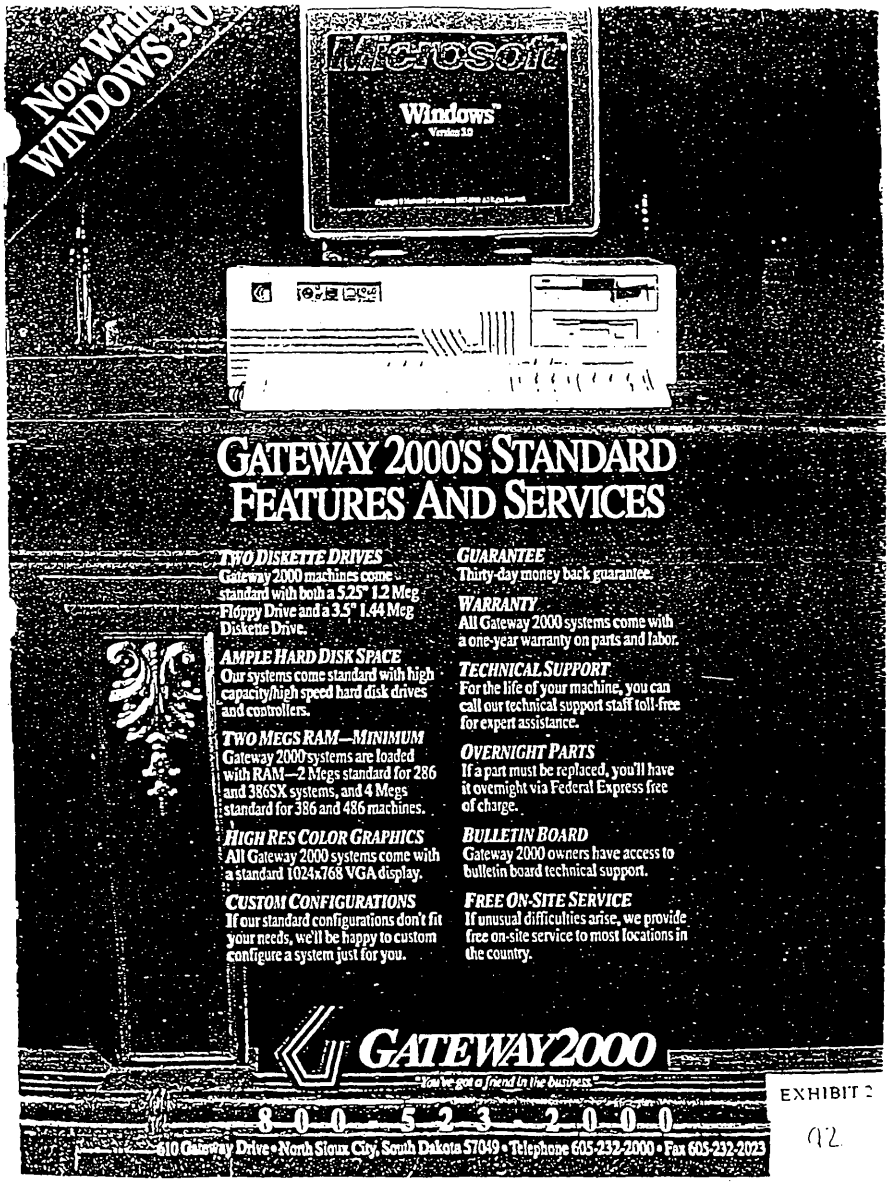


EXHIBIT 2

92

EXHIBIT 3

Gateway 2000 Assurances

Like most companies, Gateway 2000 offers a good written guarantee and warranty on all products. Unlike most companies, we treat our customers as individuals, taking special care to see that your individual situation is handled fairly. Your satisfaction is our number one priority.

30-Day Money-Back Guarantee

If you're unhappy with your Gateway 2000 purchase, for any reason you can return the system within 30 days for a full refund.

One-Year Warranty

Every Gateway 2000 system comes with a one-year warranty on parts and service. If a part needs to be replaced, we'll quickly send a replacement part via overnight shipping free of charge. Beyond the warranty, we provide free telephone technical support for the life of your machine.

Free On-Site Service

If unusual difficulties occur, we can provide free on-site service to most locations in the country.

Credit Terms

You can purchase your Gateway 2000 system on C.O.D. terms or with American Express, Discover, Visa, or Mastercard. Net 30-day credit terms and leasing options are also available to qualified buyers.

New FCC and Product Development Labs

As an added assurance to you that your Gateway 2000 system will comply with all FCC certification requirements, we've just installed a new FCC testing lab in our recently expanded 70,000 square-foot manufacturing facility. We've also expanded our product development lab in which we are continually testing new components. The quest for even better price/performance computer systems never ends at Gateway.

New Sales Hours

For your convenience, we've expanded our sales hours. New sales hours are from 7 a.m. to 10 p.m. (CST) Monday through Friday and 9 a.m. to 4 p.m. Saturdays.

EXHIBIT 3
38

EXHIBIT 4

GATEWAY 2000

16MHZ 286 VGA

- 80286 Processor
- 2 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey™ Keyboard
- MS DOS® 5.0

$1395

16MHZ 386SX VGA

- Intel® 80386SX Processor
- 2 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey Keyboard
- Microsoft® Mouse
- MS DOS 5.0
- MS Windows™ 3.0

$1495

20MHZ 386SX CACHE

- Intel 80386SX Processor
- 32K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 512K
- 14" Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 1 PS/2 Mouse Port
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$1895

25MHZ 386 VGA

- Intel 80386 Processor
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2095

BEST BUYS

- Get our 33 MHz 386 Cache system, same configuration as listed, with a 120 MB IDE hard drive instead of the 200 MB drive.

$2495

- Same features as our 33 MHz 486 Cache system except this machine has 4 MB RAM, instead of 8, and a 120 MB IDE hard drive, instead of the 200 MB drive in our standard configuration.

$2845

33MHZ 386 CACHE

- Intel 80386 Processor
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2795 –

25MHZ 486 CACHE

- Intel 80486 Processor
- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$2995

33MHZ 486 CACHE

- Intel 80486 Processor
- 64K Cache RAM
- 8 MB RAM, Expands to 64 MB
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16-Bit VGA with 1 MB
- 14" Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 124-Key AnyKey Keyboard
- Microsoft Mouse
- MS DOS 5.0
- MS Windows 3.0

$3395

The Extras – That Don't Cost Extra At Gateway

- One-year warranty on parts and labor
- Replacement parts shipped quickly via overnight shipping at no charge
- 30-day money-back guarantee
- Lifetime toll-free technical support from the service organization that won PC World's Service Excellence Award
- Free on-site service to most locations
- Free bulletin board technical support
- C.O.D. terms and major credit cards honored
- Net 30-day credit terms available to qualified commercial customers
- Leasing options available to qualified commercial customers
- MS DOS 5.0 is standard; versions 4.01 and 3.3 are available at no extra charge
- The programmable AnyKey keyboard is standard; a 101-key keyboard is also available at no extra charge

All prices are subject to change. Prices do not include shipping. *Printed on recycled paper.* *Corporate Sponsor – a program of the American Forestry Association, Box 2000, Washington, DC 20013 Call us for information on how you can support Global Releaf.*

Sales Hours: 7am-10pm Weekdays, 9am-4pm Saturdays (Central Time)
Service Hours: 6am-Midnight Weekdays, 9am-2pm Saturdays (Central Time)

intel inside

GATEWAY2000
"You've got a friend in the business"

8 0 0 - 5 2 3 - 2 0 0 0
610 Gateway Drive • N. Sioux City, SD 57049 • 605-232-2000 • Fax 605-232-2023

Now Toll-F
From Cana

EXHIBIT 4

60

EXHIBIT 5

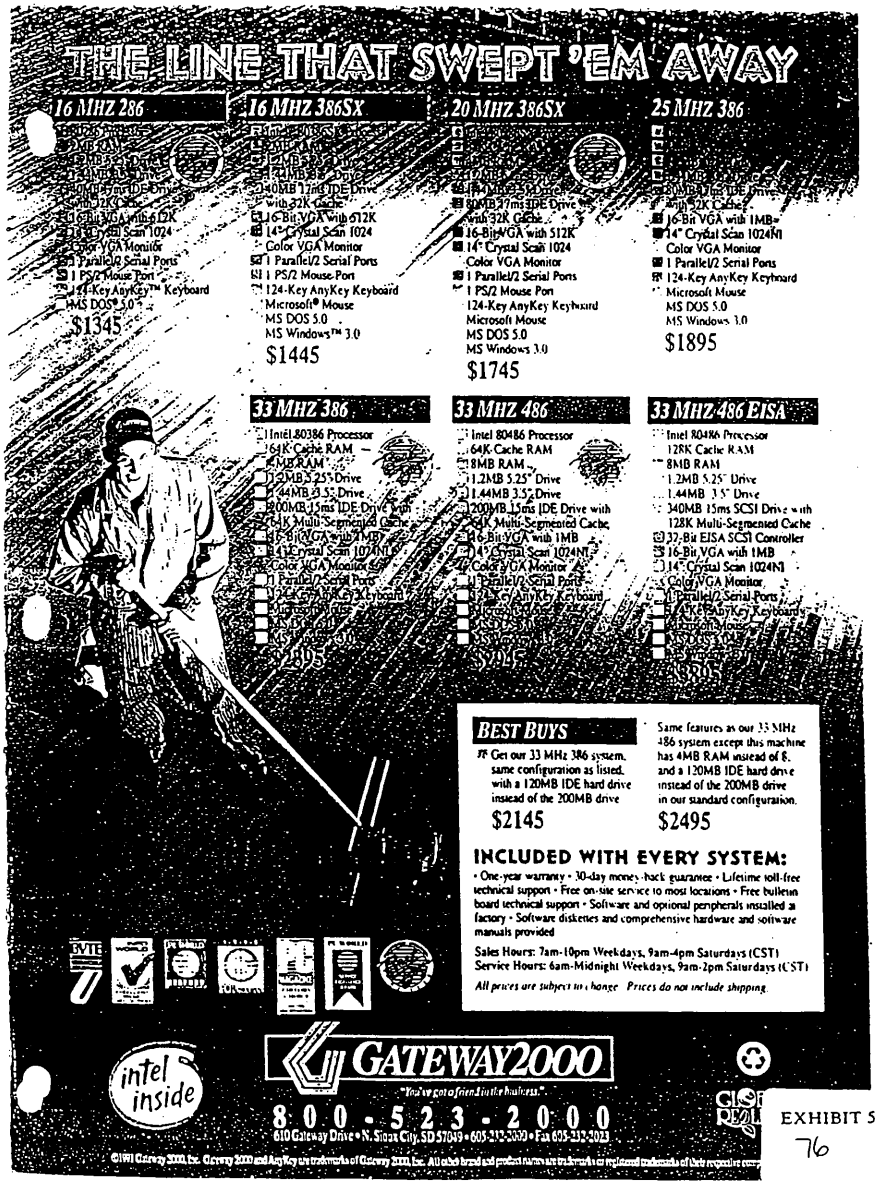


EXHIBIT 5
76

EXHIBIT 6

Gateway 2000 was a record, what would it sound like? Music to your ears!

ıose Old-Time Country Values
The Low Overheads

Our album would kick off with some great Country
es because, after all, we're the original country PC
npany with the low-overhead prices. We're located

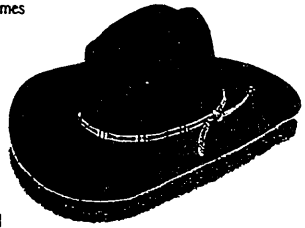
the heartland of America where our factory is
rd( )by corn and bean fields. KSUX country radio,
e Super Pig, is the number
ıe station in these
ırts (no fooling).
ateway folks are
ostly midwest born
ıd raised, and it shows in our quality workmanship
ıd in the friendly, down-home way we treat our
ıstomers. We'll bend over backwards to please you.
/hen you buy from Gateway, you get the best price,
uality and service. That's a value nobody can beat.

;imme the Good Stuff –
ıy Hammer and the Boys

This song is dedicated to everybody who's tired of
ıew technology becoming affordable only after it's
ıpstaged by something better. At Gateway, we offer
he l- -t, newfangled technology at homespun prices.

ateway's 4SX-33 makes a mighty fine Windows machine!

Baby, Let Me Baby You
by The Support Group



Every Gateway 2000 system comes with excellent after-the-sale support. You get a 30-day money-back guarantee. If you don't like your system, send it back within 30 days for a refund. All systems come with a one-year limited warranty and telephone technical support for the life of the system from our award-winning tech department. We received *PC World's* World Class Award in 1992 for best service and support in the hardware category. And in a February 1993 survey, *PC Magazine* readers once again gave Gateway an excellent rating for service and reliability. You also get a lifetime BBS membership for additional technical support and online forums.

To serve you better, we've hired and trained over 500 new people for customer service, technical support, sales and manufacturing in the past five months, bringing our total number of employees to over 1,900.

We offer on-site service to most locations in the country (factory service only for notebooks). Replacement parts leave our factory as quickly as possible; we pay overnight shipping. Plus we now have interactive documentation on desktop systems with pictures and text right on your hard drive (in addition to comprehensive hardware and software manuals).

We make it easy for you to buy a Gateway PC, too, with convenient payment options including major credit cards and C.O.D. terms. Net 30-day terms and leasing options are also available to qualified commercial customers. All this *and* your great-looking Gateway PC comes in our distinctive, country cow-spotted box!

EXHIBIT 6

GATEWAY 254

800-846-4089

EXHIBIT 7

Gateway 2000 Systems

12MHZ 286VGA

- 80286-12 Processor
- 1 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 512K
- 14" Gateway Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01

$1495.00

GATEWAY 386SX

- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 40 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 512K
- 14" Gateway Crystal Scan 1024 Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$1895.00

25MHZ 386™VGA

- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$2395.00

25MHZ 386CACHE

- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 80 MB 17ms IDE Drive with 32K Cache
- 16Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$2695.00

33MHZ 386VGA

- 64K Cache RAM
- 4 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$3195.00

25MHZ 486™VGA

- 64K Cache RAM
- 8 MB RAM
- 1.2 MB 5.25" Drive
- 1.44 MB 3.5" Drive
- 200 MB 15ms IDE Drive with 64K Multi-Segmented Cache
- 16 Bit VGA with 1 MB
- 14" Gateway Crystal Scan 1024NI Color VGA Monitor
- 1 Parallel/2 Serial Ports
- 101 Key Keyboard
- MS DOS 3.3 or 4.01
- MS WINDOWS 3.0

$3995.00

33MHZ 486VGA

- Same configuration as the 25 MHz 486 VGA

$4395.00

BEST BUY

- Same features as our 33 MHz 386 VGA system except this machine has an 80 MB 17ms IDE Drive instead of the 200 MB 15ms IDE Drive.

$2795.00

STANDARD FEATURES & SERVICES

- Microsoft Windows
- 30-day money-back guarantee
- One-year warranty
- Leasing options

NEW CRYSTAL SCAN 1024NI

- Our new 14" Gateway Crystal Scan 1024NI color VGA monitor comes standard with all 386 DX and 486 systems. This monitor is non-interlaced for a flawless, flicker-free display. 1024 x 768 @ 60 Hz. 800 x 600 @ 72 Hz. 28 D.P.

We custom-build each Gateway 2000 computer to customer specifications. We'll gladly provide you with a quote on your configuration. 386 and 486 are trademarks of Intel Corporation. Due to the volatility of the DRAM market, all prices are subject to change. Prices do not include shipping.

GATEWAY2000

"You've got a friend in the business."

800-523-2000

610 Gateway Drive • N. Sioux City, SD 57049 • 605-232-2000 • Fax 605-232-2023

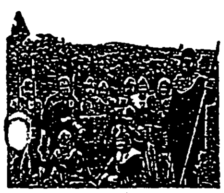
EXHIBIT 7

37

EXHIBIT 8

[illegible]

[illegible]



[illegible]

THE EXTRAS

That Don't Cost Extra At Gateway

- √ One-year warranty
- √ 30-day money-back guarantee
- √ Lifetime toll-free technical support from the service organization that won PC World's Service Excellence Award
- √ Free on-site service to most locations
- √ Free bulletin board technical support
- √ Replacement parts sent via overnight shipping free of charge
- √ Leasing options available to commercial customers
- √ Sales hours 7am-10pm weekdays, 9am-4pm Saturdays (Central Time)
- √ Service hours 6am-midnight weekdays, 9am-2pm Saturdays (Central Time)
- √ Toll-free lines now connected for Canada too
- √ Custom 124-key programmable AnyKey keyboard standard with all systems
- √ MS DOS 5.0, featuring improved memory efficiency, enhanced/new utilities and new user shell, standard with all systems
- √ Flicker-free non-interlaced Crystal Scan 1024 x 768 color monitors standard with all 386 DX and 486 systems

CURTAIN CALL

The characters in our annual summer fun ad were played by a few of the 750 dedicated people who work at Gateway 2000. All photos were shot in and around our hometown of N. Sioux City, South Dakota.

[illegible]

[illegible]

[illegible]

GATEWAY2000

"You've got a friend in the business."

8 0 0 - 5 2 3 - 2 0 0 0

610 Gateway Drive • N. Sioux City, SD 57049 • 605-232-2000 • Fax 605-232-2023

[illegible] © 1991 Gateway 2000, Inc. Photos by G.R. Lindblade & Company.

52

EXHIBIT 8

EXHIBIT 9

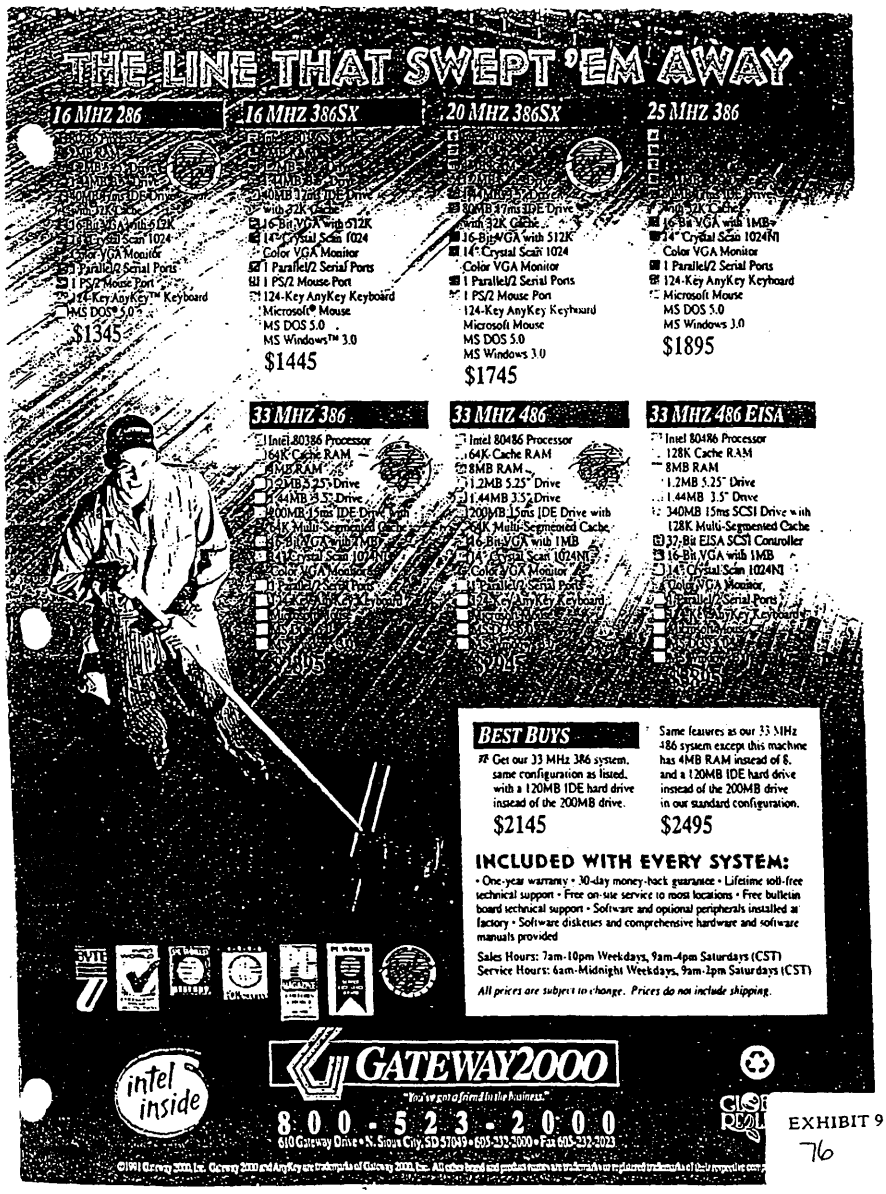


EXHIBIT 9
76

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 Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of Section 5 of The Federal Trade Commission Act ("FTC Act"); the Magnuson-Moss Warranty Act ("Warranty Act") and two Rules promulgated thereunder: the Rule concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule"); and the Rule concerning the Pre-Sale Availability of Written Warranty Terms ("Pre-Sale Rule"). Under Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), violations of the Warranty Act or its Rules are also violations of Section 5 of the FTC Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent 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 respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

A. Respondent Gateway 2000, 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 at 610 Gateway Drive, North Sioux City, SD.

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

ORDER

DEFINITIONS

1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, and in Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, shall apply to the terms used in this order.

2. "*On-Site Service*" shall mean the provision of the services of a qualified technician at the location of a defective or allegedly defective product sold or supplied by Gateway 2000, Inc. ("respondent") in an attempt to repair, replace, or otherwise correct a problem described by a purchaser to the respondent.

3. "*Clearly and conspicuously*" shall mean that the disclosure must be given in: (1) twelve point type where the representation that triggers the disclosure requirement is given in twelve point or larger type; or (2) the same type size as the representation that triggers the disclosure requirement where that representation is given in a type size that is smaller than twelve point type.

I.

It is ordered, That respondent Gateway 2000, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product for which the respondent offers a written warranty, do forthwith cease and desist from:

A. Excluding liability for any incidental or consequential damages arising from any consumer injury without clearly and conspicuously disclosing, as provided by Section 701.3(a)(8) of the Disclosure Rule, 16 CFR 701.3(a)(8), that some states do not allow for such exclusion;

B. Failing to disclose, as provided by Section 701.3(a)(9) of the Disclosure Rule, 16 CFR 701.3(a)(9), that certain states may give the consumer legal rights in addition to those provided by the warranty;

C. Disclaiming any implied warranty, except as provided by Section 108 of the Warranty Act, 15 U.S.C. 2308;

D. Failing to make the text of any written warranty on a consumer product readily available for examination by prospective buyers prior to sale through utilization of one or more means specified in Section 702.3(c) of the Pre-Sale Availability Rule, 16 CFR 702.3(c).

II.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, do hereby cease and desist from failing to provide a full refund of the purchase price of a product, including any shipping costs, insurance, handling or any other fee or charge paid by the consumer, within seven (7) business days of the respondent's acceptance, after a reasonable opportunity for inspection, of the merchandise returned by the consumer for a refund pursuant to any money-back guarantee offer made by respondent; provided, however, that respondent may deduct a service charge or other fees such as shipping and handling costs only if respondent has disclosed that such deductions will be made, clearly and conspicuously and in close proximity to the money-back guarantee offer made by respondent.

III.

It is further ordered, That respondent, its successors and assigns, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the U.S. Treasury and delivered to Commission counsel, Cleveland Regional Office, 1111 Superior Avenue, Suite #200, Cleveland, OH 44114, the sum of Two Hundred Eighty Nine Thousand Four Hundred Twenty Nine and 05/100 ($289,429.05) Dollars. Respondent shall make this payment on or before the tenth day following the date of service of the order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. No portion of the respondent's payment shall be deemed payment of any fine, penalty, or punitive assessment.

IV.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, do forthwith cease and desist from representing, in any manner, directly, or by implication, that it shall provide On-Site Service unless respondent discloses, clearly and conspicuously and in close proximity to the representation, any material limitations on obtaining On-Site Service.

V.

It is further ordered, That respondent, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale or offering for sale of any consumer product, for which the respondent offers a written warranty, do forthwith cease and desist from misrepresenting a consumer's remedies under its warranties for claims based upon incidental or consequential damages.

VI.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, deliver to each of the respondent's current directors and officers, and to all managing employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility with respect to the subject matter of this order, a copy of this order to cease and desist. For a period of three (3) years thereafter, respondent shall distribute the same to all future directors and officers, and to all future managing employees, agents, and representatives within thirty (30) days after the inception of their affiliation with respondent.

VII.

It is further ordered, That respondent shall, within thirty (30) days of the date of service of this order, provide written instructions to all current managing employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility on behalf of respondent as to respondent's specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301, *et seq.*),

including, but not limited to, Section 108 (15 U.S.C. 2308), thereof, and Rules 701 and 702, 16 CFR Parts 701 ("the Disclosure Rule") and 702 ("the Pre-Sale Availability Rule"), promulgated thereunder, and this order. For a period of three (3) years thereafter, respondent shall provide said instructions to all future such managing employees, agents, and representatives within thirty (30) days after the inception of their affiliation with respondent.

VIII.

It is further ordered, That respondent shall, for a period of not less than five (5) years from the date of service of the order, maintain and upon request make available to the Federal Trade Commission for inspection and copying (i) copies of all written instructions provided by respondent to its supervising employees, agents, and representatives having any sales, advertising, customer service, or policy responsibility on behalf of respondent pursuant to Part VII, above; (ii) all warranties on consumer products costing more than $15 for which the respondent is the warrantor; and (iii) exemplars of all advertising by the respondent.

IX.

It is further ordered, That respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporate entity that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That this order will terminate on December 22, 2018, 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.

XI.

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

Commissioner Anthony recused.

Re:Petition of Mt. Olympus Financial, Dan Horman, and Annette Horman to Quash Civil Investigative Demands -- File No.982-3543 (Mt. Olympus Financial)

August 11, 1998

Dear Messrs. Atkin and Hawkins:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. As also set forth below, the new deadline for Mt. Olympus Financial, L.C. and its principals, Dan and Annette Horman (together "Petitioners" or "Mt Olympus"), to respond to, and otherwise comply with, the Civil Investigative Demands ("CID") is Wednesday, August 26, 1998.

Petitioners have the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1] The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- August 26, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. SUMMARY OF THE DISPUTE

Mt. Olympus is a subprime lender. At issue in this investigation is whether Mt. Olympus violated Section 5 of the FTC Act, 15 U.S.C. 45(a); the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 *et seq.*, which includes the Home Ownership and Equity Protection Act ("HOEPA"); and/or TILA's implementing regulation, Regulation Z, 12 CFR Part 226. More specifically, the Commission wants to pursue preliminary evidence it has gathered suggesting that Petitioners induced consumers to falsify their loan applications to indicate that the loans were for business purposes when, in fact, those loans were for personal, family, or household purposes. The consumer protection requirements imposed by TILA do not apply to business loans.[2]

---

[1] This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

[2] The Truth in Lending Act specifically exempts certain transactions, including, "[c]redit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes . . . ." 15 U.S.C. 1603(1), *see also* 12 CFR 226.3.

At the heart of this dispute is Petitioners' refusal to honor specification 5 of the CIDs which requests access to all of Mt. Olympus' loan files for the relevant period -- approximately 110 files. Petitioners contend that they only make business loans, and, therefore, their files are not relevant to an investigation aimed at uncovering violations of TILA and HOEPA. Rather than provide access to the entire set of files, Petitioners suggest that access be limited to the files of those borrowers whom the FTC can identify as claiming that their loans were for consumer, rather than business, purposes. As explained in detail below, this is not viable alternative for several reasons, not the least of which is that borrowers' willingness to cooperate in the investigation might be chilled if they knew that they would be singled out to their lender as having provided damaging testimony or evidence.

II. BACKGROUND

On July 6, 1998, pursuant to its omnibus resolution, dated June 1, 1998, the Commission issued identical CIDs to each of the three Petitioners, requesting various documents. The June 1, 1998 resolution authorizes the use of compulsory process in non-public investigations "[t]o determine whether various unnamed subprime lenders have engaged or are engaging in acts or practices in violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, as amended, including but not limited to the Home Ownership and Equity Protection Act of 1994, and its implementing Regulation Z, 12 CFR 226, as amended, and whether they have engaged or are engaging in unfair or deceptive acts or practices in violation of Section 5(a)(l) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(l), as amended." The resolution also authorizes investigation to determine whether action to obtain redress for injury to consumers or others would be in the public interest. All three CIDs specified a return date of July 20, 1998.

The 13 specifications contained in each CID seek various documents relating to the loans made by Mt. Olympus and Mt. Olympus' business practices generally. For example, the CIDs request documents relating to the total number of loans made, the dates of those loans, the loan amounts, the interest rates and other terms of the loan contracts, the payment status of the loans, and foreclosure activities. With respect to Mt. Olympus' business activities, the CIDs request documents relating to, among other things, the identity of Mt. Olympus' employees, complaints received from borrowers, communications

with governmental agencies, private litigation or law enforcement actions, and policies and procedures regarding compliance with TILA.[3]

Rather than produce the requested documentary materials, on or about July 20, 1998, Petitioners filed a Petition to Quash the CIDs. Petitioners assert three main arguments in support of their Petition: (1) the information sought is not within the scope of the FTC's investigation; (2) the information sought is not relevant to the matters under investigation; and (3) the requests are vague, overly broad, and unduly burdensome.[4]

Commissioner Anthony has carefully reviewed the CIDs, the Petition to Quash, the declaration of Blake Atkin, and all of the various correspondence filed with the Petition and finds that none of Petitioners' arguments support quashing the CIDs.

III. ANALYSIS

A. Scope of Investigation and Relevance of the Information Sought

Petitioners contend that they should not have to comply with the CIDs because their activities are outside of the scope of the investigation authorized by the Commission's June 1, 1998 resolution regarding subprime lenders; therefore, they add, the information sought in the CIDs cannot be relevant. Petitioners are mistaken on both of these points. As shown below, Petitioners' activities *are within the scope* of the authorized investigation, and the information sought by the CIDs *is relevant* to that investigation.

1. Scope

This investigation is intended to uncover unfair or deceptive business practices by subprime lenders. Petitioners do not dispute that Mt. Olympus is a subprime lender. Instead, they attempt to place

[3] In their submission, Petitioners repeatedly mention that they previously provided a great deal of the material sought by the CIDs in response to an April, 1998 access letter. Petition at 1-3; Atkin Affidavit ¶4. While Petitioners' prior cooperation may be commendable, there is no dispute that the CIDs seek documents that have not been previously produced, *e.g.*, all of the loan files. If Petitioners' description of the previous voluntary production is intended to suggest that the CIDs are somehow inappropriate as duplicative of the access letter, Petitioners should note that the instant CIDs contain the standard instruction intended to deal with this issue: "If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission."

[4] The first and the second argument are closely related. Petitioners addressed the two arguments together in their Petition, and those arguments are addressed together in this letter decision as well.

themselves outside of the scope of the investigation by claiming that their activities do not fall within the statutes at issue.[5]

Petitioners incorrectly define the scope of the investigation as limited to uncovering violations of TILA and Regulation Z. They attempt to dismiss the portion of the resolution regarding the FTC Act -- "[t]o determine. . . whether [subprime lenders] have engaged or are engaging in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(l)" -- as "general, vague language" that can be ignored. Petition at 5 n.2. Section 5 of the Commission's original authorizing statute - the cornerstone of the Commission's consumer protection authority -- cannot be dismissed so easily. Indeed, the Commission's investigation is not nearly so narrow as Petitioners suggest, but rather encompasses all "unfair or deceptive acts or practices" by subprime lenders as well as any specific violations of TILA and Regulation Z.

Under this proper definition of the scope of the investigation, even if Petitioners do indeed only make business loans and, therefore, are not subject to TILA, they are still within the scope of the investigation by virtue of Section 5. This fact renders moot Petitioners' argument that the loan applications it has already produced establish, as a matter of law, that it only makes business loans. It is worth noting, however, that the case law Petitioners cite in support this argument is easily distinguished. In those cases, the borrowers, in essence, deceived the lender about the purpose of the loan and later sought refuge in state usury laws applicable only to consumer transactions. Notably lacking in those cases was any evidence that the lenders required the borrowers to mischaracterize their loans as business loans or that the lenders knew that the borrowers intended to use the loan proceeds for personal uses. Here, by contrast, the Commission has evidence suggesting that, in an apparent effort to evade the requirements of TILA and HOEPA, Petitioners actively induced consumers to falsify the purpose of their loan on the loan applications despite consumers having told them that

---

[5] It is worth noting at the outset that the purpose of an investigation is to learn the nature of the target's *actual* activities; the target cannot deflect the investigation merely by proffering self-serving *claims* regarding its activities.

they intended to use the loan proceeds for personal, family or household purposes.[6]

Extensive case law regarding sham business loans establishes that objective manifestations of purpose, such as loan applications or affidavits attesting to a business purpose, are not determinative of the nature of the loan when the lender manipulates the loan's structure to appear as a business loan or when the lender requires the consumer to sign a false statement of business purpose in order to evade the laws designed to protect consumers. Moreover, the borrower is not estopped from denying the representations contained in a business purpose affidavit when the affidavit is executed at the request of the lender and the borrower is not informed of the implications of claiming a business purpose. The borrower's acquiescence in signing a false business purpose statement does not change the true character of the loan. *See, e.g., Brown v. Giger*, 111 Wash. 2d 76, 757 P.2d 523 (1988); *McGovern v. Smith*, 59 Wash. App. 721, 801 P.2d 250(1990); *Marashi v. Lannen*, 55 Wash. App. 820, 780 P.2d 1341(1989); *Aetna Finance Co. v. Darwin*, 38 Wash. App. 921, 691 P.2d 581 (1984); *Commercial Mortgage & Finance Co. v. Life Savings of America*, 129 Ill. 2d 42, 541 N.E.2d 661 (1989); *see also* "The Cost of Credit: Regulation and Legal Challenges," Kathleen E. Keest, National Consumer Law Center (1997 Cumulative Supplement).

2. Relevancy

Petitioners' incorrectly assert that they are outside the scope of the investigation, and, therefore, they reason, the documents sought cannot be relevant to the investigation. This relevancy argument is baseless and fails. Petitioners have made absolutely no supportable arguments, much less any showing, that the requests fall outside of the Commission's authority or this investigation's properly defined scope.

[6] Throughout their submissions, Petitioners argue, without citation to any authority, that the Commission lacks "probable cause" for its CID requests. Petition at 2, 3 and 5, Affidavit of Blake S. Atkin at ¶¶ 3, 6. First of all, as noted above, Petitioners own Petition reports that the Commission staff has explained to Petitioners' counsel on more than one occasion that staff had contacted borrowers who stated that "they were told to falsely state on the form that the loan was for business purposes when in fact it was for consumer purposes." Petition at 4; *see also* Atkin Affidavit ¶¶ 7, 12. Second, the Commission is not held to any "probable cause" standard in conducting its investigations. As the Supreme Court explained almost fifty years ago, the Commission "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Third, even if the Commission were required to have some evidence of a potential violation before it could investigate, it would be under no obligation to reveal the existence or nature of such evidence to the target of the investigation. In short, Petitioners' lack of probable cause complaints are meritless.

Even if, as Petitioners mistakenly assert, the investigation were limited to ferreting out TILA, HOEPA, and Regulation Z violations, the information requested in the CIDs falls well within this artificially narrowed scope. The documents sought will be relevant to the issue of whether Petitioners have indeed induced consumers to falsify their applications to characterize personal loans as business loans -- that is, whether Petitioners are indeed subject to TILA. If the evidence shows that the Petitioners have made personal loans, *i.e.*, are subject to TILA, the documents sought by the CIDs will also be useful in determining the nature and extent of any TILA, HOEPA, and Regulation Z violations, *e.g.*, instances when Petitioners failed to provide material disclosures, failed to afford borrowers their right to rescind, and/or committed prohibited practices.

Petitioners further argue that only the files of borrowers who claim to have been induced to falsify the purpose of their loans are relevant, and, therefore, only those files should be sought. Petition at 7 n.3. First, as explained above, this investigation is not limited to consumer loans, but rather encompasses all unfair or deceptive acts or practices by subprime lenders -- even acts and practices involving loans made for business purposes. Thus, the premise of Petitioners' offer of this limited production -- that only the consumer loans would be relevant to the investigation -- is fatally flawed. Second, even if the Commission were *primarily* interested in investigating consumer loan practices in this instance, Petitioners' suggested limitation is still unacceptable because, among other things, (1) access to all of the files is necessary to determine which of them relate to consumer loans; (2) the target of an investigation cannot be permitted to interfere with the FTC's investigatory methods and strategies; and (3) singling out these individual borrowers to their lender threatens to chill their willingness to cooperate in the investigation by exposing them to potential retaliatory action by Petitioners.

B. Burden

Petitioners' final contention is that the requests are vague, overly broad, and unduly burdensome. Petitioners' one paragraph argument on this issue provides no valid support for this contention.

Petitioners argue that the CIDs "request numerous compilations and financial calculations to be conducted by the CID recipients which are not normally done in connection with their business."

Petition at 8. First, Petitioners neither identify the specifications they contend make such requests nor offer any evidence that those requests would be unduly burdensome to meet. Second, these are *documentary* CIDs; they do not require the respondents to *create* compilations or *perform* financial calculations, but rather merely require that Petitioners *produce documents* in their possession, custody or control that fall within the terms of the specifications.[7]

Petitioners next argue that some of the information sought can be derived from the loan applications they have already provided. While some information sought, *e.g.*, the names and addresses of borrowers, may be available from these forms, the forms do not provide all of the information sought, nor as explained at length above, are the application forms necessarily accurate regarding key points such as the type of loan -- consumer or business. Indeed, many additional documents are necessary to assess Petitioners' compliance with the statutes cited in the Commission's June 1, 1998 resolution.

Petitioners final argument seems to be that the term "covered loan" is too vague. The CIDs define this term simply and directly as: "any credit transaction that is secured by the borrower's dwelling in which [any Petitioner] is the party to which the obligation was initially payable.... The definition excepts loans financing acquisition or initial construction as well as reverse mortgage transactions. In short, this definition is neither complicated nor vague. The key concept is that the security for the loan is the borrower's residence. In other words, all of Petitioners' loans are likely to fall within this definition.

In sum, Petitioners' burden argument is rejected. Petitioners completely fail: to specify which of the particular CID requests they consider vague, overly broad, or burdensome; to explain adequately the nature of any asserted deficiencies; or to provide any evidence supporting their contention that the requests would impose an undue burden upon them. Moreover, an examination of the CIDs themselves reveals that the specifications are narrow, relevant, and focused.

---

[7] Perhaps Petitioners' confusion on this point stems from the fact that some of the specifications do not require production of *every* document relating to a particular set of facts, but rather only "documents sufficient to show . . ." the facts. Ironically, this convention is used to render compulsory process requests *less* burdensome.

IV. CONCLUSION

Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 20. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission, asking only whether (i) the information sought is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not too indefinite or unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). While this matter is, of course, not presently before a federal court, it is worth noting that the CIDs issued here meet all three of these criteria. This is an absolutely proper and statutorily authorized investigation. These CIDs seek information that is relevant to that investigation and have been crafted to avoid placing an undue burden on Petitioners. Indeed, as set forth above, the burden and vagueness objections advanced by Petitioners are unsupported and meritless.

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioners are directed to comply with the Civil Investigative Demands on or before Wednesday, August 26,1998.

TABLE OF COMMODITIES

DECISIONS AND ORDERS

Page

INDEX*

DECISIONS AND ORDERS

* Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by ***italics***.

Page

Page

Page

Page

Page

ISBN 0-16-050968-8
90000
9 780160 509681