

Complaint

IN THE MATTER OF

DOWN TO EARTH DESIGNS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4443; File No. 122 3268
Complaint, March 18, 2014 – Decision, March 18, 2014

This consent order addresses Down to Earth Designs, Inc. d/b/a gDiapers' marketing, sale, and distribution of diapers and baby wipes with claims of various environmental benefits. The complaint alleges that respondent represented that its diapers and wipes are biodegradable, "certified 100% biodegradable," garbage free when trashed or flushed, and plastic free. The complaint further alleges that respondent failed to disclose adequately that consumers can safely compost only wet used inserts and wipes. The consent order requires respondent to clearly and prominently disclose the time to complete decomposition or the rate and extent of decomposition with a further disclosure that the stated rate and extent of decomposition does not mean that the item will continue to decompose, if the item does not completely decompose within one year after customary disposal. The order also prohibits respondent from making specific environmental claims about any product or package unless the claim is true, not misleading, and substantiated by competent and reliable scientific evidence.

Participants

For the *Commission*: Matthew Wilshire and Boris Yankilovich.

For the *Respondent*: Ann M. Begley and Zachary A. Rothstein,
Morgan, Lewis & Bockius LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Down to Earth Designs, Inc., d/b/a gDiapers ("Respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is an Oregon corporation with its principal place of business at 2808 NE Martin Luther King Jr. Boulevard, Portland, Oregon, 97212.

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2. Respondent has advertised, labeled, offered for sale, sold, and distributed the following products throughout the United States:

- a. gDiapers: A diaper system that consists of two components: (i) a reusable outer shell (gPants), and (ii) an inner liner, either a disposable pad (gRefills) or a reusable cloth insert. Respondent has offered for sale and sold gPants and gRefills separately and in combination with each other.
- b. gWipes: Moist wipes for use on babies' skin.

3. Respondent has advertised, offered for sale, and sold gRefills and gWipes as disposable products on its website, www.gdiapers.com, and through other online media, including but not limited to advertisements on third-party websites, social media advertisements, and email advertisements sent to potential customers. Additionally, Respondent has advertised, offered for sale, sold, and distributed these products through various retailers and distributors throughout the United States.

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 disseminates, has disseminated, or has caused the dissemination of promotional materials relating to its gDiapers and gWipes products to retailers and consumers. In numerous instances, including but not limited to the promotional materials shown in Exhibits 1-19, Respondent has represented that:

- a. gRefills and gWipes are biodegradable:

100% ecodorable*

***cute & biodegradable.**

Ex. 1 (gDiapers website).

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100% biodegradable

Exs. 2, 3 (gDiapers website). *See also* Exs. 4, 5 (online advertising).

100% biodegradable for a happy planet.

Ex. 4 (online advertising).

disposable.

biodegradable.

adorable.

Exs. 6, 7 (online advertising).

biodegradable* gRefills

Ex. 8 (packaging).

biodegradable gWipes

Ex. 9 (packaging).

b. gRefills and gWipes biodegrade when trashed:

100% biodegradable**disposable diaper inserts**

**So gentle on the earth you can flush, compost,
or toss.**

Ex. 1 (gDiapers website).

Flush.

Compost.

Toss.

gDiapers. No garbage.

Ex. 10 (online advertising). *See also* Ex. 11 (online advertising).

a diaper shouldn't last forever.

50 million diapers enter the landfill every day.

Each one takes up to 500 years to break down.

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gDiapers are the only earth-friendly diapers that are 100% biodegradable. gDiapers biodegradable gRefills can be flushed, home composted, or tossed.

Ex. 3 (gDiapers website).

Put the poop in the toilet and toss the baby wipe. You can breathe easier knowing that a gWipe will break down much faster than other disposable baby wipes on the market.

Ex. 12 (gDiapers website).

**toss
a plastic-free option that's easier on the planet**

Ex. 13 (gDiapers website). *See also* Ex. 8 (packaging).

no landfill necessary.

Ex. 15 (online advertising).

c. gRefills biodegrade when flushed:

**100% Biodegradable
So gentle on the earth you can flush, compost,
or toss.**

Ex. 1 (gDiapers website).

**gDiapers biodegradable gRefills can be flushed,
home composted, or tossed.**

Ex. 3 (gDiapers website). *See also* Ex. 2 (gDiapers website).

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- d. gRefills are “certified” biodegradable:

gRefills are certified 100% biodegradable.

Exs. 13 (gDiapers website), 16 (email advertising),
8 (packaging).

- e. gRefills and gWipes are compostable, including in
home composts:

gRefills can be . . . home composted

Exs. 2, 3 (gDiapers website).

gWipes can be home composted

Ex. 12 (gDiapers website).

Flush.

Compost.

Toss.

gDiapers. No garbage.

Ex. 10 (online advertising).

Flush, compost, or throw them away!

Ex. 11 (online advertising).

gRefills in your own backyard.

* * *

**Collect your yard waste, your fruit and veggie
scraps from the kitchen, your coffee grounds
and your baby’s wet gRefills and watch how
they work together to break down into useful
and valuable compost.**

Ex. 14 (gDiapers website).

- f. gRefills offer an environmental benefit because they
can be flushed:

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Earth-friendly diapers
Flush your diapers.

Ex. 17 (online advertising).

Eco-friendly diapers.

* * *

Flush, compost, or throw them away!

Ex. 11 (online advertising).

Flush
You're putting poop where it belongs

Exs. 13 (website); *see also* 8 (packaging).

g. gDiapers are plastic free:

plastic free, naturally.

Ex. 18 (online advertising).

No plastic, chlorine, or guilt!

Ex. 11 (online advertising).

End plastic diaper use.

Ex. 19 (online social media advertising).

6. In numerous instances, no disclaimers accompanied the representations listed in Paragraph 5. *See, e.g.*, Exs. 9, 10, 11. In other instances, Respondent made qualifying statements – *e.g.*, disclaimers that only wet gRefills or gWipes can be composted, or that gRefills and gWipes are biodegradable only in composting environments – but in numerous instances those qualifiers were not clear and conspicuous or proximate to the claim. For example, while Respondent's home page advertised gRefills with unqualified compostable claims, *see* Ex. 1, it disclosed that only "wet ones" (*i.e.*, wet gRefills) can be composted on different web pages. *See, e.g.*, Exs. 3, 13. Similarly, in contrast to the unqualified biodegradable claims on the front of gRefills and

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gWipes packaging, Respondent revealed on back and side panels that the products biodegrade in only “home and commercially-approved composts.” *See, e.g.*, Exs. 8, 9.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal. For items entering the solid waste stream, consumers likely interpret unqualified degradable claims to mean that the item will completely decompose within one year after customary disposal. 16 C.F.R. § 260.8(b),(c).

8. Consumers likely interpret unqualified compostable claims to mean that all the materials in the item will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner (*i.e.*, in approximately the same time as the materials with which it is composted) in an appropriate composting facility, or in a home compost pile or device. 16 C.F.R. § 260.7(b).

9. Approximately 92 percent of total municipal solid waste in the United States is disposed of in landfills, incinerators, or recycling facilities. Landfills, incinerators, and recycling facilities do not present conditions for biodegradation or composting within a reasonably short period of time.

10. Consumers of gRefills dispose of the majority of used gRefills by throwing them away in the trash (“trashing”). Trashing gRefills and gWipes leads to their final disposal in a landfill or incinerator.

11. In fact, gRefills and gWipes do not biodegrade in landfills or incinerators in a reasonably short period of time.

12. Municipal wastewater facilities filter out a portion of flushed gRefills and send that material to landfills. Of the material that is not filtered out, only a part may degrade in the wastewater stream during the treatment process. Of the remainder, a portion is landfilled or incinerated. As a result, a significant portion of flushed gRefills do not biodegrade.

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13. Only wet used gRefills and gWipes are safe to compost.

14. Respondent has not obtained any independent, third-party certification that gRefills are biodegradable.

15. gDiapers are not plastic free. The gPants component of the gDiapers system contains, among other things, plastic.

VIOLATIONS OF SECTION 5 OF THE FTC ACT**COUNT I: FALSE OR MISLEADING
REPRESENTATIONS**

16. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

- a. gRefills and gWipes are biodegradable—*i.e.*, will completely break down and decompose into elements found in nature within one year after customary disposal;
- b. gRefills and gWipes will biodegrade when trashed;
- c. gRefills will biodegrade when flushed;
- d. gRefills are “certified” biodegradable;
- e. No part of used gRefills will end up in a landfill or incinerator after disposal by trashing or flushing; and/or
- f. gDiapers are plastic free.

17. In truth and in fact:

- a. gRefills and gWipes will not completely break down and decompose into elements found in nature within one year after customary disposal;
- b. gRefills and gWipes will not biodegrade when trashed;
- c. gRefills will not biodegrade when flushed;

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- d. gRefills are not “certified” biodegradable;
- e. Part of used gRefills will end up in a landfill or incinerator after disposal by trashing or flushing; and/or
- f. gDiapers are not plastic free.

18. Therefore, the representations set forth in Paragraph 16 were, and are, false or misleading.

19. Respondent’s false or misleading representations constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

**COUNT II: FAILURE TO DISCLOSE, OR FAILURE TO
DISCLOSE CLEARLY AND CONSPICUOUSLY, THAT
COMPOSTABILITY IS LIMITED TO WET GREFFILLS
AND GWIPES**

20. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that used gRefills and gWipes are home compostable – *i.e.*, will break down into, or otherwise become part of, usable compost in a safe and timely manner in a home compost pile or device.

21. Respondent has failed to disclose that gRefills and gWipes soiled with solid waste will not break down into, or otherwise become part of, usable compost in a safe and timely manner in a home compost pile or device. Where Respondent has made such disclosures, in numerous instances they have not appeared in a clear and conspicuous manner.

22. This additional information, described in Paragraph 21, would be material to consumers in deciding whether to purchase gDiapers’ products.

23. Respondent’s failure to disclose the material information in Paragraph 21, in light of the representations made in Paragraph 20, constitutes a deceptive act and practice in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

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COUNT III: UNSUBSTANTIATED REPRESENTATIONS

24. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that:

- a. gRefills and gWipes will biodegrade when trashed;
- b. gRefills will biodegrade when flushed;
- c. gRefills offer an environmental benefit because they can be flushed; and/or
- d. gWipes are home compostable.

25. Through the means described in Paragraph 5, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 24 at the time the representations were made.

26. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 24, at the time the representations were made. Therefore, the representation set forth in Paragraph 25 was, and is, false or misleading.

27. Respondent's practices constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

IN WITNESS THEREOF, the Federal Trade Commission has issued this Complaint against Respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eighteenth day of March, 2014.

By the Commission.

Complaint

Exhibit 1

Complaint

Exhibit 2

gDiapers - disposable diapers from gDiapers are 100% biodegradable diapers.

gDiapers | feel good | the g story | customer care | shop

disposable diaper inserts
gRefills are the only 100% biodegradable diaper. Flush, compost or toss.
No landfill necessary.

change starts here
how it works
reusable covers
disposable inserts
watch the videos
just the facts
give it a try

gRefills are beyond biodegradable.
10 million diapers enter landfills every day. And they can take up to 500 years to break down. It's because disposable diapers are made of plastic and plastic doesn't biodegrade. gDiapers biodegradable gRefills are plastic-free, and they can be flushed, home composted or tossed. No stinky diaper pail. No landfill necessary.

The only diaper you can flush, compost or toss.

flush
you're putting poop where it belongs

or

compost
wet ones in home garden in 50-150 days.

or

toss
a plastic-free option that's easier on the planet

gRefills are 100% biodegradable.
It's a fact. gDiapers are 100% biodegradable diapers. Our gRefills have been tested to these standards by an independent laboratory. With options for disposal, gRefills mean no landfill is required.

Cradle to Cradle certified.
gDiapers are the only diaper to be certified Cradle to Cradle. It's true! The only one. Cradle to Cradle accreditation comes from the earth-loving design principles of Bill McDonough and his firm, MDC.

wet gRefills can be composted.
Turn waste into a resource with compostable diapers. Wet-only gRefills can be home composted. They break down fast, typically in 50-150 days. And even faster in commercial compost from diaper to garden in the blink of an eye.

rip, swish, flush.
Flushable diapers? Such a thing exists? Yep! But only here. Biodegradable gRefills are flushable in North America. Put poop where it belongs, down the toilet, not the garbage can. It's so simple as rip, swish, flush. Just follow the easy directions.

watch the videos ...
Learn more about Ft., function, flushing, etc.

gDiapers - disposable diapers from gDiapers are 100% biodegradable diapers.

plastic-free is better for everyone.
Disposable diapers are made of plastic. Even when they're paper-soft or brown instead of bleached white, the truth is, they're plastic. Which isn't good for the earth. And not good for baby. gRefills are plastic-free. Please.

let's be social
We'll only send the good stuff. Care, facts, new products.

sign up for eNews
Share your glow.

get involved
to the diaper therapy shop to get more out of gDiapers.

facts, stories & more
let's talk diapers. 866.553.5674
Or you can email us or see our website.

search

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Exhibit 3

gDiapers - Environmentally friendly diapers that are cute and easy as 1, 2, 3

gDiapering | feel good | the g story | customer care | shop

change starts here 
watch the video

change starts here
how it works
reusable covers
disposable inserts
watch the videos
just the facts
give it a try

gDiapers. cute bum. small footprint.
gDiapers are stretchy cloth diaper covers with disposable, biodegradable inserts. So less waste goes in landfills. Our diaper covers are playful on the outside and high-tech on the inside, so baby's precious skin can breathe. More comfort. Less rash. Because with so many changes a day, diapering should be a beautiful ritual.

a diaper shouldn't last forever.
50 million diapers enter the landfill every day. Each one takes up to 500 years to break down. gDiapers are the only earth-friendly diapers that are 100% biodegradable. gDiapers biodegradable gDiapers can be flushed, home composted, or tossed. Good for babies. Good for the planet. And easy on everybody.

the only diaper you can flush, compost or toss.

 **flush**
you're putting poop where it belongs.

or  **compost**
wet uses in home garden in 90-150 days.

or  **toss**
a plastic-free option that's easier on the planet.

next  **see how it works ...**
Tuck air inserts inside gDiapers. Secure tabs gently around baby's back. Pick up baby. Hug.

let's be social    

sign-up for eNews  We'll only send the good stuff, tips, deals, new products.

get involved  Show your love. 

facts, stories & more  Go to the diaper therapy blog to get more out of gDiapers.

let's talk d-diapers. 800.553.5874
Or you can email us or use our webform.
search 

©2012 gDiapers | privacy | media | wholesale | terms | shop   

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Exhibit 4



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Exhibit 5

Ad Preview  **Edit**

gDiapers


How big will her footprint be? gDiapers 100% biodegradable diapers. The best of cloth and disposable in one earth-friendly diaper.

 Like · 46,011 people like this.

[View on Site](#) · [Create a Similar Ad](#)

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Exhibit 6



**cute bum.
small footprint.**

disposable.
biodegradable.
adorable.

save \$10
off first order
use code TRYIT

 **shop now**

g
diapers
.com

Complaint

Exhibit 7

**too cute to
throw it all away**

disposable.
biodegradable.
adorable.

\$10 off
your first order.
Use code **TRYIT**

 **shop now**

g
diapers
.com

Complaint

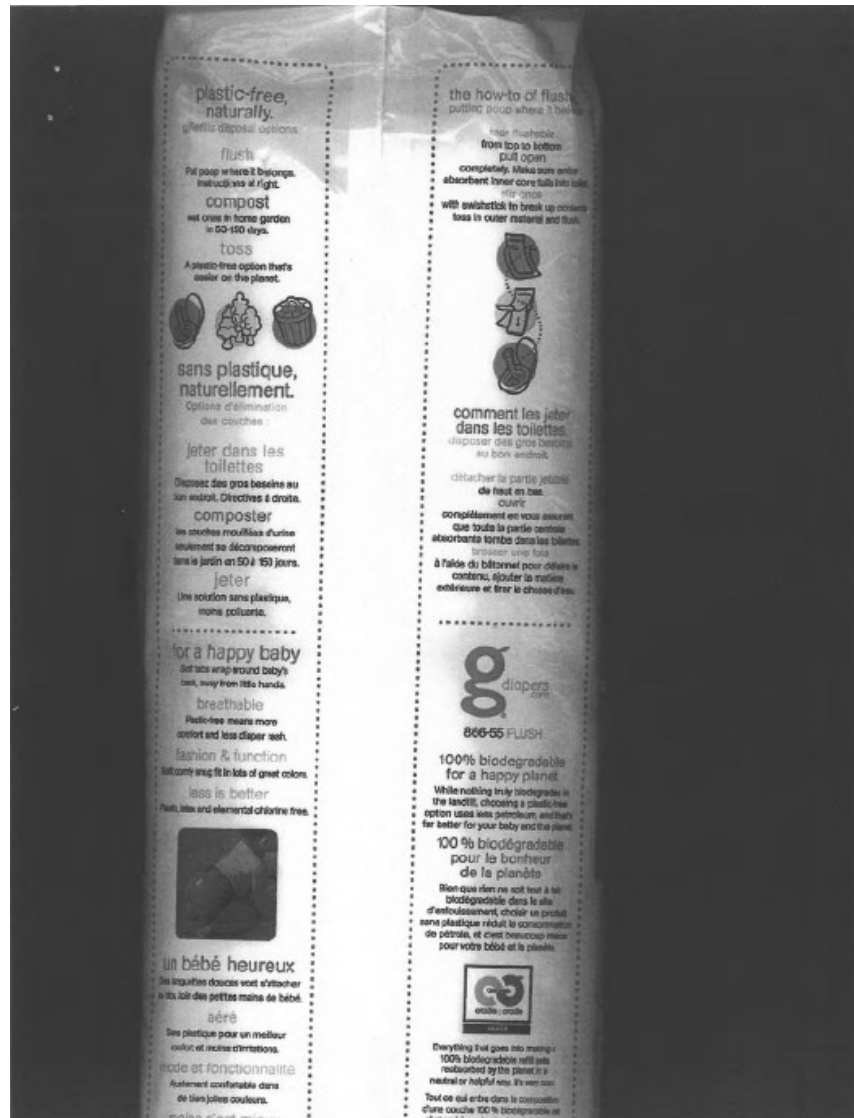
Exhibit 8



Complaint



Complaint



Complaint

Exhibit 9

Complaint

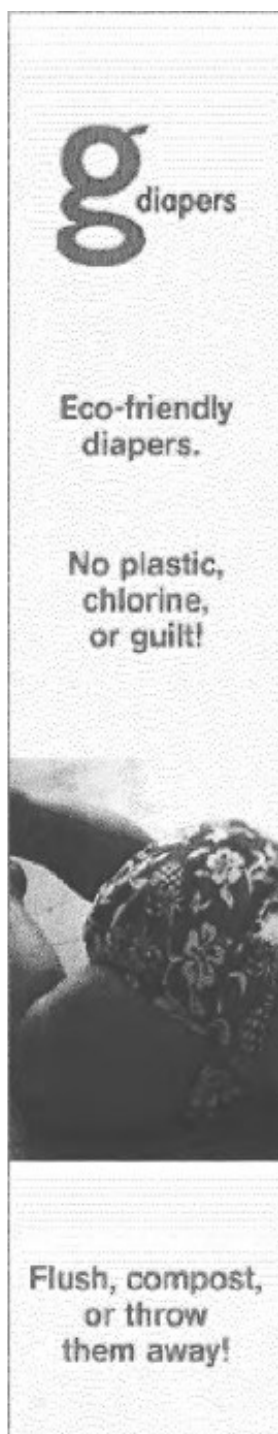


Complaint

Exhibit 10

Complaint

Exhibit 11



Complaint

Exhibit 12

gDiapers - gWipes biodegradable baby wipes package. Clean up naturally.

The screenshot displays the gDiapers website interface. At the top, a navigation bar includes links for 'gDiapering', 'how to use', 'the g story', 'customer care', and 'shop'. The main content area is divided into several sections:

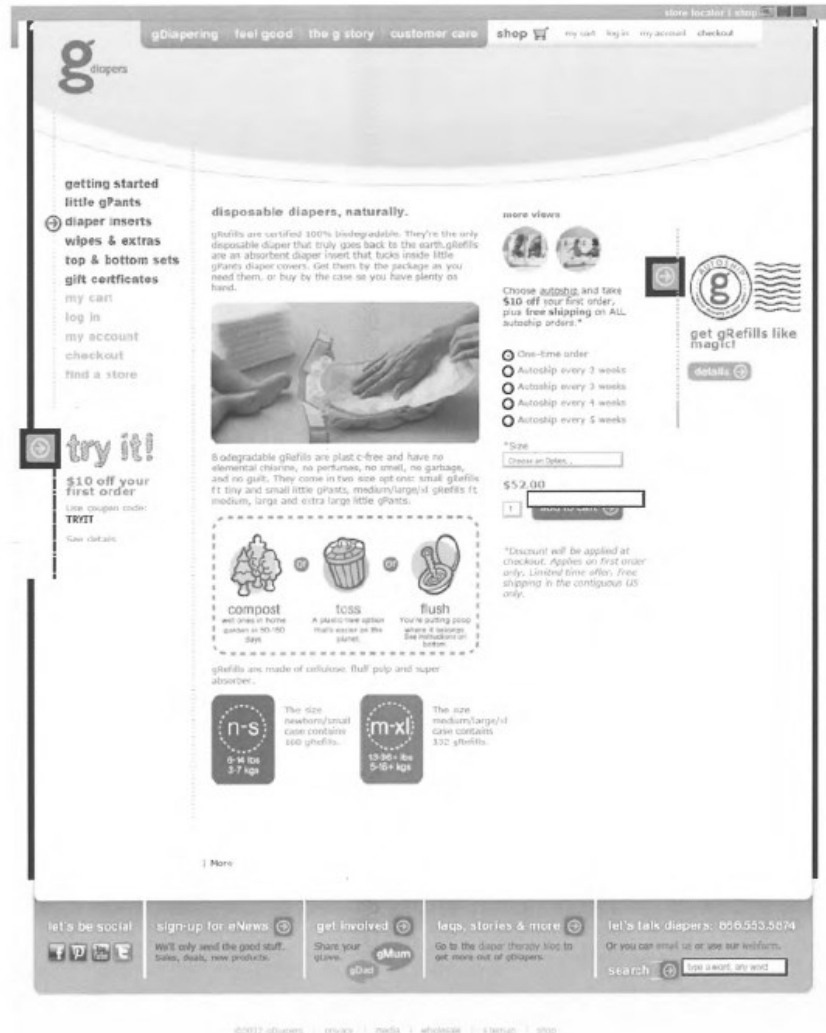
- getting started**: A sidebar menu with links for 'little gPants diaper inserts', 'wipes & extras', 'top & bottom sets', 'gift certificates', 'my list', 'log in', 'my account', 'subscribe', and 'find a store'.
- Head-to-toe softness, naturally.**: A central text block describing the benefits of gWipes, noting they are biodegradable, baby wipes that are soft and gentle, and suitable for sensitive skin. It mentions they are available in package and case sizes, with each package containing 70 gWipes. The gWipes case contains 17 packages.
- more views**: A section showing a product image and a price of \$4.49.
- you may also like...**: A section showing a product image and a price of \$49.99.
- try it!**: A section with a coupon code 'TRYIT' for \$10 off your first order.

The footer contains several promotional banners and social media links, including 'let's be social', 'sign up for eNews', 'get involved', 'join stories & more', and 'let's talk diapers'. It also features a search bar and a list of logos for various organizations, including GreenSource, Audubon, and others.

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Exhibit 13

gDiapers - biodegradable gPants case



gDiapers - biodegradable gPants case



Complaint

Exhibit 14

gDiapers - Compostable diapers from gDiapers are 100% biodegradable

store location | shop

gDiapering | feel good | the g story | customer care | shop

gDiapers

take those diapers outside.
gRefills break down quickly in home compost. So waste becomes resource. In your own backyard.

real life with g's
good for earth

made to last
100% biodegradable
compostable
flushable
plastic-free

global good
good friends
gMum'sDad

learn how to compost
gRefills.
let's make dirt.

how does your garden grow?

But you've never seen a disposable diaper do that! Biodegrade, that is. gRefills break down in home composts in as little as two months, taking baby's wet diapers and turning them into a valuable soil amendment. So what happens when you stink up the heat in a commercial compost? The gRefills go back to the earth in one week. You heard right. Compostable diapers are happening. Right here.

In May 2010, Paul First, a Taiwanese owned and operated compost company, conducted a commercial compost trial for gDiapers gRefills. Soil first selected a window that was 7 days old, had a core temperature of 61 degrees celcius and a moisture content of approximately 40%. The wet gRefills were placed on top of the window, and then turned by the compost turner once, to get them to the core of the pile. When the compost turner returned one week later to inspect the rate of decomposition, the gRefills were completely gone. Not a trace was found.

The trial concluded that gRefills break down very early in a commercial compost process. Previous testing of other brands of diapers caused major contamination issues, as the plastics in them did not break down. gRefills were already known to be compostable diapers in a home compost, and the commercial process proved that the degradation rate could be cut by several weeks by turning up the heat.

"Thanks!
For switching over a month ago to your compostable diapers you should be rewarded with a bonus! And there will be an extra bonus at our Eastern Oregon vacation ranch, where we have to pack out all of our garbage. Now I can compost the wet ones and flush the dries."

Kimberly, Portland, OR
share real life stories

gRefills in your own backyard.

You don't need to create windrows or have a groovy compost turning tractor to reap the benefits of composting gRefills. Get or build a compost bin, it can be as simple or as complex as you like. Collect your yard waste, your fruit and veggie scraps from the kitchen, your coffee grounds and your baby's wet gRefills and watch how they work together to break down into useful and valuable compost. Check out the diaper therapy blog for more tips on getting started with backyard composting.

More

let's be social

sign-up for eNews

get involved

faq, stories & more

let's talk diapers: 866.553.5614

search

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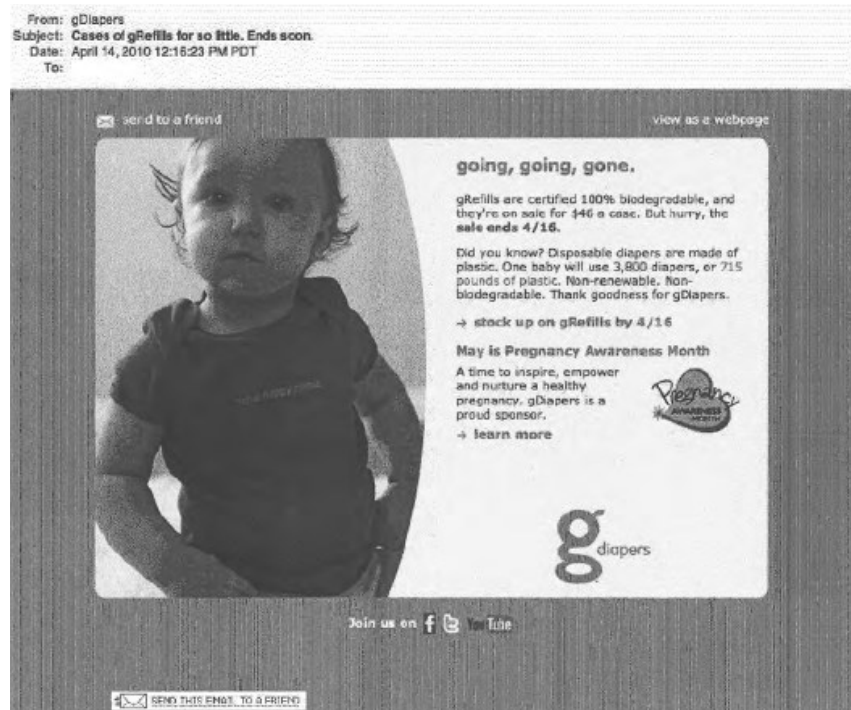
Complaint

Exhibit 15



Complaint

Exhibit 16



Complaint

Exhibit 17



Exhibit 18



Decision and Order

Exhibit 19**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 a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by respondents that they neither admit nor deny any of the allegations in the draft complaint, except as specifically stated in

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the Consent Agreement, and, only for purposes of this action, admit the facts necessary to establish jurisdiction; 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 Federal Trade Commission 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, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is an Oregon Corporation with its principal office or place of business at 2808 NE Martin Luther King Jr. Boulevard, Portland, Oregon, 97212.
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:

- A. "Clearly and prominently" means as follows:
 1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read, and comprehend it;

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2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read, and comprehend it; and
 3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
- C. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by

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qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically:

1. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.
 2. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
 - a. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and
 - b. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.
- E. “Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.
- F. “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.

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- G. “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.
- H. Unless otherwise specified, “respondent” means Down to Earth Designs, Inc., a corporation, and its successors and assigns.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication:

- A. That any product or package is degradable, unless
 1. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
 2. the representation is clearly and prominently and in close proximity qualified by:
 - a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and
 - b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or

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method to consumers where the product or package is marketed or sold

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- B. That any product or package is compostable, unless all materials in the item will break down into, or otherwise become part of, usable compost (*e.g.*, soil-conditioning material, mulch) in a safe and timely manner (*i.e.*, in the same time as the materials with which it is composted):

1. in a home composting pile or device;
2. in a municipal or institutional composting facility that is available to a substantial majority of consumers or communities where the item is sold, and respondent discloses clearly and prominently and in close proximity to the representation that the item is only compostable in such a facility; or
3. in a municipal or institutional composting facility that is not available to a substantial majority of consumers or communities, and respondent discloses clearly and prominently and in close proximity to the representation: (a) that the item is only compostable in such a facility and (b) the limited availability of municipal or institutional composting facilities that compost the item, such as by disclosing the percentage of consumers or communities that have access to such facilities,

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- C. That any product respondent markets in whole or in part as capable of handling human waste, including,

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but not limited to, any disposable diaper product or disposable wipe, is compostable, unless respondent discloses clearly and prominently and in close proximity to the representation that the product cannot be composted if soiled with anything other than urine.

- D. That any product or package is free of, or does not contain or use, a substance, unless the representation is true, not misleading, and, at the time it is made respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; and
1. the product or package does not contain or use substances that pose the same or similar environmental risks as the substance that is not present; and
 2. the substance has been associated with the product category.

Provided, however, that this order shall not enjoin respondent from representing that any product or package is free of, or does not contain or use, a substance where: 1) the level of the specified substance is no more than that which would be found as an acknowledged trace contaminant or background level; 2) the substance's presence does not cause material harm that consumers typically associate with that substance; and 3) the substance has not been added intentionally to the product.

- E. That any product, package, or service offers a general environmental benefit, unless respondent discloses, clearly and prominently and in close proximity to the representation, a specific environmental benefit or benefits, and, taking into account any such disclosure, all reasonable interpretations of the representation are true, not misleading, and at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that

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substantiates each reasonable interpretation of the representation.

- F. That any product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, is permanently restrained and enjoined from making or assisting others in making, expressly or by implication, orally or in writing, any misrepresentation regarding certifications, including:

- A. The fact that, or degree to which, an independent third-party certifier or organization with appropriate expertise has evaluated a product, package, or service based on its environmental benefits or attributes; or
- B. That an independent third-party certifier or organization with appropriate expertise has evaluated the environmental benefits or attributes of any product, package, or service based on the application of objective standards.

III.

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 Commission for inspection and copying:

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- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* 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.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation 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 entity; 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

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change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: “gDiapers, File No. 122 3268.”

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: “gDiapers, File No. 122 3268.”

VII.

This order will terminate on March 18, 2034, or twenty (20) years from the most recent date that the United States or the 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:

Analysis to Aid Public Comment

- 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.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Down to Earth Designs, Inc. d/b/a gDiapers, a corporation ("respondent").

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.

Analysis to Aid Public Comment

This matter involves respondent's marketing, sale, and distribution of diapers and baby wipes with claims of various environmental benefits. According to the FTC's complaint, respondent represented that its diapers and wipes are biodegradable, "certified 100% biodegradable," garbage free when trashed or flushed, and plastic free. The complaint alleges that these claims were false and misleading. The complaint also alleges that respondent failed to disclose adequately that consumers can safely compost only wet used inserts and wipes. Finally, the complaint alleges that respondent did not possess and rely upon a reasonable basis to substantiate its claims that its products biodegrade when trashed or flushed, offer an environmental benefit because they can be flushed, and that its wipes are home compostable. Accordingly, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. As detailed below, Part I prohibits respondent from making specific environmental claims about any product or package unless the claim is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.A forbids respondent from making unqualified degradable claims about a product or package unless the item completely decomposes into elements found in nature within one year after customary disposal. Consistent with the FTC's Green Guides, the proposed order limits "customary disposal" to landfills, incinerators, or recycling facilities. If the item does not completely decompose within one year after customary disposal, Part I.A requires respondent to clearly and prominently disclose: (1) either the time to complete decomposition or the rate and extent of decomposition with a further disclosure that the stated rate and extent of decomposition does not mean that the item will continue to decompose; and (2) if the item does not decompose in (or by) a customary disposal facility or method, the type of non-customary disposal facility or method, and the availability of such facility or method to consumers where the item is marketed or sold.

Part I.A also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence substantiating the representation.

Analysis to Aid Public Comment

If respondent relies on a scientific technical protocol for substantiation, that protocol must do two things. First, it must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (*i.e.*, simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation.

Part I.B prohibits respondent from making unqualified compostable claims unless all materials in the item will break down into, or otherwise become part of, usable compost in a safe and timely manner (*i.e.*, in the same time as the materials with which it is composted) in a home compost, or in a municipal or institutional composting facility, in which case respondent must clearly and prominently disclose that fact and the limited availability of such facilities.

Under Part I.C, if respondent claims that a disposable diaper or wipe is compostable, it must clearly and prominently disclose that the product cannot be composted if soiled with human waste other than urine.

Part I.D prohibits respondent from representing that any product or package is “free of” any substance unless the representation is true and not misleading, and substantiated, and unless the product or package advertised does not contain substances that pose the same or similar environmental risks and the “free of” substance has been associated with the product category.

Part I.E prohibits respondent from making general environmental benefit representations unless it discloses the product, package, or service’s specific environmental benefit, and each reasonable interpretation of the representation is true and substantiated.

Part I.F prohibits the respondent from representing that any product, package, or service offers any environmental benefit unless the representation is true, not misleading, and substantiated, which when appropriate must be competent and reliable scientific evidence.

Analysis to Aid Public Comment

Part II of the proposed consent order prohibits respondent from making misrepresentations about certifications, including misrepresentations that a third-party certifier has evaluated a product, package, or service based on its environmental benefits or attributes, or that the third-party certifier has done so using objective standards.

Parts III through VI are reporting and compliance provisions. Part III requires respondent to keep and, upon request, make available to the Commission for copying: advertisements, labeling, packaging, and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the representations; and all acknowledgments of receipt of the order. Part IV requires respondent to disseminate the order to subsidiaries, principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part V requires notification to the FTC of changes in respondent's corporate status. Part VI requires respondent to submit an initial compliance report to the FTC within sixty (60) days of service and subsequent reports upon request.

Finally, Part VII is a "sunset" provision, which provides that the order terminates after twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

ENDO HEALTH SOLUTIONS INC.;
BOCA LIFE SCIENCE HOLDINGS, LLC;
AND
BOCA PHARMACAL, LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket No. C-4430; File No. 131 0225
Complaint, January 29, 2014 – Decision, March 19, 2014

This consent order addresses the \$225 million acquisition by Endo Health Solutions Inc. of certain assets of Boca Pharmacal, LLC from Boca Life Science Holdings, LLC. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening current and future competition in U.S. markets for (1) generic PolyViFlor 0.25mg multivitamin drops; (2) generic PolyViFlor 0.5mg multivitamin drops; (3) generic PolyViFlor 0.25mg multivitamin drops with iron; (4) generic TriViFlor 0.25mg multivitamin drops; (5) generic Bromfed-DM; (6) generic Zamiket; and (7) generic Vosol HC. The consent order requires Boca to return to Sonar all of Boca's rights related to the four prescription fluoride multivitamin drops and to continue to distribute the multivitamin drops for Sonar for a period of up to six months in order to allow Sonar time to establish itself with a new marketing and distribution partner. Further, Endo is required to divest to Rhodes all of its rights and interests in generic Bromfed-DM and generic Zamiket as well as all of Boca's rights and interests in generic Vosol HC.

Participants

For the *Commission*: David L. Inglefield, Jacqueline K. Mendel, David von Nirschl, and Elyssa L. Wenzel.

For the *Respondents*: Robert Skitol and Joanne Lewers, Drinker Biddle & Reath LLP; David Pearl, Ryan Thomas, and David Wales, Jones Day.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Endo