ADVERTISING LAW
Final Exam—July 7, 2004
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With the prospect of summer camp looming for many parents, the Federal Trade Commission (FTC) has decided to investigate online advertising directed to head lice treatments. Head lice are most prevalent in elementary school age children, who easily catch the parasites from sharing hats or combs. Head lice infestation affects over eight million children per year.

Although the presence of head lice on children's scalps does not indicate a lack of hygiene or sanitation practiced by their hosts, many parents are embarrassed by the problem and, so, turn to the internet for a quick and private solution. Additionally, long-standing treatments are less than desirable. Over-the-counter products used to treat head-lice infestation are reported to be losing their effectiveness because lice are becoming resistant to the active ingredients in such products, and prescription medications contain pesticides that worry parents about the health hazards.

After surveying online advertisements for head lice treatments, the FTC identified Del Pharmaceuticals, Inc., a market leader in head lice treatments, as making claims that the FTC believed to be false with regard to its non-prescription product, Pronto Shampoo. Del Pharmaceuticals' website contained the following express claim about Pronto Shampoo:

> "100% Effective in Laboratory Testing In Killing Lice and Their Eggs On Contact. No Reinfestation and No Lasting Chemical Pesticide Residue Left In Your Child's Hair."

Dr. Deborah Barnes, identified only as a well-known pediatrician and author, was pictured on Del Pharmaceutical's website with the following quote appearing below her picture:

> "Pediatricians agree—no other treatment is as effective in killing lice and eggs as Pronto Shampoo."

The website assured consumers that if they are not completely satisfied with the product they may return the unused portion of the shampoo for a full refund. The shampoo costs $16 per bottle exclusive of shipping and handling. The website does not indicate any other requirement for obtaining a refund.

Upon investigation, the FTC determined the following facts:

- No laboratory testing had been conducted by Del Pharmaceuticals when it posted the claims regarding Pronto Shampoo on its website. Later tests, conducted by Del Pharmaceuticals while the FTC was pursuing its investigation of the company,

substantiated a 100% kill rate for lice and their eggs on contact w/Pronto Shampoo. Those tests did not take place in a controlled laboratory setting but in a "human laboratory," i.e., in several childcare facilities by childcare workers who had been told to record periodic observations of their charges' treated scalps.

- Dr. Barnes is a respected pediatrician who has authored several books on diagnosing childhood ailments. She has no background in pharmaceutical science although she is a major shareholder in Del Pharmaceuticals. She believes that most pediatricians in the U. S. agree with her statement regarding the effectiveness of Pronto Shampoo because an informal poll of her colleagues taken at a recent national conference of pediatricians showed a marked preference for the product over all other nonprescription treatments.

- In a controlled clinical laboratory setting, Pronto Shampoo is only 65% effective in killing lice and their eggs on contact.

- Infestation is rarely controlled with one application. In most cases, Pronto Shampoo must be reapplied in seven to ten days, followed by vigorous combing with an egg-removing comb in order to control infestation.

- In most cases, the most effective treatment to prevent reinfestation is application of a prescription medication containing a pesticide because pesticide residue remains on the scalp for several weeks and stays active during that period.

- Only 2 % of consumers who have purchased Pronto Shampoo have returned the unused portion of the product seeking a refund. None of these consumers has received a refund as their returns did not include the box in which the shampoo was shipped to them and it is the box that contains the bar code. According to the company, the bar code is a necessary piece of information for recordkeeping and refund purposes.

Based upon its investigation, the FTC plans to issue a complaint against Del Pharmaceuticals and Dr. Barnes.

(1) Give the statutory basis for the FTC's complaint and analyze each element of the FTC's case in light of the facts given, making sure to reference, where appropriate, relevant materials assigned and/or discussed in class.

(2) Assume that the FTC makes a final determination that Del Pharmaceuticals and Dr. Barnes have violated the FTC Act. What remedies should the FTC include in its final order against the company and the pediatrician? Explain your reason for including each specific remedy.

Draft your response in no more than five typewritten, double-spaced pages, using 12 pt. font. Be sure to include your exam number of each page of your response.