

Complaint

IN THE MATTER OF

KFC CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4118; File No. 0423033**Complaint, September 9, 2004--Decision, September 9, 2004*

This consent order, among other things, prohibits Respondent KFC Corporation from representing that eating KFC fried chicken is better for a consumer's health than eating a Burger King Whopper, or that eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs, unless the representation is true and, at the time it is made, the respondent possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation. The order also prohibits the respondent from making certain representations about the absolute or comparative amount of fat, cholesterol, sodium, calories or any other nutrient in any food it sells that contains chicken; about the compatibility of such food with any weight loss program; or about the health benefits of such food, unless the representation is true and, at the time it is made, the respondent possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation. In addition, the order provides that representations conveying nutrient content or health claims that the Food and Drug Administration has by regulation defined for labeling purposes will be evaluated using the same nutrient thresholds that the FDA has established for those claims.

Participants

For the Commission: *Shira Modell, Michelle Rusk, Heather Hippsley, Mary K. Engle and Carolyn Cox.*

For the Respondent: *James H. Sneed, McDermott, Will & Emery.*

COMPLAINT

The Federal Trade Commission, having reason to believe that KFC Corporation, a corporation, ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing

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to the Commission that this proceeding is in the public interest, alleges:

1. Respondent KFC Corporation (“KFCC”) is a Delaware corporation with its principal office or place of business at 1441 Gardiner Lane, Louisville, Kentucky 40213-1914.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed food products to the public, including fried chicken sold under the “KFC” name.
3. Fried chicken is a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.
4. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
5. Respondent has disseminated or has caused to be disseminated advertising and promotional materials for its fried chicken, including but not limited to the attached Exhibits A and B. These advertisements and promotional materials contain the following statements:

A. (Exhibit A: Television advertisement)

Visual: A man watching a football game on television while his wife arrives at home carrying a shopping bag.

Husband: Hey, honey.

Wife: Hey. Remember how we talked about eating better. Well, it starts today!

Fine Print Superscript: A balanced diet and exercise are necessary for good health.

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Visual: Wife puts a bucket of KFC chicken down in front of husband.

Announcer: The secret's out. Two Original Recipe chicken breasts have less fat than a BK Whopper. Or go skinless for just 3 grams of fat per piece.

Fine Print Superscript: Comparing edible portions. 2 Original Recipe breasts 38 g fat, Whopper 43 g fat. . . .

Visual: **2 KFC BREASTS
LESS FAT
THAN 1 WHOPPER**

Announcer: And now, get a 12-piece bucket of kitchen-fresh chicken for just \$9.99.

Fine Print Superscript: Not a low sodium, low cholesterol food. 12-piece bucket also contains legs, thighs and wings. . . .

Husband: You know, I'm doing this for you.

Wife: Hmm.

Announcer: For a fresh way to eat better, you've gotta KFC what's cookin'!

B. (Exhibit B: Television advertisement)

Visual: A man is sitting on the tailgate of a truck with his back to the camera. Another man walks by, then backs up as he recognizes him.

Man: Jack? Is that you? Man, you look fantastic! What the heck you been doing!?

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Jack: Eatin' chicken.

Fine Print Superscript: A balanced diet and exercise are necessary for good health.

Visual: Jack takes a bite of fried chicken. Next to him on the tailgate is a KFC box containing at least one other piece of chicken.

Announcer: The secret's out. One Original Recipe chicken breast has just 11 grams of carbs and packs 40 grams of protein. So if you're watching carbs and going high-protein, go KFC.

Visual: **11GRAMS OF CARBS**
40 GRAMS OF PROTEIN

Fine Print Superscript: Not a low fat, low sodium, low cholesterol food. 12-piece bucket also contains legs, thighs and wings. . . .

Announcer: And now, get a 12-piece bucket of kitchen-fresh chicken for just \$9.99.

Man: Chicken?

Jack: Chicken.

Announcer: For a fresh way to eat better, you gotta KFC what's cookin'!

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that eating KFC fried chicken, specifically two Original Recipe fried chicken breasts, is better for a consumer's health than eating a Burger King Whopper.

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7. In truth and in fact, eating KFC fried chicken, specifically two Original Recipe fried chicken breasts, is not better for a consumer's health than eating a Burger King Whopper. While compared to Burger King's Whopper, two KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.), they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710). Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs.

9. In truth and in fact, eating KFC fried chicken is not compatible with "low carbohydrate" weight loss programs. "Low carbohydrate" weight loss programs such as the Atkins Diet and the South Beach Diet advise against eating breaded, fried foods. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

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

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this ninth day of September, 2004.



PRODUCT KFC Original Recipe Chicken
MARKET Boston, MA
PROGRAM News
CODE # 031008316
TITLE Starting Today They're Eating Better

LENGTH 30
STATION WBZ
DATE 10/27/2003
TIME 05:57 AM



(SFX: TV/BALL GAME)



MAN: Hey, honey. WOMAN: Hey. Remember how we talked about eating better?



(SFX)



Well, it starts today.



(SFX PAUSES) (MUSIC IN) MALE ANNCR: The secret's out,



two Original Recipe Chicken breasts have



less fat than a BK Whopper. Or go skinless for just



three grams of fat per piece.



And now, get a 12-piece bucket of kitchen fresh chicken for just 9.99. (MUSIC PAUSES)



(SFX RESUMES) MAN: You know, I'm doing this for you.



WOMAN: Hmm. (SFX OUT) (MUSIC RESUMES) ANNCR: For a fresh way to eat better,



you've gotta KFC what's cookin'. (MUSIC OUT)

ALSO AVAILABLE ON VIDEO CASSETTE

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PRODUCT KFC Original Recipe Chicken
MARKET Boston, MA
PROGRAM News
CODE # 031008294
TITLE Jack's Been Eating Chicken

LENGTH 30
STATION WHDH
DATE 10/27/2003
TIME 06:23 AM



(SFX: BIRDS IN) MAN: Jack,



is that you?



Man, you look fantastic. What the heck you've been doing?



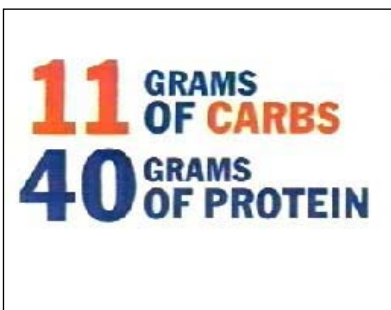
JACK: Eating chicken. (MUSIC IN)



MALE ANNCR: The secret's out.



One Original Recipe Chicken Breast



has just 11 grams of carbs and packs 40 grams of protein.



So, if you're watching carbs and going high protein, go KFC.



And now, get a 12-piece bucket of kitchen-fresh chicken for just 9.99.



MAN: Chicken?



JACK: Chicken.



ANNCR: For a fresh way to eat better, you gotta KFC What's Cookin'. (MUSIC/ OUT)

ALSO AVAILABLE ON VIDEO CASSETTE

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Decision and Order

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter from interested persons, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent KFC Corporation ("KFCC") is a Delaware corporation with its principal office or place of business at 1441 Gardiner Lane, Louisville, Kentucky 40213-1914.

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

ORDER**DEFINITIONS**

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

1. “Competent and reliable scientific evidence” shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
2. Unless otherwise specified, “respondent” shall mean KFC Corporation, its successors and assigns, and its officers, agents, representatives, and employees.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0.
5. “Food” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of fried chicken, in or affecting commerce, shall not make any representation, in any manner, expressly or by

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implication, including through the use of endorsements or the product name that:

- A. Eating KFC fried chicken is better for a consumer's health than eating a Burger King Whopper; or
- B. Eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs;

unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which for purposes of Part I.A. of this Order must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of chicken or any food or combination of foods in which chicken is a component, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or the product name, about:

- A. The absolute or comparative amount of fat (including, but not limited to, total fat, saturated fat, and trans fat), cholesterol, sodium, calories or any other nutrient in such food;
- B. The compatibility of such food with any weight loss program; or
- C. The health benefits of such food, including but not limited to characterizing such food as better for consumers' health than another food;

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unless the representation is true and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which for purposes of Parts II.A. and II.C. of this Order must be competent and reliable scientific evidence, that substantiates the representation. If any representation covered by this Part either expressly or by implication conveys any nutrient content or health claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation. *Provided, however,* that a numerical statement of the absolute amount of a particular nutrient in such food shall not, by itself, be considered to make a claim covered by Part II.B. or II.C. hereof.

III.

Nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

IV.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation including recordings of all such broadcast advertisements;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations or other evidence in their possession or control that contradict,

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qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that respondent, for a period of three (3) years after the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future employees, agents, and representatives having managerial responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learn less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

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VII.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days from the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on September 9, 2024, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from KFC Corporation (“KFCC”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of KFC Original Recipe fried chicken. According to the FTC complaint, KFC represented that eating KFC fried chicken, specifically 2 Original Recipe fried chicken breasts, is better for a consumer's health than eating a Burger King Whopper. The complaint alleges that this claim is false. Although 2 KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.) than Burger King's Whopper, they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710).

The FTC's complaint also alleges that KFCC represented that eating KFC fried chicken is compatible with “low carbohydrate” weight loss programs. The FTC alleges that this claim is false because “low carbohydrate” weight loss programs such as the Atkins Diet and the South Beach Diet, for example, advise against eating breaded, fried foods.

The proposed consent order contains provisions designed to prevent KFCC from engaging in similar acts and practices in the future.

Analysis

Part I of the order prohibits KFCC from representing that eating KFC fried chicken is better for a consumer's health than eating a Burger King Whopper, or that eating KFC fried chicken is compatible with "low carbohydrate" weight loss programs, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation.

Part II prohibits KFCC from making certain representations about the absolute or comparative amount of fat, cholesterol, sodium, calories or any other nutrient in any food it sells that contains chicken, about the compatibility of such food with any weight loss program, or about the health benefits of such food, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation.

Part II also provides that representations conveying nutrient content or health claims that have been defined (for labeling purposes) by regulations promulgated by the Food and Drug Administration ("FDA") will be evaluated using the same nutrient thresholds that FDA has established for those claims.

Furthermore, Part II provides that a mere numerical statement of the amount of a particular nutrient in such food will not, by itself, be considered to be a weight loss compatibility or health benefit claim covered by Part II.

Part III permits any representation for any product that is permitted in labeling for such product pursuant to regulations promulgated by FDA pursuant to the Nutrition Labeling and Education Act of 1990.

Parts IV through VII of the order require KFCC to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of its current and future personnel for three years; to notify the

Analysis

Commission of changes in corporate structure; and to file compliance reports with the Commission. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Statement

**STATEMENT OF COMMISSIONER PAMELA JONES
HARBOUR**

The Commission has accorded final approval to a consent agreement with KFC Corp. (“KFCC”) to settle allegations that the company deceptively advertised its fried chicken as being compatible with low-carbohydrate weight loss programs, among other claims. I concur with the Commission’s admirable results in obtaining strong injunctive relief, and I applaud staff for bringing a national advertising case. I believe, however, that an even stronger remedy is warranted. KFCC is fully aware of our nation’s struggle with obesity, yet has cynically attempted to exploit a massive health problem through deceptive advertising. Companies should not be allowed to benefit monetarily from this kind of deception, especially where the health and safety of consumers are compromised. Therefore, I encourage the Commission to find ways to seek monetary relief in future cases like this one.

Our nation’s obesity rate has “reached epidemic proportions, afflicting 6 out of every 10 Americans.”¹ Being overweight or obese is “the second leading cause of preventable death, after smoking, resulting in an estimated 300,000 deaths per year. The costs, direct and indirect, associated with [being] overweight and obes[e] are estimated to exceed \$100 billion a year.”² Obesity has been described as both an “epidemic” and a “crisis.”³ Many

¹ *Weight-Loss Advertising: An Analysis of Current Trends, A Report of the Staff of the Federal Trade Commission* (Sept. 2002), at vii (“Executive Summary”), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

² *Id.*

³ See *The Time/ABC News Summit on Obesity* (Preliminary Agenda for June 2-4, 2004), available at <http://www.time.com/time/2004/obesity>; *America’s Obesity Crisis*, TIME (June 7, 2004).

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consumers are interested in controlling their weight, and they rely heavily on the nutritional information in food advertisements to help them make choices about which foods to eat.

In the fall of 2003, KFCC apparently was suffering from decreased fried chicken sales, perhaps as a result of consumers' interest in a healthier diet.⁴ In October 2003, KFCC embarked on an ad campaign in which it deceptively advertised that eating KFC fried chicken is compatible with a "low carbohydrate" weight loss program, even though "low carbohydrate weight loss programs such as the Atkins Diet and the South Beach Diet advise against eating breaded, fried foods."⁵ In another ad, KFCC advertised that eating two of its "Original Recipe" fried chicken breasts was better for a consumer's health than eating a Burger King Whopper – even though the chicken is nearly equivalent to the Whopper in fat grams and is actually higher in trans fat, cholesterol, sodium and calories.⁶ Both ads also promote an entire bucket of chicken, even though the voiceovers in the ads

⁴ See 20/20: *Fast Not Fat: Fast Food Chains Will Go to Any Lengths to Keep People Eating Their Food* (ABC News television broadcast, Oct. 31, 2003); *Editorial, KFC blunders in "health" ads*, ADVERTISING AGE (Nov. 3, 2003), at 22; Bob Garfield, *Garfield's AdReview: KFC serves big, fat bucket of nonsense in "healthy" spots*, ADVERTISING AGE (Nov. 3, 2003), at 61.

⁵ *In the Matter of KFC Corporation*, File No. 042-3033, Complaint at ¶¶ 5, 8-9 (June 2, 2004).

⁶ *Id.* at ¶ 7 ("While compared to Burger King's Whopper, two KFC Original Recipe fried chicken breasts have slightly less total fat (38 g. v. 43 g.) and saturated fat (12 g. v. 13 g.), they have more trans fat (3.5 g. vs. 1 g.), more cholesterol (290 mg. v. 85 mg.), more sodium (2300 mg. vs. 980 mg.), and more calories (760 v. 710).").

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referenced one or two-piece servings.⁷

KFCC knew (or certainly should have known) that its ads were false and deceptive, and that the ads would encourage consumers to believe that KFC fried chicken was much healthier for them than it actually is. Only a few days after the ads aired, an *Advertising Age* editorial strongly criticized KFCC for running them, describing the ads as “desperate and sleazy tactics.”⁸ In an interview on National Public Radio, the executive editor of *Advertising Age* stated that it was “very unusual” for the publication to run such a staff editorial, but justified it by saying that “[i]nstead of being truth well told, which is what advertising should be, it seems like not only an exaggerated claim, but basically an effort to deceive.”⁹ Consumer advocacy groups complained about the ads as well, and the ads were the subject of much discussion until they stopped airing in late November 2003.¹⁰

I voted to accept the proposed settlement because it contains very strong injunctive relief that will go a long way toward

⁷ See, e.g., *World News Tonight with Peter Jennings: Good for You? KFC Adverts* (ABC television broadcast, Nov. 19, 2003); *NBC Nightly News with Tom Brokaw: Federal Trade Commission Wanting Proof That KFC’s Chicken Can Be Called a Health Food in TV Commercials* (NBC television broadcast, Nov. 18, 2003); *KFC Corporation*, Complaint at ¶ 5 (setting forth voiceovers).

⁸ Garfield, *supra* note 4.

⁹ *Day To Day: Jonah Bloom Discusses Advertising Age Magazine’s Editorial Criticism of KFC’s New Ad Campaign* (National Public Radio broadcast, Nov. 6, 2003).

¹⁰ See, e.g., Bruce Schreiner, *KFC Ends Healthy Fried Chicken Ad Blitz*, ASSOC. PRESS ONLINE (Nov. 19, 2003); 20/20, *supra* note 4.

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preventing KFCC from engaging in similar deceptive advertising in the future. In addition to addressing the specific claims made in the KFCC ads, the consent agreement also contains more general language prohibiting KFCC from making representations about the absolute or comparative amount of fat, cholesterol, sodium, calories, or any other nutrient in any food it sells that contains chicken; about the compatibility of such food with any weight loss program; or about the health benefits of such food, unless the representation is true and, at the time it is made, KFCC possesses and relies upon competent and reliable evidence – which in certain specified cases must be competent and reliable scientific evidence – that substantiates the representation.¹¹

Accepting injunctive relief alone is reasonably consistent with the Commission's prior settlements in similar cases. However, where a company appears to have exploited a national health crisis, an even stronger response from the Commission is warranted. While I recognize that it may be difficult to calculate monetary relief in these kinds of cases, I would like to see the Commission develop methodological approaches that would support seeking such remedies in future cases of similar types of deceptive advertising, as the Commission has done in the past. For example, in 1995, the FTC settled charges with The Dannon Company that it had made false or misleading claims for its Pure Indulgence line of frozen yogurt. As part of the consent agreement, Dannon agreed to pay \$150,000 in disgorgement.¹² Similarly, in 1983, the FTC settled charges with Estee Corporation that it had misled consumers by falsely claiming that

¹¹ *In the Matter of KFC Corporation*, File No. 042-3033, Analysis of Proposed Consent Order to Aid Public Comment (June 2, 2004).

¹² FTC Press Release, *Dannon Agrees To Settle FTC Charges That Low-Fat Ad Claims for Frozen Yogurt were False and Misleading* (Nov. 25, 1995); *In the Matter of The Dannon Company, Inc.*, Dkt. No. C-3643, 121 F.T.C. 136, 139 (March 18, 1996) (consent order).

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the sweeteners in its foods had been accepted by the American Diabetes Association and the Food and Drug Administration. Estee Corporation agreed to pay \$25,000 in *cy pres* relief to the American Diabetes Association or the Juvenile Diabetes Foundation.¹³

While injunctive relief is important in deceptive advertising cases such as this one, monetary relief may further serve to correct unlawful conduct, reverse its ill effects, and deter future violations of the law. Well-formulated *cy pres* relief, in particular, may provide real benefits to consumers. It is not only reasonably related to the violation, but also reasonably likely to reach the individuals most injured by a particular deceptive advertisement. Should the appropriate case present itself in the future, I strongly encourage the Commission to consider the applicability and effectiveness of *cy pres* and other potential monetary remedies.

¹³ *In the Matter of Estee Corporation*, Dkt. No. C-3126, 102 F.T.C. 1804, 1812 (Nov. 16, 1983) (consent order). *Cy pres* relief, also known as indirect restitution or fluid recovery, is used in situations where injured persons cannot be directly compensated. Instead, under *cy pres*, restitutionary funds are awarded in some alternate way that indirectly benefits the injured persons.

Complaint

IN THE MATTER OF

GATEWAY LEARNING CORP.

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

Docket C-4120; File No. 0423047

Complaint, September 10, 2004--Decision, September 10, 2004

This consent order, among other things, prohibits Respondent Gateway Learning Corporation -- a marketer and seller of products designed for children who are learning math and reading under the “Hooked on Phonics” brand name and trademark -- from misrepresenting, in connection with the collection of personal information from or about an individual, (1) that it will not sell, rent, or loan to third parties such personal information; (2) that it will not provide to any third party personal information about children under the age of thirteen; (3) the manner by which it will notify consumers of changes to its privacy policy; or (4) the manner in which it will collect, use, or disclose personal information. The order also prohibits the respondent from disclosing to any third party any personal information collected on its Web site prior to the date it posted its revised privacy policy permitting third-party sharing (June 20, 2003) without the express affirmative (“opt-in”) consent of the consumers to whom such personal information relates. In addition, the order prohibits the respondent -- in connection with the posting in the future of any privacy policy that materially changes the previous version of the policy -- from applying such changes to information collected from or about consumers before the date of the posting without the express affirmative (“opt-in”) consent of those consumers. The order also requires the respondent to disgorge to the United States Treasury its profits from renting customer data.

Participants

For the Commission: *Laura Mazzarella, Loretta H. Garrison, Jessica Rich, Joel Winston and [Bureau of Economics].*

For the Respondent: *D. Reed Freeman, Jr., Collier Shannon Scott, PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Gateway Learning Corporation, a corporation (“Respondent”) has