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July 15, 2010

Federal Trade Commission  
The Bureau of Consumer Protection  
The Division of Advertising Practices  
600 Pennsylvania Ave. N.W.  
Washington, DC 20580

Attn.: Mary K. Engle, Associate Director for Advertising Practices

Re: Citizens' Complaint against the Scotts Company LLC for deceptive practices and misleading advertisements in connection with the Ortho Home Defense MAX Kill & Contain Mouse Trap

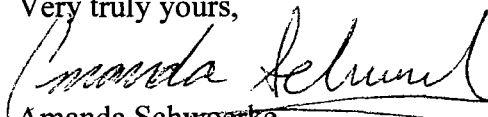
Dear Ms. Engle:

I am counsel to People for the Ethical Treatment of Animals (PETA) and I enclose PETA's citizens' complaint against the Scotts Company LLC (Scotts) for deceptive practices in violation of Section 5 of the Federal Trade Commission Act (Act), concerning Scotts' Ortho Home Defense MAX Kill & Contain Mouse Trap (Kill & Contain).

Scotts' representations to consumers, that the Kill & Contain is a humane, effective, and safe mouse trap, do not survive even the shallowest scrutiny. As demonstrated in the complaint, the trap utterly fails to live up to its name: it neither kills nor contains reliably. Far from killing humanely, the Kill & Contain often mangles the mouse's body, leaving him to die a lingering and painful death from hypothermia, suffocation, starvation, or dehydration—a sight which would traumatize most children.

We therefore respectfully request that the Commission (i) require Scotts to remove the misleading statements concerning the Kill & Contain's humaneness, efficacy, and safety from its advertising, website, and all other media; (ii) enjoin Scotts from making such misleading statements in the future; (iii) require Scotts to disseminate corrective statements in all media in which the deceptive statements were previously disseminated; and (iv) require Scotts to disclose how the trap really kills in its advertising and labeling.

Very truly yours,

  
Amanda Schwoerke  
Litigation Counsel

**PETA**  
FOUNDATION

PEOPLE FOR THE ETHICAL  
TREATMENT OF ANIMALS  
FOUNDATION

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PETA FOUNDATION IS AN OFFERING  
NAME OF THE FOUNDATION TO  
SUPPORT ANIMAL PROTECTION

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

CITIZENS' COMPLAINT SEEKING  
ACTION AGAINST THE SCOTTS  
COMPANY LLC FOR DECEPTIVE  
ACTS AND PRACTICES, INCLUDING  
DECEPTIVE ADVERTISING

Docket No. \_\_\_\_\_

Submitted to:

Federal Trade Commission  
The Bureau of Consumer Protection  
The Division of Advertising Practices  
600 Pennsylvania Ave. N.W.  
Washington, DC 20580  
Attn.: Mary K. Engle

On: July 15, 2010

Submitted by:

People for the Ethical Treatment of Animals

Attn.: Amanda Schwoerke, Litigation Counsel  
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*Representing more than 2 million PETA members and supporters*

## CITIZENS' COMPLAINT

1. The undersigned submit this citizens' complaint pursuant to section 5 of the Federal Trade Commission Act ("Act"), 15 U.S.C. Section 45, to request that the Federal Trade Commission (the "Commission") stop The Scotts Company LLC ("Scotts" or the "Company") from deceiving consumers about the Ortho Home Defense MAX Kill & Contain Mouse Trap (the "Kill & Contain") by representing that the Kill & Contain is guaranteed to kill mice with "no see, no mess disposal,"<sup>1</sup> that the trap is "particularly well-suited for use around young children,"<sup>2</sup> and that it produces a "clean" kill<sup>3</sup> such that the mice do not suffer slow, painful deaths.
2. Petitioner People for the Ethical Treatment of Animals ("PETA") is an international nonprofit organization under the laws of Virginia and headquartered at 1536 16<sup>th</sup> St. N.W., Washington D.C. 20036.
3. Defendant Scotts is a wholly-owned subsidiary of The Scotts Miracle-Gro Company, the world's largest marketer of branded consumer lawn and garden products. Scotts produces, markets, and supplies products for lawn and garden care, including the Kill & Contain. The Company's Ortho brand is the leading brand in the lawn and garden pest control category. Scotts is headquartered in Marysville, Ohio.

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<sup>1</sup> Kill & Contain 2-Pack Package (image attached as Ex. A).

<sup>2</sup> Press Release, Scotts, Scotts Donates Free Kill & Contain Mouse Traps to Schools Nationwide (Sept. 2009), *available at* <http://www2.prnewswire.com/mnr/orthohomedefensemamax/39545/> [hereinafter Press Release, Schools Program].

<sup>3</sup> 2-Pack Package, *supra* note 1 (The Kill & Contain "is the safe, simple and clean way to kill mice.").

## SUMMARY OF THE ALLEGATIONS

4. Scotts produces, markets, and supplies the Kill & Contain, which is sold on-line and in retail stores across the country. According to Scotts, the Kill & Contain “is the safe, simple and clean way to kill mice. The exclusive design kills and contains, so you never have to see or touch the dead mouse again!”<sup>4</sup> The company touts the Kill & Contain as “particularly well-suited for use among young children”<sup>5</sup> and boasts that “[p]rotecting your home and family from mice just got easier!”<sup>6</sup> Scotts has disseminated these and similar representations about the Kill & Contain in various media.

5. Scotts’ representations are intended to create, and have created, a reasonable and justifiable belief in consumers that the Kill & Contain is a quick, effective, and humane way of eliminating mice from their homes—one that is family-friendly and appropriate for small children. These representations are demonstrably false and misleading.

6. In fact, the Kill & Contain fails to eliminate mice cleanly or effectively. Rather, as consumer reviews attest, many mice die slowly in the trap from hypothermia,<sup>7</sup> suffocation, or starvation. Given the truth, few consumers would find the Kill & Contain “particularly well-suited for use among young children”<sup>8</sup> or a “drama-free way” to kill.<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> Press Release, Schools Program, *supra* note 2.

<sup>6</sup> 2-Pack Package, *supra* note 1.

<sup>7</sup> “Hypothermia” is defined as “abnormally low body temperature in a warm-blooded creature, associated with a general slowing of physiologic activity.” THE NEW ENCYCLOPAEDIA BRITANNICA (15th ed. 2010).

<sup>8</sup> Press Release, Schools Program, *supra* note 2.

<sup>9</sup> Usage Tips,

[http://www.orthohomedefense.com/msg/templates/index.jsp?pageUrl=homedefenseUsage\\_mousePh2](http://www.orthohomedefense.com/msg/templates/index.jsp?pageUrl=homedefenseUsage_mousePh2) (last visited June 10, 2010).

7. The Commission recently recognized that “animal treatment is an important issue for many consumers”<sup>10</sup> and “consumer interest in humane animal treatment appears to be increasing.”<sup>11</sup> Scotts manipulates this interest by misleading consumers into believing that the Kill & Contain delivers a “safe, simple, and clean”<sup>12</sup> kill, when the truth is messier . . . and far less humane.

8. Consumers have a right to know the truth. On November 30, 2009, PETA wrote to Scotts demanding that the Company immediately stop the manufacture of the Kill & Contain and pull the devices from store shelves. PETA explained that the Kill & Contain

does not kill mice instantly, and Ortho encourages consumers to throw the trap in the trash once a mouse is immobilized inside, condemning these gentle creatures to a slow, terrifying death from suffocation or dehydration, *something that would likely be found to violate prohibitions against ‘unnecessary suffering’ in many states’ anti-cruelty statutes.*<sup>13</sup>

The letter also cautioned that

the lack of information available about this product, both in commercials and on the Ortho Web site, means that consumers don’t know what they’re getting when they buy the trap. The promotional materials give no specific information about how the trap works, and as the comments on your own website indicate, many consumers are horrified to learn that mice suffocate to death in the . . . trap.<sup>14</sup>

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<sup>10</sup> Email from Mary Engle, Associate Director, Bureau of Consumer Protection, FTC, to Bonnie Robson, Counsel for PETA (Apr. 14, 2009, 13:53 EST) [hereinafter Apr. 14 Email from Mary Engle] (on file with the PETA Foundation).

<sup>11</sup> Letter from Mary Engle to Martina Bernstein, Counsel for PETA, 1 (May 4, 2010) (on file with PETA Foundation).

<sup>12</sup> *E.g.*, 2-Pack Package, *supra* note 1; Mouse & Rat Control Overview, <http://www.orthohomedefense.com/msg/templates/index.jsp?pageUrl=homedefenseMouseOverviewPagePh2> (last visited June 11, 2010).

<sup>13</sup> Letter from Tracy Reiman, Executive Vice President, PETA, to James Hagedorn, Chairman and CEO of Scotts, 1 (Nov. 30, 2009) (attached as Ex. B).

<sup>14</sup> *Id.*

9. Scotts' December 7, 2009 response failed even to acknowledge PETA's demand, or its concerns about the cruelty of the trap and the Company's deceptive advertising.<sup>15</sup> While "[n]o single product can address every concern," Scotts expressed its "belie[f] that consumers will choose the solution that is best for them and their families."<sup>16</sup>

10. Consumers cannot "choose the solution that is best" until Scotts abandons its ruse that the Kill & Contain is a humane and effective choice. In January 2010, Scotts announced that it was improving the Kill & Contain to kill mice more quickly, implicitly conceding PETA's claims.<sup>17</sup> Unfortunately, the new and "improved" Kill & Contain is much like the old Kill & Contain: it fails to kill or contain consistently. Experiments by PETA and recent reviews demonstrate that the spring mechanism remains too weak to kill many mice.<sup>18</sup> Moreover, the original version remains on shelves at major stores like Home Depot and Lowe's.<sup>19</sup>

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<sup>15</sup> See Letter from Jim King, Senior Vice President of Investor Relations and Corporate Affairs, Scotts, to Tracy Reiman (Dec. 7, 2009) (attached hereto as Ex. C).

<sup>16</sup> *Id.*

<sup>17</sup> Posting of lat5, Forum Moderator, to <http://www.scotts.com/msg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Jan. 26, 2010, 6:44 CST); Posting of ForYouBlue, Forum Moderator, to <http://www.scotts.com/msg/connect/connectLanding.jsp> (follow hyperlink to Forums; then follow hyperlink to Off Topic Discussion; then follow hyperlink to New Mouse Trap) (Jan. 22, 2010, 12:13 CST).

<sup>18</sup> For example, a customer review posted on May 24, 2010—five months after Scotts purportedly improved the Kill & Contain—complains:

Not nearly enough force to be effective. I bought the Ortho Home Defense Max Kill and Contain trap because A) I thought it would be safe to use around my pets (large dogs, small [toy-sized] dogs and cats), and B) I thought it would be a cleaner and more humane way to rid our area of mice. Unfortunately, the trap does not have nearly enough force to kill the mice... it merely traps them. The first time I tried to release the trapped (I assumed DEAD) mouse, the varmint jumped out of the trap onto my shoulder and escaped down my arm. The second time, the mouse got stuck but was most definitely alive, and I couldn't shake it out of the trap. Certainly a horribly inhumane method of pest control.

11. Prompted by Scotts' failure to end its deception and remove the Kill & Contain from store shelves, PETA sent the Company a second letter on June 21, 2010.<sup>20</sup> In addition to the wrongful acts described in the December 2009 letter, PETA detailed Scotts' misleading statements and omissions, including that the trap kills mice quickly and is safe to use around children.<sup>21</sup> The letter demanded that Scotts respond by Friday, July 2, 2010 with specific details of the timeline in which the Company would cease production of the Kill & Contain and pull the remaining traps from store shelves.<sup>22</sup> PETA informed Scotts that it was prepared to take legal action to stop the Company from profiting from its deception, at animals' expense.<sup>23</sup>
12. Scotts responded on July 2, 2010. The Company refused to correct its false and manipulative advertising, or to remove the Kill & Contain from store shelves.<sup>24</sup>

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Posting of Kerry to <http://www.buzzillions.com/review/ortho-home-defense-max-kill-contain-mouse-trap-0320110-review-15981720> (May 24, 2010); *see also, e.g.*, Leggett Aff., May 4, 2010, ¶ 1 (attached as Ex. D) (purchased Kill & Contain on or about April 7, 2010); Posting of jeffreysil to <http://www.scotts.com/msg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Apr. 25, 2010, 9:34 CDT); Posting of Mark A. Liebergall to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Mar. 24, 2010); Posting of My Alias to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Mar. 8, 2010); Posting of D. Ireland "DrDale.com" to <http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/dp/B001H1HHYS> (Mar. 5, 2010).

<sup>19</sup> Telephone Interview by Brittany Peet, Legal Fellow, PETA Foundation, with Scotts Customer Service Representative (Apr. 26, 2010) [hereinafter Apr. 26 Telephone Interview].

<sup>20</sup> Letter from Jeffrey S. Kerr, General Counsel and Vice President of Corporate Affairs, PETA Foundation, to James Hagedorn (June 21, 2010) (attached as Ex. E).

<sup>21</sup> *Id.* at 2-4.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> Letter from Jim King to Jeffrey S. Kerr (July 2, 2010) (attached as Ex. F).

13. Since Scotts will not voluntarily stop its deception, the Commission should exercise its authority to force Scotts to do so, as well as to provide consumers with much-needed corrective information about the way in which the Kill & Contain really kills.

#### APPLICABLE LEGAL STANDARD

14. Section 5 of the Act declares that “unfair or deceptive acts or practices in or affecting commerce” are unlawful.<sup>25</sup> Deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer from acting reasonably in the circumstances, to the consumer’s detriment.<sup>26</sup> The important criterion is the net impression that the representation, omission, or practice is likely to make on the general populace.<sup>27</sup>

15. The consumer’s interpretation will be presumed reasonable if it is one that the advertiser intended to convey.<sup>28</sup> An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class. A material representation that misleads a significant minority of reasonable consumers is deceptive,<sup>29</sup> even if nonmisleading interpretations are also possible.<sup>30</sup>

16. Section 5 requires that the representation or omission be material. According to the Commission’s Policy Statement on Deception, a misrepresentation is material if it is likely to affect a consumer’s choice regarding a product. In addition, an omission is material “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information

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<sup>25</sup> 15 U.S.C. § 45(a)(1).

<sup>26</sup> FTC Policy Statement on Deception § I, *appended to Cliffdale Assocs., Inc.*, 103 FTC 110, 174 (1984).

<sup>27</sup> *Id.* § III (quoting *Grolier*, 91 FTC 315, 430 (1978), *remanded on other grounds*, 615 F.2d 1215 (9th Cir. 1980), *modified on other grounds*, 98 FTC 882 (1981), *reissued*, 99 FTC 379 (1982)).

<sup>28</sup> *Id.* § III.

<sup>29</sup> *Id.* § III n. 20.

<sup>30</sup> *See, e.g., Bristol-Meyers Co.*, 102 FTC 21, 320 (1983), *aff’d*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).



to evaluate the product or service.”<sup>31</sup> A finding of materiality is thus a finding that injury is likely to exist because of the representation, omission, practice, or marketing technique. The Commission presumes that express claims are material. Certain categories of information are also presumptively material, including information pertaining to the safety, efficacy, or central characteristics of the product or service.<sup>32</sup>

## LEGAL CONCLUSIONS

### False and Misleading Representations

17. Scotts’ actions and practices violate the Act and frustrate Congress’ intent that dishonest corporations not profit at the expense of the public.
18. Through the means described herein, Scotts represents expressly or by implication that:
  - a. the Kill & Contain kills and contains mice;
  - b. the Kill & Contain kills mice humanely;
  - c. the Kill & Contain is a “drama-free way to kill,”<sup>33</sup> which does not require users to see or touch mice; and
  - d. the Kill & Contain is safe for use around children.
19. In truth:
  - a. the Kill & Contain fails to consistently kill or contain mice;
  - b. the Kill & Contain causes mice unnecessary pain and suffering;
  - c. the Kill & Contain often forces users to see and touch live mice; and
  - d. the Kill & Contain is not a safe choice for families with children.

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<sup>31</sup> FTC Policy Statement on Deception, *supra* note 26, § IV.

<sup>32</sup> *Id.*

<sup>33</sup> Usage Tips, *supra* note 9.

20. Scotts has also obscured how its trap kills in order to profit from consumers' confusion. The company knows, or should know, that an ordinary consumer cannot evaluate the Kill & Contain without knowledge that many mice die in the trap from hypothermia, suffocation, or starvation.

21. Scotts' misrepresentations and omissions relate to the Kill & Contain's efficacy and safety, and thus are presumed material.<sup>34</sup> Indeed, the Company acknowledges that safety and effectiveness are "key concerns" to its customers.<sup>35</sup> The Kill & Contain's failure to produce a clean kill is also material since, as the Commission recently recognized, "for many consumers, a company's claim that its products are humane is important to their decision whether or not to purchase products from that company."<sup>36</sup> Therefore, Scotts' misrepresentations and omissions constitute deceptive acts or practices, in violation of Section 5 of the Act.

## FACTUAL GROUNDS

### Overview of the Kill & Contain Advertising Campaign

22. Scotts employs a variety of media to market the Kill & Contain to consumers. For example, the company's website not only provides an overview of the Kill & Contain, it also advertises the trap in on-line articles like "Treatment Tips for Mice and Rats"<sup>37</sup> and in blog posts

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<sup>34</sup> FTC Policy Statement on Deception, *supra* note 26, § IV.

<sup>35</sup> Press Release, Scotts, New Home Safety Council Study Shows Americans Unaware of the Many Dangers of Mice (Sept. 2009), *available at* <http://yandlprclient.com/OrthoIPK/> [hereinafter Press Release, Home Safety Council Study].

<sup>36</sup> E-mail from Mary Engle to PETA (Oct. 16, 2008) [hereinafter Oct. 16 Email from Mary Engle] (on file with PETA Foundation).

<sup>37</sup> Treatment Tips for Killing Mice and Rats, <http://www.scotts.com/smg/learn/infoHowToArticle.jsp?detailId=13000029&subNavId=11200004&navId=300030&parentId=100006> (last visited June 11, 2010).

by “lawn care expert” Ashton Ritchie.<sup>38</sup> In addition, consumers can view promotional videos posted to the Scotts website.<sup>39</sup>

23. Beginning in September 2009, the company ran a 30-second commercial on HGTV, the Home & Garden Television network. HGTV is distributed to more than 99 million U.S. households and is one of cable’s top-rated networks.<sup>40</sup> The commercial, which is still available on Scotts’ website, claims that the Kill & Contain is “guaranteed to kill the mouse. . . . Nothing to see, nothing to touch, you just throw it away. No mess. No drama.”<sup>41</sup>

24. The Company repeats this message on its sixty-four count, cardboard displays, which tout the Kill & Contain as the “no see,” “no mess” solution to mouse problems. Scotts boasts that consumers “can’t miss the displays” at The Home Depot,<sup>42</sup> the largest home improvement retailer in the country.

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<sup>38</sup> See Posting of Ashton Ritchie to Tips and Tricks for a Greener Thumb, <http://www.scotts.com/smg/connect/blogs/blogLawn.jsp?navId=page900087&parentId=600011> (follow November 2009 hyperlink; then follow “Body Count: 10” hyperlink) (Nov. 12, 2009, 8:47 CST) [hereinafter Posting of Ashton Ritchie, Body Count 10]; *id.* (follow October 2009 hyperlink; then follow “A Mouse in the House” hyperlink) (Oct. 10, 2009, 10:14 CDT) [hereinafter Posting of Ashton Ritchie, A Mouse in the House].

<sup>39</sup> See, e.g., Ortho Home Defense MAX Kill & Contain Mouse Trap Video, <http://www.orthohomedefense.com/smg/learn/video/videoPage.jsp?detailId=13300040> (last visited June 11, 2010); Home Safety Council Interview, <http://www.orthohomedefense.com/smg/learn/video/videoPage.jsp?detailId=15200040> (last visited June 11, 2010); Rodent Prevention Video, <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=14300042> (last visited June 14, 2010).

<sup>40</sup> HGTV, <http://www.scrippsnetworksinteractive.com/our-brands/hgtv> (last visited June 11, 2010).

<sup>41</sup> Ortho TV 2009, Mouse Tale Video, <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=14200020> (last visited June 11, 2010).

<sup>42</sup> Posting of kipatScotts, Forum Moderator, to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 3) (Oct. 26, 2009, 10:25 CDT).

25. Scotts also pays companies like ARAcontent to distribute articles drafted by or on behalf of Scotts to newspaper publishers, who receive the copyright-free content at no cost. For instance, in April 2010, numerous small- and mid-sized newspapers ran the article “Spring Cleaning to Find Hidden Villains,” which advised readers:

If you find that mice have entered your home, choose an effective mouse trap like Ortho Home Defense MAX Kill and Contain Mouse Trap. This trap won’t snap fingers or paws, so it’s safe for use around children and pets, and it traps the dead mouse inside where you never have to touch it.<sup>43</sup>

This marketing strategy is particularly invidious since it cloaks Scotts’ profit-driven advertising in the mantle of respectable journalism.

**Scotts’ Claims Regarding the Humaneness of the Kill & Contain Are Objectively and Demonstrably False and/or Misleading**

26. Scotts has disseminated advertisements and promotional materials, which lead reasonable consumers to believe that the Kill & Contain does not cause mice pain or suffering. Specifically:

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<sup>43</sup> *E.g.*, WEEKLY CALLISTOGAN (Cal.), May 30, 2010, [http://www.weeklycalistogan.com/ara/kitchen\\_bed\\_bath/10025.txt](http://www.weeklycalistogan.com/ara/kitchen_bed_bath/10025.txt) (last visited June 11, 2010); APEX HERALD (N.C.), May 11, 2010, [http://www.theapexherald.com/pages/full\\_story/push?article-Spring+cleaning+to+find+hidden+villains%20&id=7161620&instance=kitchen](http://www.theapexherald.com/pages/full_story/push?article-Spring+cleaning+to+find+hidden+villains%20&id=7161620&instance=kitchen) (last visited June 11, 2010); THE PICKENS SENTINEL (S.C.), May 11, 2010, [http://www.theapexherald.com/pages/full\\_story/push?article-Spring+cleaning+to+find+hidden+villains%20&id=7161620&instance=kitchen](http://www.theapexherald.com/pages/full_story/push?article-Spring+cleaning+to+find+hidden+villains%20&id=7161620&instance=kitchen) (last visited June 11, 2010); DAILY TRIBUNE (Okla.), May 10, 2010, [http://www.dailytribune.com/ara/kitchen\\_bed\\_bath/10025.txt](http://www.dailytribune.com/ara/kitchen_bed_bath/10025.txt) (last visited June 11, 2010); BENTON COUNTY ENTERPRISE (Miss.), April 19, 2010, [http://www.bentoncountyenterprise.com/ara/kitchen\\_bed\\_bath/10025.txt](http://www.bentoncountyenterprise.com/ara/kitchen_bed_bath/10025.txt) (last visited June 11, 2010); STILLWATER GAZETTE (Minn.), Apr. 19, 2010, [http://www.stillwatergazette.com/ara/kitchen\\_bed\\_bath/10025.txt](http://www.stillwatergazette.com/ara/kitchen_bed_bath/10025.txt) (last visited June 11, 2010); PARIS BEACON NEWS (Ill.), April 19, 2010, [http://parisbeacon.com/ara/how\\_to/10025.txt](http://parisbeacon.com/ara/how_to/10025.txt) (last visited June 11, 2010); LEXINGTON CLIPPER-HERALD ON-LINE (Neb.), Apr. 19, 2010, [http://www.lexch.com/ara/health\\_and\\_wellness/10025.txt](http://www.lexch.com/ara/health_and_wellness/10025.txt) (last visited June 11, 2010); WUXP ON-LINE (Tenn.), date unknown, <http://www.mytv30web.com/sections/lifestyle/kitchen/10025> (last visited June 11, 2010).

27. “For welfare reasons, only traps with the power and of a size and design appropriate to kill the target animal should be used.”<sup>44</sup> Scotts’ statements that the Kill & Contain is “strong enough to take care of [a] mouse” and that “the floor [of the trap] will snap up with enough force to kill” misrepresent the trap as one of a “power and of a size and design appropriate to kill” a mouse, and therefore suitable for those concerned with animal welfare.

28. A common misperception is that the Kill & Contain is an old-fashioned snap trap enclosed in a plastic container.<sup>45</sup> This leads consumers to believe that the trap is humane since “[t]he best snap traps kill instantaneously, and are thus good from a welfare perspective.”<sup>46</sup>

29. Indeed, numerous advertisements claim that the Kill & Contain is the “clean way to kill mice.” A “clean kill” is one that kills quickly without leaving alive a crippled or wounded animal.<sup>47</sup> One reasonable interpretation of these advertisements is that the Kill & Contain produces a “clean kill,” rather than leaving mice to suffer prolonged deaths.

30. This interpretation is justified since promotional materials represent that the Kill & Contain kills mice *before* the trap is disposed of. Statements such as the following mislead

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<sup>44</sup> THE UNIVERSITIES FEDERATION FOR ANIMAL WELFARE (UFAW), GUIDING PRINCIPLES IN THE HUMANE CONTROL OF RATS AND MICE 7 § 6.3.2 (2009), *available at* <http://www.ufaw.org.uk/documents/GuidanceonhumanecontrolofrodentsFeb2509V19.pdf>.

<sup>45</sup> *See, e.g.*, Posting of DeniseSte to <http://www.scotts.com/msg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 4) (Sept. 22, 2009, 20:05 CDT) (“I figured this device was a traditional trap in a plastic container, but can’t tell. After reading one review, I am now confused.”); Posting of E. Freedman to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_1?ie=UTF8&showViewpoints=0](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_1?ie=UTF8&showViewpoints=0) (July 27, 2009) (“This is advertised as a ‘kill and contain’ trap – a rather conventional plastic snap lever nicely concealed inside a plastic sleeve . . .”).

<sup>46</sup> G. Mason & K.E. Littin, *The Humaneness of Rodent Pest Control*, 12 ANIMAL WELFARE 1:18 (2003).

<sup>47</sup> *See, e.g.*, JAN E. DIZARD, MORTAL STAKES: HUNTERS AND HUNTING IN CONTEMPORARY AMERICA 129-131 (2003); Shot Placement on Alaska Game, <http://www.wc.adfg.state.ak.us/> (follow Hunting & Shooting hyperlink; then follow General Information hyperlink; then follow Shot Placement hyperlink) (last visited July 13, 2010); Goose Hunting Tips, <http://www.dnr.state.mn.us/hunting/goose/tips.html> (last visited July 13, 2010).

consumers who desire a clean kill into believing that live animals do not end up like refuse in a landfill:

- a. “Ortho Home Defense MAX Kill & Contain Mouse Trap *kills and holds the mouse* in an enclosed container . . . .”<sup>48</sup>
- b. “[T]he Ortho Home Defense MAX Kill & Contain Mouse Trap catches and *kills the mouse in an enclosed container* . . . .”<sup>49</sup>
- c. “The Ortho Home Defense MAX Kill and Contain Mouse Trap . . . *traps the dead mouse inside* . . . .”<sup>50</sup>

31. Materials also represent that the Kill & Contain’s spring mechanism—rather than starvation or suffocation—kills mice directly so that they do not suffer prolonged deaths. For instance:

- a. “The *exclusive design kills and contains*, so you never have to see or touch the dead mouse again.”<sup>51</sup>
- b. “Its *new design* encloses mice in a self-contained unit, shutting the entry way behind the mouse *and killing it*.”<sup>52</sup>

32. Understanding that “there has been considerable . . . public interest in the humane treatment of animals,” Scotts has obscured how its trap kills in order to profit from consumers’

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<sup>48</sup> Traps vs. Baits: Which Are Better?; <http://www.scotts.com/smg/home/home1.jsp> (follow Learn hyperlink; then follow Learning Library hyperlink; then follow Critter Control hyperlink) (last visited July 13, 2010) (emphasis added).

<sup>49</sup> Mice: Killing, Controlling & Preventing Them, <http://www.scotts.com/smg/solve/solution/solutionArticle.jsp?detailId=13100016> (last visited May 20, 2010) (emphasis added).

<sup>50</sup> *Spring Cleaning to Find Hidden Villains*, *supra* note 43 (emphasis added).

<sup>51</sup> 2-Pack Package, *supra* note 1 (emphasis added).

<sup>52</sup> Mice Can Spread Disease, Cause Fires, [http://mpelembe.blogware.com/blog/\\_archives/2009/9/22/4329265.html](http://mpelembe.blogware.com/blog/_archives/2009/9/22/4329265.html) (last visited June 11, 2010) (emphasis added) (“Source ScottsMiracle-Gro”).

confusion.<sup>53</sup> The company tells consumers: “just push down this lever right here and it does the rest,” but the promotional materials give little information about what “the rest” is.<sup>54</sup> As the comments on Scotts’ website indicate, many users are horrified to learn that mice die of hypothermia or starve to death in the Kill & Contain.

33. *In fact*, the Kill & Contain does not produce a clean kill.

34. Contrary to Scotts’ claim that the “the floor [of the trap] will snap up with enough force to kill,” the Kill & Contain is not a snap trap, and its “patented spring board technology”<sup>55</sup> does not kill many mice. Rather, according to Barry Sanders, Executive Vice President for Scotts’ North American consumer business, the Kill & Contain “flips” the mouse, “induc[ing] hypothermia;”<sup>56</sup> or, as one user describes it, the mouse is “flattened against the back side of the

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<sup>53</sup> Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624 (September 28, 2005). For example, the Company monitors discussions on its website, immediately responding to questions such as where to purchase the Kill & Contain. *See, e.g.*, Posting of kipatScotts, Forum Moderator, *supra* note 42. However, Scotts has ignored questions in its on-line forums such as this one:

I saw the tv commercial and I thought it was very interesting that no mention was made on how the mouse is killed. So I came on the website to find out. I am totally against slow-killing methods, esp those glue trays that forces the animals to starve to death. I figured this device was a traditional trap in a plastic container, but can't tell. After reading one review, I am now confused. I normally use catch & release traps . . . . If anyone can tell me how the mice are killed, please let me know.

Posting of DeniseSte, *supra* note 45.

<sup>54</sup> Mouse Tale Video, *supra* note 41.

<sup>55</sup> Mouse Trap Video, *supra* note 39.

<sup>56</sup> Dean Eaton, *Scotts Miracle Gro Plots Way Around Recession*, COLUMBUS BUSINESS FIRST, Feb. 20, 2009, available at <http://columbus.bizjournals.com/columbus/stories/2009/02/20/story4.html>.

trap in a horrible upside down [position] near suffocation.”<sup>57</sup> Fear and panic cause the mouse’s organs to fail as his temperature falls.<sup>58</sup>

35. In many instances, rather than killing the mouse, the Kill & Contain leaves him to die slowly of starvation, suffocation, or dehydration.<sup>59</sup> In other instances, the trap does not kill the mouse outright, but mangles his body, “lead[ing] to a prolonged time to death as a result of

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<sup>57</sup> Posting of Dave Braunschweig to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_1?ie=UTF8&showViewpoints=0](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_1?ie=UTF8&showViewpoints=0) (Oct. 22, 2009).

<sup>58</sup> See K. Eddie Gabry et. al., *The Hypothalamus-Pituitary-Adrenal (HPA) Axis: A Major Mediator of the Adaptive Responses to Stress*, in 3 *NEUROIMMUNE BIOLOGY, THE IMMUNE NEUROENDOCRINE CIRCUITRY: HISTORY AND PROGRESS* 379, 399 (Istvan Berczi & Andor Szentivanyi eds., 2003) (explaining that prolonged “psychological stress” causes hypothermia in mice); Daniel F. Danzl & Evan L. Lloyd, *Treatment of Accidental Hypothermia*, in 1 *MEDICAL ASPECTS OF HARSH ENVIRONMENTS* 491, 493-502 (Kent Pandolf & Robert E. Burr eds., 2002) (describing the effects of hypothermia, including psychosis, respiratory distress, and heart failure).

<sup>59</sup> See Posting of BK to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_1?ie=UTF8&showViewpoints=0](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_1?ie=UTF8&showViewpoints=0) (Feb. 10, 2010) (“the mouse probably spent a horrible few days in your trash can before finally dying”); Posting of lisaf to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Jan. 24, 2010, 9:45 CST) [hereinafter 9:45 CST Posting of lisaf] (“[What] kills the mouse is throwing it in the garbage to die a slow death [and] suffocate as it starves and dehydrates as well.”); Posting of lovas84 to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Jan. 8, 2010) (“I’m no animal rights activist but [] mice are very hearty and can survive days without food or water . . . [K]illing them by breaking their neck is [] much more humane . . . .”); Posting of animallover to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Dec. 17, 2009, 10:17 CST) [hereinafter 10:17 CST Posting of animallover] (“Bought 2 traps because label says ‘traps and kills.’ It didn’t say the mouse starves to death in a landfill! Inhumane way to kill mice!”); Posting of J. Garratt to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Nov. 20, 2009) (“I was a little horrified to find that the little guy was still alive after being stuck in the trap all night, suffering.”).



injuries and exposure and possibly also from wounding by other animals.”<sup>60</sup> Consumer reviews indicate that the Kill & Contain frequently injures mice without killing them.

- a. “[T]he trap had broken his back two legs. He tried crawling away with all his might with just his two front legs.”<sup>61</sup>
- b. “[H]is little head was sticking out the back bait door. I got him out only to discover that the trap had broken his back.”<sup>62</sup>
- c. “[T]hank G\_d my wife didn’t see the carnage. I was shocked to see the poor mouse ¾ of the way out of the bait side of the trap. How did he break through that wall? There was blood all over my counter top! The poor thing was still alive.”<sup>63</sup>

36. Welfare experts advise that

[l]ive traps . . . be inspected often enough to avoid compromising seriously the welfare of trapped animals by, for example, hunger, thirst or exposure. Traps designed to kill need to be inspected so that any animals that may have been injured but not killed can be dispatched as soon as possible.<sup>64</sup>

Because Scotts does not inform users that the Kill & Contain may injure without killing, users do not know to inspect the traps for live animals. In fact, the Company encourages users to “just throw it away” without inspection: “Nothing to see, nothing to touch, you just throw it away. No

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<sup>60</sup> UFAW, *supra* note 44.

<sup>61</sup> Posting of Kathy to Happy, Healthy Life Blog, <http://kblog.lunchboxbunch.com/2009/09/tell-hgtv-to-drop-ortho-mice-killer.html> (Sept. 17, 2009) (quoting Posting of notafan to Scotts.com).

<sup>62</sup> Posting of WHE to [http://www.amazon.com/Scotts-0320110-Ortho-Defense-Contain/product-reviews/B002YF91AE/ref=dp\\_top\\_cm\\_cr\\_acr\\_txt?ie=UTF8&showViewpoints=1](http://www.amazon.com/Scotts-0320110-Ortho-Defense-Contain/product-reviews/B002YF91AE/ref=dp_top_cm_cr_acr_txt?ie=UTF8&showViewpoints=1) (Dec. 22, 2009).

<sup>63</sup> Posting of jeffreysil, *supra* note 18.

<sup>64</sup> UFAW, *supra* note 44, at 4 § 6.3; *see also* Mason & Littin, *supra* note 46 (“[W]elfare problems can occur if the traps cause injury rather than death, and this makes it absolutely essential to check them at least daily.”).

mess. No drama.”<sup>65</sup> Scotts’ promise that “you never have to touch or see [the mouse] when you dispose of it” is a centerpiece of its advertising campaign.<sup>66</sup>

37. *The humaneness of the Kill & Contain is material to consumers.* “Irrespective of the view on how to balance human and animal interests, there seems to be a consensus that animals should not be made to suffer unnecessarily.”<sup>67</sup> The Commission recently acknowledged that, “for many consumers, a company’s claim that its products are humane is important to their decision whether or not to purchase products from that company.”<sup>68</sup> In response to consumer demand, there are now more than a dozen humane mouse traps on the market and major pest-control companies like Victor offer humane alternatives to traditional traps.

38. Mice are mammals with no less sentience than a dog or cat. They possess the demonstrated capacity to experience pain, panic, and a wide range of other feelings and emotions.<sup>69</sup> As intelligent as dogs, they become attached to each other, love their families, and enjoy playing, wrestling, and sleeping curled up together.<sup>70</sup> Many users would never have purchased the Kill & Contain had they known that these animals suffocate, starve or—as Scotts acknowledges—panic to death in the trap.

- a. The Mouse Suffers Too Long. I have no problem killing mice. I want the suckers dead, but I don’t want them to suffer. These traps might kill them . . . eventually . . . . I investigated the trap . . . . This nasty thing springs them [mice] up into some slots which I assume are supposed to break it’s [sic] back. Well they don’t. They mangle the mouse badly so that it SUFFERS in the trap until it dies. It can’t

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<sup>65</sup> Mouse Tale Video, *supra* note 41.

<sup>66</sup> Traps vs. Baits: Which Are Better?, *supra* note 48.

<sup>67</sup> THE ENCYCLOPEDIA OF APPLIED ANIMAL BEHAVIOUR AND WELFARE 465 (Daniel S. Mills ed., 2010).

<sup>68</sup> Oct. 16 Email from Mary Engle, *supra* note 35; *see also* Apr. 14 Email from Mary Engle, *supra* note 9 (“animal treatment is an important issue for many consumers”).

<sup>69</sup> *See* MARC BEKOFF, THE EMOTIONAL LIVES OF ANIMALS: A LEADING SCIENTIST EXPLORES ANIMAL JOY, SORROW, AND EMPATHY—AND WHY THEY MATTER 10-12 (2007).

<sup>70</sup> *See* JONATHAN P. BALCOMBE, PLEASURABLE KINGDOM: ANIMALS AND THE NATURE OF FEELING GOOD 72 (2006).

be let loose because it's too badly hurt, and it isn't killed instantly. This is a horrible horrible trap. I'm throwing all of them out and I'm going to scour the internet and the local stores until I find the covered ones that snap their necks. If I can't find them then I'm going back to the old fashioned mouse traps!<sup>71</sup>

- b. We want to be humane and kill the mouse quickly with as little suffering as possible and the old fashioned snap traps do the job most of the time; however it is unsightly so we thought we would try these enclosed Ortho traps, but since we determined that they do not meet our standards of killing the mice humanely we would not purchase them again.<sup>72</sup>
- c. I wanted a quick, painless death for the mouse and that's exactly what didn't happen here. I was a little horrified to find that the little guy was still alive after being stuck in that trap all night, suffering.<sup>73</sup>
- d. The 'Kill' on the label should be elimin[at]ed, because it does not kill, nor is it humane, if I understand the trap mechanism. The mouse is trapped upside down and held close to the end of the trap, but not close enough to kill it quickly. When I checked the trap this morning, the mouse was struggling and definitely NOT killed. I set the mouse free out of pity. This was a waste of money, and plastic.<sup>74</sup>
- e. If the suffering of an animal doesn't bother you, then this trap suits your needs. If you, like me, didn't want your rodent to die a slow, torturing death, look for something else.<sup>75</sup>
- f. So far we have caught three mice with them, but none of the mice have been killed by the traps. I don't mind killing a mouse, but I would prefer it be done quickly. I'm sure the mouse would prefer it too.<sup>76</sup>

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<sup>71</sup> Posting of Beta to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Jan. 6, 2010).

<sup>72</sup> Posting of G.T. to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Nov. 29, 2009).

<sup>73</sup> Posting of J. Garratt, *supra* note 59.

<sup>74</sup> Posting of awyn to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Feb. 11, 2010, 9:02 CST).

<sup>75</sup> Posting of J. Garratt, *supra* note 59.

<sup>76</sup> Posting of A. Smith to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=3](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=3) (Oct. 26, 2009).

- g. As others have said these do not kill the mouse in spite of what the package says. I have no problem with instant death for the creatures, but a long slow agonizing death is not good.<sup>77</sup>
- h. If you're a catch and release fan, buy a real catch and release trap. If you want dead mice, buy the d-CON trap. Stay away from the Ortho Home Defense MAX, it's neither humane nor effective.<sup>78</sup>
- i. If you happen to catch a large mouse, you'll likely never get it out of the trap. If you forget to check the trap, the mouse will eventually die a very, very slow death. This is definitely not a "humane" friendly trap and I'd highly discourage anyone from purchasing it. A much more effective product is the d-CON 00027 Ultra Set Covered Mouse Trap. These traps quickly kill the trapped mouse  
.....<sup>79</sup>
- j. I'm truly disappointed that there isn't an immediate, HUMANE termination. I'm no animal rights activist but [] mice are very hearty and can survive days without food or water . . . . [K]illing them by breaking their neck[s] is [] much more humane . . . .<sup>80</sup>
- k. Bought 2 traps because label says "traps and kills." It didn't say the mouse starves to death in a landfill! Inhumane way to kill mice!<sup>81</sup>
- l. I'll stick to the old type that slams them instantly. No muss, no fuss, and by all means more humane.<sup>82</sup>
- m. False advertising. Take the word kill off the package. It kills eventually I guess after they starve to death if you wait that long.<sup>83</sup>

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<sup>77</sup> Posting of Corliss O'Bryan "compulsive reader" to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=3](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=3) (Oct. 22, 2009).

<sup>78</sup> Posting of Dave Braunschweig, *supra* note 57.

<sup>79</sup> Posting of Jeff Chambers to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_1?ie=UTF8&showViewpoints=0](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_1?ie=UTF8&showViewpoints=0) (July 6, 2009).

<sup>80</sup> Posting of lovas84, *supra* note 59.

<sup>81</sup> 10:17 CST Posting of animallover, *supra* note 59.

<sup>82</sup> Posting of animallover to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Dec. 17, 2009, 19:10 CST) [hereinafter 19:10 CST Posting of animallover].

<sup>83</sup> Posting of bradhar to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Nov. 16, 2009, 21:49 CST).

- n. I originally got these traps because I thought they would be more humane than poisoning the mice in my garage and barn. . . . I would strongly urge people to check to see if their mouse is dead before disposing. While mice may be destructive, diseased and gross, they are living creatures with an ability to feel pain. No matter how much you dislike mice have a heart in how you deal with your caught mouse. Either relocate him or end his suffering quickly.<sup>84</sup>
- o. I have a feeling that anyone who gave this product a good review simply assumed the trap had killed the mouse. In reality the mouse probably spent a horrible few days in your trash can before finally dying. . . . I think many people may have not realized that they were inhumanely killing mice with these traps.<sup>85</sup>
- p. Seems to be like a have a heart trap b[ecause] it does not kill the mouse. [What] kills the mouse is throwing it in the garbage to die a slow death a[nd] suffocate as it starves and dehydrates as well.<sup>86</sup>
- q. I recommend this only as a reusable 'have a heart style trap.' If you just throw away the live mouse in the garbage to suffer it gets a thumbs down.<sup>87</sup>
- r. This product is awful! Can you only imagine being the poor mouse trapped inside dying a slow death?? To think we are in the year 2009 and this stuff still exists? I am surprised this awful slow killer even passed approval to be sold. How barbaric!<sup>88</sup>
- s. We were already using living traps but after a year of that I gave in to my husband about killing the little boogers instantly without the mice suffering. Your product doesn't do that so I will not be wasting money on more of your products.<sup>89</sup>

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<sup>84</sup> Posting of JenWam to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Jan. 28, 2010, 22:12 CST).

<sup>85</sup> Posting of BK, *supra* note 59.

<sup>86</sup> 9:45 CST Posting of lisaf, *supra* note 59. Havahart® is a leading manufacturer of live animal traps.

<sup>87</sup> Posting of lisaf to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (Jan. 24, 2010, 9:57 CST) [hereinafter 9:57 CST Posting of lisaf].

<sup>88</sup> Posting of VicHcv to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 4) (Sept. 29, 2009, 13:57 CDT).

<sup>89</sup> Posting of triciasu to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 4) (May 10, 2009, 13:17 CDT).

- t. I saw a television ad for this product the morning after a mouse was in our basement . . . . I was going to buy this product because I thought it would be a humane method to eliminate any additional mice—until I read the reviews. I understand we’re talking about a mouse, and it’s a rodent, and I don’t want it in my house; but I also can’t be cruel to a living thing, even if it’s a mouse. If your product would kill the mouse immediately, fine; but trapping it to suffer a slow death? No, absolutely not.<sup>90</sup>

39. Scotts recognized customers’ concern with the mouse’s prolonged suffering when it purportedly “improved [its] traps to kill the mice more quickly.”<sup>91</sup> However, the new and “improved” Kill & Contain is much like the old Kill & Contain: it fails to produce a clean kill. Many consumers would bypass the Kill & Contain if they knew that it causes mice prolonged pain and suffering.

**Scotts Claims Regarding the Kill & Contain’s Effectiveness are Objectively and Demonstrably False and/or Misleading**

40. Scotts also misrepresents, and fails to disclose, material facts concerning the Kill & Contain’s effectiveness. Scotts has disseminated advertisements and promotional materials, which represent that the trap (1) kills mice (2) in a manner that does not require users to see or touch them. These materials include the following statements:

- a. **“KILLS MICE, GUARANTEED!”**<sup>92</sup> The Kill & Contain is “the safe, simple and clean way to kill mice. The exclusive design kills and contains, so you never have to see or touch the dead mouse again!”<sup>93</sup>

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<sup>90</sup> Posting of CannotBeCruel to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 4) (Sept. 22, 2009, 11:28 CDT).

<sup>91</sup> Posting of lat5, Forum Moderator, *supra* note 17.

<sup>92</sup> 2-Pack Package, *supra* note 1 (emphasis in original).

<sup>93</sup> *Id.*

- b. “[I]t’s a new kind of mousetrap from Ortho. Home Defense MAX. It’s guaranteed to kill the mouse. Just push down this lever right here and it does the rest. Nothing to see, nothing to touch, you just throw it away. No mess. No drama.”<sup>94</sup>
- c. The Kill & Contain is “strong enough to take care of my mouse. . . . [T]he floor will snap up with enough force to kill.”<sup>95</sup>
- d. “[T]he Ortho Home Defense MAX Kill & Contain Mouse Trap catches and kills the mouse in an enclosed container, so you never have to touch or see it when you dispose of it.”<sup>96</sup>
- e. “Its new design encloses mice in a self-contained unit, shutting the entry way behind the mouse and killing it. A one-touch, easy-to-set lever on the side of the trap shows users when a mouse has been caught. The entire trap then gets thrown away, so users don’t have to touch or see the mouse inside.”<sup>97</sup>
- f. “NO SEE, NO MESS DISPOSAL.”<sup>98</sup>
- g. “Ortho Home Defense MAX Kill & Contain mouse traps are enclosed, so you never have to see or touch the dead mouse.”<sup>99</sup>
- h. “Ortho Home Defense MAX Kill & Contain Mouse Traps kills and holds the mouse in an enclosed container, so you never have to touch or see it when you dispose of it.”<sup>100</sup>

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<sup>94</sup> Mouse Tale Video, *supra* note 41.

<sup>95</sup> Home Safety Council Video, *supra* note 39.

<sup>96</sup> Mice: Killing, Controlling & Preventing Them, *supra* note 49.

<sup>97</sup> Mice Can Spread Disease, Cause Fires, *supra* note 52.

<sup>98</sup> 2-Pack Package, *supra* note 1.

<sup>99</sup> Treatment Tips for Killing Mice and Rats, *supra* note 37.

<sup>100</sup> Traps vs. Baits: Which Are Better?, *supra* note 48.

i. “[T]he convenient grab tab makes disposing of the trap easier and cleaner than ever. Now you know that your mouse is gone while insuring that you never have to see or touch the mouse ever again.”<sup>101</sup>

j. “[I]t traps the dead mouse inside where you never have to touch it.”<sup>102</sup>

k. “[Y]ou do not even have to see the dispatched mouse.”<sup>103</sup>

l. “Choose from glue traps, snap traps or our new Kill & Contain Mouse Trap that kills mice the drama-free way so you don’t have to see or touch them.”<sup>104</sup>

41. *In fact*, the Kill & Contain infrequently kills and does not provide many of the benefits claimed by Scotts. Among other things:

42. The trap’s spring mechanism is too weak to kill reliably,<sup>105</sup> *a fact that Scotts acknowledges*.<sup>106</sup> In many instances, rather than killing the mouse, the Kill & Contain leaves him to die slowly of starvation, suffocation, or hypothermia.<sup>107</sup> More fortunate mice gnaw

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<sup>101</sup> Mouse Trap Video, *supra* note 39.

<sup>102</sup> *Spring Cleaning to Find Hidden Villains*, *supra* note 43.

<sup>103</sup> Posting of Ashton Ritchie, *A Mouse in the House*, *supra* note 38.

<sup>104</sup> Usage Tips, *supra* note 9.

<sup>105</sup> See Posting of becky4 to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 3) (Oct. 25, 2009, 7:46 CDT) (“The label says ‘kill’ and contain. It only contains, it does NOT kill the mouse.”); Posting of C. Bleifield to <http://www.scotts.com/smg/connect/connectLanding.jsp> (follow hyperlink to Forums; then follow hyperlink to Off Topic Discussion; then follow hyperlink to New Mouse Trap) (Jan. 20, 2010, 8:54 CST) (“I am TOTALLY disappointed with this mouse trap! It’s supposed to catch the mice . . . NO DRAMA? How about the mouse crawled in, ate all the peanut butter and waltzed out. NO TRAPPING here!”); Posting of michaeldre to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Nov. 24, 2009, 12:06 CST) (“READ THE REVIEWS!!! IT DOES NOT KILL THEM!!!! It just contains them, so you now have a trapped live mouse to deal with. . . . VERY MISLEADING!!!!”).

<sup>106</sup> Eaton, *supra* note 56; Apr. 26 Telephone Interview, *supra* note 19; Telephone Interview by Brittany Peet, Legal Fellow, PETA Foundation, with Scotts Customer Service Representative (Apr. 16, 2010) [hereinafter Apr. 16 Telephone Interview].

<sup>107</sup> See *supra* note 59.



through the trap or force open the bait door to escape, although they too may become injured in the trap or during escape, and die from their wounds.<sup>108</sup>

43. A centerpiece of the Kill & Contain campaign is the promise of “no mess” “no drama.”<sup>109</sup>

However, as consumer reviews indicate, the trap is hardly a “drama free way to kill.”<sup>110</sup> For example:

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<sup>108</sup> See Posting of TomJeri to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 3) (Oct. 17, 2009, 8:54 CDT) (“[T]hat darn varmit [sic] was wiggling around in the trap trying to get out and I believe if left long enough it would have[.] [T]he spring loaded platform is not strong enough to me, so if the mouse is caught while you are sleeping or away it might . . . squiggle its way out.”); Posting of MikeHei777 to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Nov. 4, 2009, 22:08 CST) (“One thing I learned VERY FAST was to re-enforce the bait trap door with duct tape. I picked up the trap . . . which I could not tell if it had a mouse in it because the lever registered ‘NOT SET.’ Well I picked it up and it started vibrating . . . . [A]s I was dumping the trap, the little door popped open and I had [a] little nose sticking out.”); Posting of TediHah to

<http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Dec. 8, 2009, 9:49 CST) (describing how mice escaped by gnawing through two traps she purchased); Posting of Mark A. Liebergall, *supra* note 18 (“This trap is worth than useless. It does not kill the mouse when the lever is tripped. The mouse either suffers or it can chew it’s [sic] way [out] of the trap at the top . . . .”); Posting of Christopher J. Nelson to [http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm\\_cr\\_pr\\_link\\_2?ie=UTF8&showViewpoints=0&pageNumber=2](http://www.amazon.com/Scotts-0320110-2PK-Mouse-Trap/product-reviews/B001H1HHYS/ref=cm_cr_pr_link_2?ie=UTF8&showViewpoints=0&pageNumber=2) (Dec. 6, 2009) (“It caught one within just a few hours of setting one out. Unfortunately, this was while we were asleep. By the time that I got up in the morning the mouse had chewed his way right out of the back of it.”); Posting of My Alias, *supra* note 18.

<sup>109</sup> E.g., Mouse Tale Video, *supra* note 41; see also Press Release, Home Safety Council Study, *supra* note 35 (“Ortho has built a better mouse trap that takes the drama out of ridding your home from mice.”).

<sup>110</sup> Usage Tips, *supra* note 9; see also, e.g., Posting of from my viewpoint to <http://www.buzzillions.com/reviews/ortho-home-defense-max-kill-contain-mouse-trap-0320110-reviews> (Dec. 22, 2009) (“You can sometimes hear the mouse trying to get out. The whole thing is kind of creepy.”); Posting of D. Ireland “DrDale.com,” *supra* note 18 (“[T]he trap doesn’t kill mice so you have two choices. One: you can kill them yourself by any imaginative technique or Two: you can release the little buggers which involves pushing the lever back down while a crazed and really p---d off mouse comes tearing out of the trap and going for you.”); Posting of My Alias, *supra* note 18 (“I thought the little fella was dead, but when I got close he darted out and back into my stove top. Can hear him rattling around in the kitchen as I type this.”).

- a. I did . . . find, like many others, that my caught mouse was not killed. In attempting to be green I tried to “remove” the dead mouse by shaking him into the rubbish, but when I peeked in to see why he was not leaving I saw the little fellow clinging to the inside of the trap. I now have a mouse in a bucket.
- b. When the indicator on a trap that I used last fall was positioned between “not set” and “mouse caught” I found that, with a mouse inside, there was resistance when pushing the lever to “set.” That time the mouse was dead. This morning the indicator on a trap was in that same position. When I slowly pressed the lever a very much alive mouse ran out. This happened less than 5 minutes after I had awake[ne]d this morning. That is not the way to start a day.<sup>111</sup>
- c. I concur that the mouse is still alive for a while. . . . I am a girl. I cannot deal with blood and guts. The first time I caught one of the mice it happened so quickly that I thought I just hadn’t set it. There was no movement[;] [i]t didn’t seem to weigh or feel any different. So while I [was] repositioning the lever, and looking inside, mind you . . . out popped the mouse. Barely missing my face, off he ran behind the washer/dryer.<sup>112</sup>
- d. The first time I tried to release the trapped (I assumed DEAD) mouse, the varmint jumped out of the trap onto my shoulder and escaped down my arm.<sup>113</sup>
- e. I trapped 15 mice with this trap, but it didn’t kill them. . . . [T]he first mouse turned out to be catch and release, as I tried to empty out what I thought was a dead mouse, and it came jumping out of the garbage can and ran off as I stood screaming.<sup>114</sup>

Users with whom PETA spoke confirmed that the Kill & Contain is ineffective as either a “kill” trap or a catch-and-release trap.<sup>115</sup>

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<sup>111</sup> Posting of Elliott37 to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 2) (Jan. 6, 2010, 16:15 CST).

<sup>112</sup> Posting of LauraDri to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&> (follow hyperlink to page 3) (Oct. 20, 2009, 21:11 CDT).

<sup>113</sup> Posting of Kerry, *supra* note 18.

<sup>114</sup> Posting of Nutmeg00 to <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=14200020&tabs=reviews&navId=16900002&subNavId=16900008&parentId=100006> (Feb. 1, 2010, 13:12 CST).

<sup>115</sup> *See, e.g.,* Leggett Aff., *supra* note 18, ¶ 3 (“The red indicator on the side of the trap indicated ‘Mouse Caught.’ I could see the foot of a mouse through the side of the trap. I looked inside and saw that the mouse was still moving and had not been killed.”).

44. Acknowledging these defects, Scotts purportedly improved the Kill & Contain in January 2010 by strengthening the spring mechanism to kill mice more quickly.<sup>116</sup> However, the new and “improved” Kill & Contain is much like the old Kill & Contain: it fails to kill or contain consistently.<sup>117</sup>

45. ***Scotts’ misrepresentations are material.*** The Company acknowledges that the desire not “to touch or even see the dead mouse” is one of consumers’ “key concerns” in selecting a trap.<sup>118</sup> To kill and contain is the *raison d’être* of the Kill & Contain, and clearly its failure to perform these basic functions affects a consumer’s choice of mouse trap.

**Scotts Claims Regarding the Kill & Contain’s Safety for Use around Children are Objectively and Demonstrably False and/or Misleading**

46. Finally, Scotts misrepresents that the Kill & Contain is suitable for use around children, and fails to disclose material facts concerning the trap’s safety. For example:

- a. “Protecting your home and family from mice just got easier! Ortho Home Defense Max Kill & Contain Mouse Trap is the safe, simple and clean way to kill mice.”<sup>119</sup>
- b. “The safe, simple, and clean way to eliminate mice.”<sup>120</sup>
- c. “[T]ry our most innovative product—a safe, simple and clean trap with no touch, no see, no mess disposal.”<sup>121</sup>

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<sup>116</sup> Posting of lat5, Forum Moderator, *supra* note 17; Posting of ForYouBlue, Forum Moderator, *supra* note 17.

<sup>117</sup> *E.g.*, Leggett Aff., *supra* note 18 (purchased Kill & Contain on or about April 7, 2010); Posting of Kerry, *supra* note 18 (posted on May 24, 2010); Posting of jeffreysil, *supra* note 18 (posted on April 25, 2010); Posting of Mark A. Liebergall, *supra* note 18 (posted on March 24, 2010); Posting of My Alias, *supra* note 18 (posted on March 8, 2010); Posting of D. Ireland “DrDale.com,” *supra* note 18 (posted on March 5, 2010).

<sup>118</sup> Press Release, Home Safety Council Study, *supra* note 35.

<sup>119</sup> 2-Pack Package, *supra* note 1.

<sup>120</sup> Mouse Trap Video, *supra* note 39.

<sup>121</sup> Mouse & Rat Control Overview, *supra* note 12.

- d. “This trap won’t snap fingers or paws, so it’s safe for use around children and pets, and it traps the dead mouse inside where you never have to touch it.”<sup>122</sup>
- e. “The trap contains no poisons and is baited with food, and is safe to use around children and pets because it won’t snap fingers or paws.”<sup>123</sup>
- f. “Our enclosed trap and patented spring board technology is safe to use around kids and pets.”<sup>124</sup>
- g. [E]specially if you have kids or pets at home you don’t want to have any exposed poisons out there—this trap is baited with a little bit of peanut butter, a little piece of cheese. You close the door and set the trap like this, pushing the lever down; the mouse will enter this small space and the floor will snap up with enough force to kill the mouse, but as you notice it won’t hurt my finger if I get my finger, or if a child puts a finger by mistake.<sup>125</sup>

47. In September 2009, Scotts announced the creation of the Ortho “Safer Schools” Program, with the goal of donating a case of sixteen traps to any elementary school that requests one. In connection with the program’s launch, Scotts issued a press release, which was published on dozens of websites,<sup>126</sup> touting the Kill & Contain as “particularly well-suited for use around young children.”<sup>127</sup>

48. *In fact*, the Kill & Contain is inappropriate for use around children. Specifically:

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<sup>122</sup> *Spring Cleaning to Find Hidden Villains*, *supra* note 43.

<sup>123</sup> Press Release, Home Safety Council Study, *supra* note 35.

<sup>124</sup> Mouse Trap Video, *supra* note 39.

<sup>125</sup> Home Safety Council Video, *supra* note 39.

<sup>126</sup> *E.g.*, *Ortho Home Defense MAX Makes California Mice Absent from School*, WASHINGTON EXAMINER.COM, Nov. 17, 2009, [http://www.examiner.com/p-437132~Ortho\\_Home\\_Defense\\_MAX\\_Makes\\_California\\_Mice\\_Absent\\_From\\_School.html](http://www.examiner.com/p-437132~Ortho_Home_Defense_MAX_Makes_California_Mice_Absent_From_School.html) (last visited June 14, 2010); *Ortho Home Defense MAX Makes Mice Absent from School this Fall*, REUTERS.COM, Sept. 2, 2009, <http://www.reuters.com/article/idUS206715+02-Sep-2009+PRN20090902> (last visited June 14, 2010); *Scotts Donates Free Kill & Contain Traps to Schools Nationwide*, TRADING MARKETS.COM, Sept. 2, 2009, <http://www.tradingmarkets.com/print/print/print/.site/news/Stock%20News/2509337/> (last visited June 14, 2010).

<sup>127</sup> Press Release, Schools Program, *supra* note 2.

49. The Kill & Contain presents a danger to children by restraining mice without killing them. Because consumers are led to believe that the Kill & Contain kills and contains, parents feel comfortable leaving the trap in areas that are accessible to young children. Understandably, however, mice often become aggressive as their anxiety increases and a frightened mouse may bite or scratch a child who pokes his finger into the trap or treats the mouse like a toy.

50. Additionally, children are familiar with domestic mice as companion animals in the classroom or in friends' homes. Cartoons such as Mickey Mouse, Cinderella, and Ratatouille introduce mice to children as furry friends. Studies demonstrate that

[c]hildren are encouraged to love and identify with animals through just about every outpost of children's culture—including toys, games, stories, and movies, and even through the presence of actual animals in the form of companion animals. The saturation of children's culture with animals is well documented.<sup>128</sup>



*Pet mouse.*

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<sup>128</sup> Nancy R. Pallotta, 16 *Origin of Adult Animal Rights Lifestyle in Childhood Responsiveness to Animal Suffering*, SOCIETY AND ANIMALS 149, 161-62 (2008). “Over the last hundred years, with few exceptions, the best-selling, best-loved children’s books feature animal characters, from *Black Beauty* (1877) to *The Tale of Peter Rabbit* (1902), to *Winnie the Pooh* (1926), to *Stuart Little* (1945), to *Charlotte’s Web* (1952), to *Old Yeller* (1956).” GAIL F. MELSON, WHY THE WILD THINGS ARE: ANIMALS IN THE LIVES OF CHILDREN 141-42 (2001). Seven of the top ten all-time bestselling children’s books in the United States are about animals. *Id.* at 140.

Many children have not yet learned to place moral boundaries between themselves and other animals, and thus are more likely to relate to, and empathize with, animals than are adults.<sup>129</sup>

Given this connection, scenes such as the following would traumatize most children:

- a. I caught the mouse! However, thank G\_d my wife didn't see the carnage. I was shocked to see the poor mouse  $\frac{3}{4}$  of the way out of the bait side of the trap. How did he break through that wall? There was blood all over my counter top! The poor thing was still alive. I thought you didn't see anything. Any child would be traumatized.<sup>130</sup>
- b. I set it [the Kill & Contain] out and finally caught my mouse today . . . . [H]e was very cute. However, I discovered I caught him because his little head was sticking out the back bait door. I got him out only to discover that the trap had broken his back. Now he's not dead, which would have at least been humane, he is just suffering.<sup>131</sup>
- c. After waiting an hour and going back out to check the [Ortho] traps, I noticed that one was tripped. Upon kneeling down to pick up the trap, I saw a tail moving around on the inside and could hear little mouse cries for help. Not sure of what to do at this point we decided that maybe he is just stuck so we would let him go. As we lowered the trap lever, the back end of his little body was sticking out of the opening. So we pulled him out slowly by the tail and placed him on the ground only to see that the trap had broken his back two legs. He tried crawling away with all his might with just his two front legs. The poor thing probably has some sort of internal injury as well.<sup>132</sup>

51. *The Kill & Contain's safety—or lack thereof—is a material fact.* Scotts acknowledges that the Kill & Contain's suitability for children is likely to affect a consumer's decision whether or not to purchase the trap. By its own admission, "Ortho surveyed consumers to determine their *key concerns* when it comes to ridding their homes of mice" and found that consumers want a mouse trap that is "safe for children and pets."<sup>133</sup> The Company's research is consistent with a

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<sup>129</sup> *Id.* at 162.

<sup>130</sup> Posting of jeffreysil, *supra* note 18.

<sup>131</sup> Posting of WHE, *supra* note 62.

<sup>132</sup> Posting of Kathy, *supra* note 61.

<sup>133</sup> Press Release, Home Safety Council Study, *supra* note 35 (emphasis added).

recent study finding that safety is paramount to parents in choosing a trap.<sup>134</sup> If parents knew that the product exposed their children to the risk of injury and trauma, they would run, not walk, away from the Kill & Contain.

### REQUESTED RELIEF

52. Consumers would shun the Kill & Contain if they knew the truth: that it is a cruel, unsafe, and defective product that utterly fails to live up to its name. Scotts should immediately stop the manufacture of the Kill & Contain and pull the devices from store shelves

53. This Complaint is not a plea to penalize producers of “kill” mousetraps, or to ban their production. PETA readily acknowledges that this is not the appropriate forum for seeking such relief. What this Complaint does request, however, is that Scotts be held accountable for selling a defective product that causes unnecessary suffering and is inappropriate for families, *contrary to the company’s claims*. Consumers have a right to know that the Kill & Contain is inhumane, ineffective, and traumatizing to children.

54. As the above documented statements and omissions demonstrate, Scotts’ claims are false and misleading in violation of the Act, causing injury to a large number of consumers who would most likely not have purchased the Kill & Contain had they known the truth.

55. Accordingly, the undersigned petitioners respectfully request that the Commission (1) require Scotts to remove the misleading statements concerning the Kill & Contain’s efficacy, safety, and humaneness from its advertising, website, and all other media; (2) enjoin Scotts from making such misleading statements in the future; (3) require Scotts to disseminate corrective statements in all media in which the deceptive statements were previously

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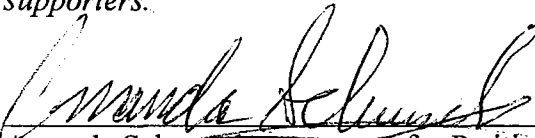
<sup>134</sup> MINTEL INT’L GROUP LTD., PEST CONTROL PRODUCTS AND SERVICES—US, Appendix: Useful Tables from 2007 Research, Figure 78 (2010).

disseminated; (4) require Scotts to disclose how the trap kills in its advertising and labeling; and  
(5) impose all other penalties as are just and proper.

DATED July 15, 2010.

**People for the Ethical Treatment of Animals (PETA)**  
*Representing more than 2 million PETA members and  
supporters.*

By:

  
Amanda Schwoerke, Attorney for Petitioner



# **Exhibit A**



Protecting your home and family from mice just got easier! Ortho® Home Defense Max® Kill & Contain™ Mouse Trap is the safe, simple and clean way to kill mice. The exclusive design kills and contains, so you never have to see or touch a dead mouse again!



**TREATMENT TIPS**

- For best results, place 2 Kill & Contain™ Mouse Traps 5-10 feet apart near mouse activity.
- Target areas with high mice activity such as: near refrigerators, stoves, pantries, between washers and dryers or along baseboards.
- Limit all competitive food sources in your home. Store food in sealed containers, including dog and bird food.

**MOUSE PREVENTION TIPS**

- Mice venture into your home to find food and heat. Stop invasions before they happen by following these handy tips:
- Cover all openings into your home. Ensure stove and dryer vents are tightly sealed.
  - Store food in sealed containers, including dog and bird food.
  - Keep garbage can lids tightly closed.

**Questions or Comments? / Preguntas o Comentarios?**

Call 1-800-225-2883  [www.ortho.com](http://www.ortho.com)

**KEEP OUT OF REACH OF KIDS & PETS.** This trap is intended for single use only. Immediately dispose of entire trap.

**WARRANTY:**

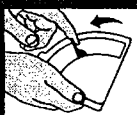
To the extent consistent with applicable law, buyer assumes all responsibility for safety and use not in accordance with directions. \*Satisfaction guaranteed or your money back. If for any reason you are not satisfied with this product, mail us proof of purchase to obtain full refund of your purchase.

**DIRECTIONS FOR USE / MODO DE EMPLEO**



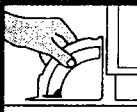
**READY:**

Open bait door located on back of trap. Bait trap by placing food (such as peanut butter) in the bait well. Close bait door.



**SET:**

Set trap by pressing the set arm located on side of trap. The easy-view indicator will point to "Set" and you will hear a "click" when trap is set.



**KILL:**

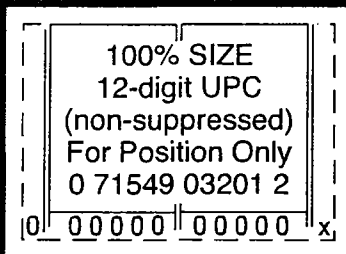
Place trap where you see or suspect mice activity.



**DISPOSE:**

Check trap frequently. When easy-view indicator is pointing to "Mouse Caught," use convenient grab tab to dispose of entire trap.

If trap is accidentally triggered, the easy-view indicator will point to "Not Set." Re-set the trap and place where you see mouse activity.



# **Exhibit B**

November 30, 2009

James Hagedorn  
Chairman and CEO  
Scotts Miracle-Gro Company  
14111 Scottslawn Rd.  
Marysville, OH 43041

**1 page via fax: 937-644-7614**

Dear Mr. Hagedorn:

I'm writing on behalf of People for the Ethical Treatment of Animals (PETA) and our 2 million members and supporters worldwide. We've received complaints from your consumers about the Ortho Home Defense Max Kill and Contain Mousetrap. This trap does not kill mice instantly, and Ortho encourages consumers to throw the trap in the trash once a mouse is immobilized inside, condemning these gentle creatures to a slow, terrifying death from suffocation or dehydration, *something that would likely be found to violate prohibitions against "unnecessary suffering" in many states' anti-cruelty statutes.* Please immediately stop the manufacture of the Kill and Contain Mousetrap and pull these devices from store shelves.

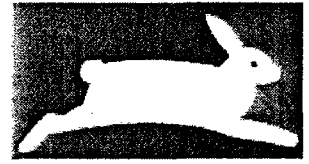
Death by suffocation is not a humane way to die, and we believe that, among other statutes, this trap could be found by a court to violate the Ohio criminal anti-cruelty statute<sup>1</sup>, which prohibits the impounding or confining of an animal—including rodents—without supplying the animal with a sufficient quantity of wholesome food and water. Ohio case law has held that passive cruelty to animals or neglect—such as the kind encouraged by selling or using the Kill and Contain Mousetrap—constitutes cruelty to animals just as an actual act of cruelty.

In addition to being cruel, the lack of information available about this product, both in commercials and on the Ortho Web site, means that consumers don't know what they're getting when they buy the trap. The promotional materials give no specific information about how the trap works, and as the comments on your own website indicate, many consumers are horrified to learn that mice suffocate to death in the Kill and Contain trap.

Mice and rats possess the demonstrated capacity to experience pain, panic, and a wide range of other feelings and emotions. As intelligent as dogs, they become attached to each other, love their families, and enjoy playing, wrestling, and sleeping curled up together. Contrary to myth, mice and rats are fastidiously clean animals who groom themselves several times a day and are less likely than dogs or cats to catch and transmit parasites and viruses. It is relatively easy to prevent

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<sup>1</sup>Ohio Revised Code §959.13.



**PETA**

PEOPLE FOR THE ETHICAL  
TREATMENT OF ANIMALS

501 FRONT ST.  
NORFOLK, VA 23510  
Tel. 757-622-PETA  
Fax 757-622-0457

PETA.org  
info@peta.org

AN INTERNATIONAL  
ORGANIZATION DEDICATED  
TO PROTECTING  
THE RIGHTS OF ALL ANIMALS

mice from entering homes, and there are a variety of live traps available that allow consumers to safely remove mice from the indoors and place them outside.

Please let us know right away that you will be discontinuing the Kill and Contain trap so that we may allay the concerns of our members and the horrified consumers who have contacted us about this product.

Sincerely,

A handwritten signature in black ink that reads "Tracy Reiman". The signature is written in a cursive, flowing style.

Tracy Reiman  
Executive Vice President

# **Exhibit C**

THE **Scotts Miracle-Gro**  
COMPANY

*Jim King*  
Senior Vice President,  
Investor Relations & Corporate Affairs

14111 Scottslawn Road  
Marysville, OH 43041  
p 937 644-5011

December 7, 2009

Tracy Reiman  
Executive Vice President  
People for the Ethical Treatment of Animals  
501 Front Street  
Norfolk, VA 23510

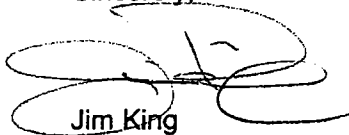
Dear Ms. Reiman,

Thank you for your recent correspondence regarding our Ortho Home Defense Kill and Contain Mousetrap. We pride ourselves on listening to all our stakeholders and we respect the opinion that you and some PETA members have shared with us. We also respect the opinion of our consumers, who are seeking safe and effective products to help them deal with unwanted mice in their homes.

We agree that there are a variety of ways to prevent mice from entering a home. Unfortunately, this still occurs and the majority of homeowners want their homes to be free of mice. Unlike some products on the market, the Kill and Contain Mousetrap does not use toxins and is therefore preferred by some consumers, especially those with children and pets. Further, containing the mouse within the trap helps to protect against children and pets becoming injured or ill by interacting with it.

Ortho is continuing to research new and better ways to meet our consumer needs. To that end, we will continue to look for ways to further improve all of our products to make them more effective. Still, we understand and respect that no single product can address every concern. We believe that consumers will choose the solution that is best for them and their families.

Sincerely,



Jim King  
Senior Vice President  
Corporate Affairs

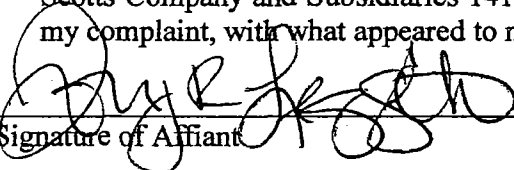


# **Exhibit D**

**AFFIDAVIT**

I, Tory Leggett, declare under penalty of perjury of the laws of the State of Wisconsin that the following is true and correct:

1. On or about April 7, 2010, my husband, Jeff Wood purchased a twin pack of Ortho Home Defense Max Kill & Contain Mouse Traps from Lowe's Home Center, Inc. at 2015 East Geneva Street in Delevan, Wisconsin. The traps were to be used to kill the mice in my kitchen.
2. That evening, I put peanut butter in the bait door of the trap, set the trap, and placed one of the Ortho Home Defense Max Kill & Contain Mouse Traps under my kitchen sink.
3. Approximately ten to fifteen (10-15) minutes later, I was sitting in my living room, which is next to the kitchen, when I heard a loud snap from the trap under the kitchen sink. I immediately went into the kitchen and checked the trap. The red indicator on the side of the trap indicated "Mouse Caught." I could see the foot of a mouse through the side of the trap. I looked inside and saw that the mouse was still moving and had not been killed.
4. I carried a flashlight and the trap containing the live mouse to a field next to my house, and, shining the flashlight on the trap's opening, released the springing platform, freeing the mouse. The mouse was approximately two and one half (2 1/2) inches long. The mouse hopped slightly as he scurried away, possibly indicating that one of the animal's legs had been injured, but other than that the animal appeared uninjured.
5. On or about April 8, 2010, I wrote to Scotts Company via its website regarding my disturbing experience with the Ortho Home Defense Max Kill & Contain Mouse Trap. My complaint was given the Issue Reference Number: 8620820.
6. On or about April 10, 2010, Karen Rausch, Consumer Response Representative from The Scotts Company and Subsidiaries 14111 Scottslawn Road Marysville, OH 43041, replied to my complaint, with what appeared to me to be a form response.

  
\_\_\_\_\_  
Signature of Affiant

State of Wisconsin                      County of Walworth

This instrument was signed before me in 4<sup>th</sup> on May 2010 by  
Tory Leggett.

  
\_\_\_\_\_  
Notary Public

My commission expires: April 8, 2012



# **Exhibit E**

**Jeffrey S. Kerr**  
General Counsel and  
Vice President of Corporate Affairs  
(202) 540-2171  
JeffK@petaf.org

June 21, 2010

James Hagedorn  
Chairman and CEO  
Scotts Miracle-Gro Company  
14111 Scottslawn Rd.  
Marysville, OH 43041

**VIA FACSIMILE: 937-644-7614;  
AND FIRST CLASS MAIL**

**Re: Deceptive advertising of Kill & Contain Mouse Trap**

Dear Mr. Hagedorn,

I am general counsel to PETA and I am writing to follow up on your company's December 7, 2009 response to PETA Executive Vice-President Tracy Reiman's letter regarding the Ortho Home Defense MAX Kill & Contain Mouse Trap, and to request that you immediately cease disseminating false and misleading statements regarding this product, issue a statement that will correct consumer misapprehensions that have resulted from Scotts' false and misleading statements regarding this device, cease the trap's production, and issue a recall for all Kill & Contain Mouse Traps remaining on store shelves.

In addition to our belief that the use of the Kill & Contain mouse trap violates cruelty to animals statutes in states that do not specifically exempt rodent trapping, we believe that your advertisements of the trap, consisting of packing, commercials, and public statements violate both federal and state consumer protection laws. Given these circumstances, PETA was shocked to learn that your "Safer Schools" program would place 16,000 of these traps in elementary schools across the country – potentially exposing children to the "carnage" one reviewer described, or to the struggles of mice who have been trapped and possibly injured, but are unable to escape from this device. Your efforts to remove this product from store shelves and halt the misleading advertising are all the more urgent given this potential risk to children. PETA is prepared to pursue this matter should Scotts continue to distribute this inherently ineffective and inhumane device, which you have unfairly and deceptively marketed to consumers with children, with companion animals, and to those concerned with the humane treatment of animals.

**PETA**  
FOUNDATION

PEOPLE FOR THE ETHICAL  
TREATMENT OF ANIMALS  
FOUNDATION

1515 K STREET, N.W.  
WASHINGTON, DC 20005  
TEL: 202 462 4600  
FAX: 202 462 4609  
E-MAIL: info@peta.org

FOR MORE INFORMATION  
VISIT: [www.peta.org](http://www.peta.org)  
OR CALL: 1-800-426-4600

## Federal Trade Commission (FTC) Act: Unfair Methods of Competition Unlawful<sup>1</sup>

Section 5 of the FTC Act declares that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” are unlawful. Deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer from acting reasonably under the circumstances, to the consumer’s detriment. A misrepresentation is material if it is likely to affect a consumer’s choice regarding a product. Scotts’ representations are intended to create, and have created, a reasonable and justifiable belief in consumers that the Kill & Contain is a quick, effective, and humane way of eliminating mice from their homes—one that is family-friendly and appropriate for small children.

As set out below, Scotts’ representations are demonstrably false and misleading:

- **Misrepresentations**
  - “[I]t’s a new kind of mousetrap from Ortho. Home Defense MAX. It’s guaranteed to kill the mouse. Just push down this lever right here and it does the rest. Nothing to see, nothing to touch, you just throw it away. No mess. No drama.”<sup>2</sup>
  - “The floor will snap up with enough force to kill.”<sup>3</sup>
  - “[O]ur new Kill & Contain Mouse Trap that kills mice the drama-free way so you don’t have to see or touch them.”<sup>4</sup>
  - “Our enclosed trap and patented springboard technology is safe to use around kids and pets.”<sup>5</sup>
- **Facts**
  - Although Scotts markets the Kill & Contain trap as safe to use around children and companion animals, because the trap does not kill instantly, it forces deceived consumers to interact with the mouse when they, in order to comply with the law and basic standards of decency, release the mouse who has been trapped and not killed in this ineffective device, or have the mouse euthanized, or when the mouse escapes through the bait door--a flaw in the trap about which consumers continue to complain despite Scotts’ redesign.
  - Because parents are led to believe that the device “kills and contains,” they feel comfortable leaving the trap in areas that are accessible to young children. Understandably, mice often become aggressive as their anxiety increases, and a frightened or injured mouse may bite or scratch a child who pokes his finger into the trap or treats the trap like a toy.

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<sup>1</sup> 15 USC § 45.

<sup>2</sup> *Mouse Tale* (Scotts 2009), available at <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=14200020> (commercial from the company’s 2009 television campaign for Ortho products).

<sup>3</sup> *Home Safety Council Interview* (undated), available at <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=15200040&subNavId=16900008&navId=16900002&parentId=100006> (promotional video for Kill & Contain Mouse Trap).

<sup>4</sup> ORTHO Home Defense Max, Home Defense Mouse & Rat Control Product Usage, <http://www.ortho.homedefense.com/smg/brand/homedefense/mouse-rat-control/usage> (last visited June 21, 2010).

<sup>5</sup> ORTHO Home Defense Max Kill & Contain Mouse Trap Video, Video, <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&subNavId=11200004&navId=300030&parentId=100006> (last visited June 21, 2010).

- More than three months after your marketing team announced that an “improved” design of trap was available in stores, *infra*, one consumer reviewer was horrified to find “blood all over my counter top” and a mouse “3/4 of the way out of the bait side of the trap” after being caught with this device.
  - The FTC recently recognized that “consumer interest in humane animal treatment appears to be increasing.”<sup>6</sup> Scotts manipulates this interest by misleading consumers into believing that the Kill & Contain device delivers a “safe, simple, and clean” kill, when the truth is messier ... and far less humane.
  - *If* the trap kills, it often does so slowly, causing extreme suffering, and, as a result, does not provide many of the benefits claimed by Scotts.
  - In an interview published in “Columbus Business First” on February 20, 2009, Barry Sanders, executive vice president for Scotts’ North American consumer business, directly contradicted the above claims when he described the Kill & Contain trap as an enclosed trap that flips the mouse and induces hypothermia. Death by stress-induced hypothermia occurs after fear and panic cause a mouse’s body temperature to fall to a terminal level.
  - On April 10 and 20, 2010, when asked how the Kill & Contain trap kills mice, two separate Scotts telephone customer service representatives explained that while smaller mice may be killed by the trap’s spring mechanism, larger mice often die from suffocation or hypothermia. Far from the drama-free death Scotts’ marketing touts, this death is likely to be slow for mice and messy for users.
  - As described in several consumer reviews of this product on Scotts’ website and Amazon.com, the unwitting consumer is likely to feel and even see a live mouse still struggling to break free from this device. Where a mouse dies from stress-induced hypothermia after being caught in the Kill & Contain mouse trap, it is, by design, slow and quite dramatic.
  - Clearly, not only is Scotts’ unable to provide a “reasonable basis” for its claims, its advertising is false and contradicts statements from its own officers and employees.
- **Misrepresentations**
    - Posted on the Scotts website consumer reviews section on October 13, 2009: **“Thank you for your feedback on the Ortho Home Defense Max Kill and Contain Mouse Trap. We understand and appreciate your concerns with this product.”**<sup>7</sup>
    - Posted on the Scotts website consumer reviews and discussion board sections on January 22 and 26, 2010: **“Because of your feedback on how the trap performed in your homes, we have improved our traps to kill the mice more quickly. These improved traps are now available in stores.”**<sup>8</sup>

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<sup>6</sup> Letter from M. Engle, FTC Div. of Advertising Procedures, Bureau of Consumer Protection, to M. Bernstein, PETA Litigation Counsel (May 4, 2010) at 1.

<sup>7</sup> ORTHO Home Defense Max Kill & Contain Mouse Trap Video, Reviews, <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&navId=300030&subNavId=11200004&parentId=100006> (last visited June 21, 2010).

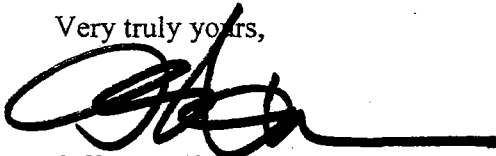
<sup>8</sup> Scotts, Gardening and Law Care Forums, <http://www.scotts.com/smg/connect/forums/forums.jsp?navId=300015&parentId=600011&plckForumPage=ForumDiscussion&plckDiscussionId=Cat%3a74824fd3-50a6-4d0e-8d7f-6b6180008ad7Forum%3a219da16e-162a-478e-826e-a0aac0c62968Discussion%3a472386d9-cc39-44be-aa81-5d728f763a76&plckFindPostKey=Cat:74824fd3-50a6-4d0e-8d7f-6b6180008ad7Forum:219da16e-162a-478e-826e>

- **Facts**

- Scotts has continued to mislead and deceive consumers despite the fact that many consumers specifically complained to the company of having been misled, or of being confused by the Kill & Contain mouse trap's advertising.
- Despite Scotts' claim that it redesigned its trap to "kill the mice more quickly" numerous consumer complaints have been posted since January 22, 2010 on Scotts' website and others, such as Amazon.com, and AceHardware.com. These reports combined with the two independent Scotts telephone customer service representatives' statements that mice captured in the newly designed traps would likely die as a result of suffocation or hypothermia, confirm that the "improved" Kill & Contain mouse trap is still far too weak to quickly and effectively kill mice.

If you intend to comply with the law, and, as Senior Vice-President for Consumer Affairs, Jim King claims, you "respect the opinion of [y]our consumers," you will immediately cease production of this inherently and needlessly cruel device, cease disseminating false and misleading statements about this device, and institute a marketing campaign intended to correct consumers' misapprehensions that have resulted from Scotts' false and misleading statements. Please respond by Friday, July 2, 2010 with specific details of the timeline in which you will cease production of the Kill & Contain Mouse Trap and pull remaining devices from store shelves.

Very truly yours,



Jeffrey S. Kerr

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a0aac0c62968Discussion:472386d9-cc39-44be-aa81-5d728f763a76Post:6167b082-63a3-4ba7-8c89-fd0c0c893dce (last visited June 21, 2010); ORTHO Home Defense Max Kill & Contain Mouse Trap Video, Reviews, <http://www.scotts.com/smg/learn/video/videoPage.jsp?detailId=13300040&tabs=reviews&navId=300030&subNavId=11200004&parentId=100006> (last visited June 21, 2010).

# **Exhibit F**



**THE Scotts Miracle-Gro**  
COMPANY

*Jim King*  
Senior Vice President  
Investor Relations and Corporate Affairs

14111 Scottslawn Road  
Marysville, OH 43041

July 2, 2010

Mr. Jeffrey S. Kerr  
PETA Foundation  
1536 16<sup>th</sup> St., NW  
Washington, DC 20036

Dear Mr. Kerr:

This is in response to your correspondence regarding our Ortho Home Defense Max Kill and Contain Mousetrap. We respect hearing the opinions of concerned organizations such as yours, and regularly take such opinions into consideration in the review and improvement of our products; however, we disagree with the alleged misrepresentations set forth in your letter.

As I am sure you are aware, the consequence of not dealing with rodent infestation can be detrimental to human health, permitting diseases to flourish unchecked. The Ortho Home Defense Max Kill and Contain Mousetrap is one of the most appropriate and highly effective methods for rodent control in the home and is a popular and preferred choice among consumers. We understand there may be different points of view on this issue and believe that homeowners ultimately will choose a solution that's right for them.

Sincerely,



Jim King  
Senior Vice President  
Investor Relations and Corporate Affairs