

USDC SCAN INDEX SHEET



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3:05-CV-02229 KOCH V. GATEWAY  
\*25\*  
\*ANS.\*

**ORIGINAL**

**FILED**

**06 MAY 30 PM 3:25**

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11  
12 KIM KOCH, MALIK AKRAM,  
13 KHOLA HERBERT, DAVID W.  
14 MAHY, SHERYL DEMARCO  
15 GREGORIUS, JAMES PERKINS,  
16 JULIE LENZ, AND DUSTY K.  
17 BROWER, on behalf of themselves and  
18 all others similarly situated,

19 Plaintiffs,

20 vs.

21 GATEWAY, INC., a Delaware  
22 corporation,

23 Defendant.

CASE NO. 05CV2229 W AJB

**DEFENDANT'S ANSWER TO THE  
SECOND AMENDED COMPLAINT**

25 #14

1 TO THE COURT AND ALL PARTIES HEREIN,  
2 Defendant Gateway, Inc. ("Defendant") for itself alone, and for no other  
3 defendant, answering the Second Amended Complaint dated May 12, 2006  
4 ("Complaint"), pleads as follows:

5 1. Answering paragraph 1, Defendant admits that this Court has  
6 jurisdiction over this action. Other than specifically admitted, Defendant denies,  
7 generally and specifically, each and every allegation therein.

8 2. Answering paragraph 2, Defendant admits that this Court has  
9 jurisdiction over this action, and that it is headquartered in Irvine, California. Other  
10 than specifically admitted, Defendant denies, generally and specifically, each and  
11 every allegation therein.

12 3. Answering paragraph 3, Defendant admits that venue is proper in this  
13 district.

14 4. Answering paragraph 4, Defendant admits that this action purports to  
15 be a class action and that it markets GTW series televisions. Other than specifically  
16 admitted, Defendant denies, generally and specifically, each and every allegation  
17 therein.

18 5. Answering paragraph 5, Defendant denies, generally and specifically,  
19 each and every allegation therein.

20 6. Answering paragraph 6, Defendant denies, generally and specifically,  
21 each and every allegation therein.

22 7. Answering paragraph 7, Defendant denies, generally and specifically,  
23 each and every allegation therein.

24 8. Answering paragraph 8, Defendant denies, generally and specifically,  
25 each and every allegation therein.

26 9. Answering paragraph 9, Defendant lacks sufficient information or  
27 belief to enable it to answer the allegations of the paragraph and, on that basis,  
28 denies, generally and specifically, each and every allegation contained therein.

1           10. Answering paragraph 10, Defendant lacks sufficient information or  
2 belief to enable it to answer the allegations of the paragraph and, on that basis,  
3 denies, generally and specifically, each and every allegation contained therein.

4           11. Answering paragraph 11, Defendant lacks sufficient information or  
5 belief to enable it to answer the allegations of the paragraph and, on that basis,  
6 denies, generally and specifically, each and every allegation contained therein.

7           12. Answering paragraph 12, Defendant lacks sufficient information or  
8 belief to enable it to answer the allegations of the paragraph and, on that basis,  
9 denies, generally and specifically, each and every allegation contained therein.

10           13. Answering paragraph 13, Defendant lacks sufficient information or  
11 belief to enable it to answer the allegations of the paragraph and, on that basis,  
12 denies, generally and specifically, each and every allegation contained therein.

13           14. Answering paragraph 14, Defendant lacks sufficient information or  
14 belief to enable it to answer the allegations of the paragraph and, on that basis,  
15 denies, generally and specifically, each and every allegation contained therein.

16           15. Answering paragraph 15, Defendant lacks sufficient information or  
17 belief to enable it to answer the allegations of the paragraph and, on that basis,  
18 denies, generally and specifically, each and every allegation contained therein.

19           16. Answering paragraph 16, Defendant lacks sufficient information or  
20 belief to enable it to answer the allegations of the paragraph and, on that basis,  
21 denies, generally and specifically, each and every allegation contained therein.

22           17. Answering paragraph 17, Defendant lacks sufficient information or  
23 belief to enable it to answer the allegations of the paragraph and, on that basis,  
24 denies, generally and specifically, each and every allegation contained therein.

25           18. Answering paragraph 18, Defendant lacks sufficient information or  
26 belief to enable it to answer the allegations of the paragraph and, on that basis,  
27 denies, generally and specifically, each and every allegation contained therein.  
28

1           19. Answering paragraph 19, Defendant lacks sufficient information or  
2 belief to enable it to answer the allegations of the paragraph and, on that basis,  
3 denies, generally and specifically, each and every allegation contained therein.

4           20. Answering paragraph 20, Defendant lacks sufficient information or  
5 belief to enable it to answer the allegations of the paragraph and, on that basis,  
6 denies, generally and specifically, each and every allegation contained therein.

7           21. Answering paragraph 21, Defendant lacks sufficient information or  
8 belief to enable it to answer the allegations of the paragraph and, on that basis,  
9 denies, generally and specifically, each and every allegation contained therein.

10          22. Answering paragraph 22, Defendant lacks sufficient information or  
11 belief to enable it to answer the allegations of the paragraph and, on that basis,  
12 denies, generally and specifically, each and every allegation contained therein.

13          23. Answering paragraph 23, Defendant lacks sufficient information or  
14 belief to enable it to answer the allegations of the paragraph and, on that basis,  
15 denies, generally and specifically, each and every allegation contained therein.

16          24. Answering paragraph 24, Defendant lacks sufficient information or  
17 belief to enable it to answer the allegations of the paragraph and, on that basis,  
18 denies, generally and specifically, each and every allegation contained therein.

19          25. Answering paragraph 25, Defendant denies, generally and specifically,  
20 each and every allegation contained therein.

21          26. Answering paragraph 26, Defendant admits that it is a Delaware  
22 corporation with offices in Irvine, California. Other than as specifically admitted,  
23 Defendant lacks sufficient information or belief to enable it to answer the allegations  
24 of the paragraph and, on that basis, denies, generally and specifically, each and  
25 every allegation contained therein. Defendant denies, generally and specifically,  
26 that any of its products are defective.

27          27. Answering paragraph 27, Defendant admits that it sells its products in a  
28 variety of ways, that it has a website and that it is headquartered in Irvine,

1 California. Other than as specifically admitted, Defendant lacks sufficient  
2 information or belief to enable it to answer the allegations of the paragraph and, on  
3 that basis, denies, generally and specifically, each and every allegation contained  
4 therein.

5 28. Answering paragraph 28, Defendant lacks sufficient information or  
6 belief to enable it to answer the allegations of the paragraph and, on that basis,  
7 denies, generally and specifically, each and every allegation contained therein.

8 29. Answering paragraph 29, Defendant admits that plaintiffs seek to bring  
9 a class action; other than specifically admitted, Defendant lacks sufficient  
10 information or belief to enable it to answer the allegations of the paragraph and, on  
11 that basis, denies, generally and specifically, each and every allegation contained  
12 therein.

13 30. Answering paragraph 30, Defendant lacks sufficient information or  
14 belief to enable it to answer the allegations of the paragraph and, on that basis,  
15 denies, generally and specifically, each and every allegation contained therein.

16 31. Answering paragraph 31, Defendant lacks sufficient information or  
17 belief to enable it to answer the allegations of the paragraph and, on that basis,  
18 denies, generally and specifically, each and every allegation contained therein.  
19 Defendant expressly denies that plaintiffs are entitled to any remedy.

20 32. Answering paragraph 32, Defendant denies, generally and specifically,  
21 each and every allegation contained therein.

22 33. Answering paragraph 33, Defendant denies, generally and specifically,  
23 each and every allegation contained therein.

24 34. Answering paragraph 34, Defendant denies, generally and specifically,  
25 each and every allegation contained therein.

26 35. Answering paragraph 35, Defendant denies, generally and specifically,  
27 each and every allegation contained therein.

28

1           36. Answering paragraph 36, Defendant denies, generally and specifically,  
2 each and every allegation contained therein.

3           37. Answering paragraph 37, Defendant lacks sufficient information or  
4 belief to enable it to answer the allegations of the paragraph and, on that basis,  
5 denies, generally and specifically, each and every allegation contained therein.

6           38. Answering paragraph 38, Defendant lacks sufficient information or  
7 belief to enable it to answer the allegations of the paragraph and, on that basis,  
8 denies, generally and specifically, each and every allegation contained therein.

9           39. Answering paragraph 39, Defendant lacks sufficient information or  
10 belief to enable it to answer the allegations of the paragraph and, on that basis,  
11 denies, generally and specifically, each and every allegation contained therein.

12           40. Answering paragraph 40, Defendant denies, generally and specifically,  
13 each and every allegation contained therein.

14           41. Answering paragraph 41, Defendant lacks sufficient information or  
15 belief to enable it to answer the allegations of the paragraph and, on that basis,  
16 denies, generally and specifically, each and every allegation contained therein.

17           42. Answering paragraph 42, Defendant denies, generally and specifically,  
18 each and every allegation contained therein.

19           43. Answering paragraph 43, Defendant denies, generally and specifically,  
20 each and every allegation contained therein.

21           44. Answering paragraph 44, Defendant lacks sufficient information or  
22 belief to enable it to answer the allegations of the paragraph and, on that basis,  
23 denies, generally and specifically, each and every allegation contained therein.

24           45. Answering paragraph 45, Defendant denies, generally and specifically,  
25 each and every allegation contained therein.

26           46. Answering paragraph 46, Defendant denies, generally and specifically,  
27 each and every allegation contained therein.

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1           47. Answering paragraph 47, Defendant denies, generally and specifically,  
2 each and every allegation contained therein.

3           48. Answering paragraph 48, Defendant denies, generally and specifically,  
4 each and every allegation contained therein.

5           49. Answering paragraph 49, Defendant lacks sufficient information or  
6 belief to enable it to answer the allegations of the paragraph and, on that basis,  
7 denies, generally and specifically, each and every allegation contained therein.

8           50. Answering paragraph 50, Defendant lacks sufficient information or  
9 belief to enable it to answer the allegations of the paragraph and, on that basis,  
10 denies, generally and specifically, each and every allegation contained therein.

11           51. Answering paragraph 51, Defendant lacks sufficient information or  
12 belief to enable it to answer the allegations of the paragraph and, on that basis,  
13 denies, generally and specifically, each and every allegation contained therein.

14           52. Answering paragraph 52, Defendant denies, generally and specifically,  
15 each and every allegation contained therein.

16           53. Answering paragraph 53, Defendant admit that plaintiffs sent a notice;  
17 other than as specifically admitted herein, Defendant denies, generally and  
18 specifically, each and every allegation contained therein.

19           54. Answering paragraph 54, Defendant denies, generally and specifically,  
20 each and every allegation contained therein.

21           55. Answering paragraph 55, Defendant denies, generally and specifically,  
22 each and every allegation contained therein.

23           56. Answering paragraph 56, Defendant denies, generally and specifically,  
24 each and every allegation contained therein.

25           57. Answering paragraph 57, Defendant denies, generally and specifically,  
26 each and every allegation contained therein.

27           58. Answering paragraph 58, Defendant hereby incorporates its responses  
28 to paragraphs 1-57 above.



1           59. Answering paragraph 59, Defendant admits that this cause of action  
2 purports to be brought pursuant to the California Consumers Legal Remedies Act.

3           60. Answering paragraph 60, Defendant denies, generally and specifically,  
4 each and every allegation contained therein.

5           61. Answering paragraph 61, Defendant admits that plaintiffs purported to  
6 serve it with a notice; other than as specifically admitted herein, Defendant denies,  
7 generally and specifically, each and every allegation contained therein.

8           62. Answering paragraph 62, Defendant responds that the Complaint  
9 speaks for itself; other than as specifically admitted herein, Defendant denies,  
10 generally and specifically, each and every allegation contained therein.

11           63. Answering paragraph 63, Defendant hereby incorporates its responses  
12 to paragraphs 1-62.

13           64. Answering paragraph 64, Defendant denies, generally and specifically,  
14 each and every allegation contained therein.

15           65. Answering paragraph 65, Defendant denies, generally and specifically,  
16 each and every allegation contained therein.

17           66. Answering paragraph 66, Defendant denies, generally and specifically,  
18 each and every allegation contained therein.

19           67. Answering paragraph 67, Defendant denies, generally and specifically,  
20 each and every allegation contained therein.

21           68. Answering paragraph 68, Defendant denies, generally and specifically,  
22 each and every allegation contained therein.

23           69. Answering paragraph 69, Defendant denies, generally and specifically,  
24 each and every allegation contained therein.

25           70. Answering paragraph 70, Defendant denies, generally and specifically,  
26 each and every allegation contained therein.

27           71. Answering paragraph 71, Defendant denies, generally and specifically,  
28 each and every allegation contained therein.

1           72. Answering paragraph 72, Defendant denies, generally and specifically,  
2 each and every allegation contained therein.

3           73. Answering paragraph 73, Defendant denies, generally and specifically,  
4 each and every allegation contained therein.

5           74. Answering paragraph 74, Defendant denies, generally and specifically,  
6 each and every allegation contained therein.

7           75. Answering paragraph 75, Defendant denies, generally and specifically,  
8 each and every allegation contained therein. Defendant further denies that plaintiffs  
9 are entitled to any remedy.

10          76. Answering paragraph 76, Defendant denies, generally and specifically,  
11 each and every allegation contained therein. Defendant further denies that plaintiffs  
12 are entitled to any remedy.

13          77. Answering paragraph 77, Defendant hereby incorporates its responses  
14 to paragraphs 1-76.

15          78. Answering paragraph 78, Defendant responds that the statute speaks for  
16 itself.

17          79. Answering paragraph 79, Defendant denies, generally and specifically,  
18 each and every allegation contained therein.

19          80. Answering paragraph 80, Defendant denies, generally and specifically,  
20 each and every allegation contained therein.

21          81. Answering paragraph 81, Defendant denies, generally and specifically,  
22 each and every allegation contained therein.

23          82. Answering paragraph 82, Defendant denies, generally and specifically,  
24 each and every allegation contained therein.

25          83. Answering paragraph 83, Defendant denies, generally and specifically,  
26 each and every allegation contained therein.

27          84. Answering paragraph 84, Defendant denies, generally and specifically,  
28 each and every allegation contained therein.

1           85. Answering paragraph 85, Defendant denies, generally and specifically,  
2 each and every allegation contained therein.

3           86. Answering paragraph 86, Defendant denies, generally and specifically,  
4 each and every allegation contained therein.

5           87. Answering paragraph 87, Defendant denies, generally and specifically,  
6 each and every allegation contained therein.

7           88. Answering paragraph 88, Defendant denies, generally and specifically,  
8 each and every allegation contained therein.

9           89. Answering paragraph 89, Defendant denies, generally and specifically,  
10 each and every allegation contained therein. Defendant also denies that plaintiffs  
11 are entitled to any remedy.

12           90. Answering paragraph 90, Defendant denies, generally and specifically,  
13 each and every allegation contained therein. Defendant also denies that plaintiffs  
14 are entitled to any remedy.

15           91. Answering paragraph 91, Defendant hereby incorporates its responses  
16 to paragraphs 1-90.

17           92. Answering paragraph 92, Defendant denies, generally and specifically,  
18 each and every allegation contained therein.

19           93. Answering paragraph 93, Defendant responds that the U.C.C. speaks  
20 for itself.

21           94. Answering paragraph 94, Defendant responds that the U.C.C. speaks  
22 for itself.

23           95. Answering paragraph 95, Defendant lacks sufficient information or  
24 belief to enable it to answer the allegations of the paragraph and, on that basis,  
25 denies, generally and specifically, each and every allegation contained therein.

26           96. Answering paragraph 96, Defendant denies, generally and specifically,  
27 each and every allegation contained therein.

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1           97. Answering paragraph 97, Defendant lacks sufficient information or  
2 belief to enable it to answer the allegations of the paragraph and, on that basis,  
3 denies, generally and specifically, each and every allegation contained therein.

4           98. Answering paragraph 98, Defendant lacks sufficient information or  
5 belief to enable it to answer the allegations of the paragraph and, on that basis,  
6 denies, generally and specifically, each and every allegation contained therein.

7           99. Answering paragraph 99, Defendant denies, generally and specifically,  
8 each and every allegation contained therein. Defendant also denies that plaintiffs  
9 are entitled to any remedy.

10          100. Answering paragraph 100, Defendant denies, generally and  
11 specifically, each and every allegation contained therein.

12          101. Answering paragraph 101, Defendant denies, generally and  
13 specifically, each and every allegation contained therein.

14          102. Answering paragraph 102, Defendant denies, generally and  
15 specifically, each and every allegation contained therein.

16          103. Answering paragraph 103, Defendant denies, generally and  
17 specifically, each and every allegation contained therein.

18          104. Answering paragraph 104, Defendant incorporates its responses to  
19 paragraphs 1-103.

20          105. Answering paragraph 105, Defendant lacks sufficient information or  
21 belief to answer the allegations of the paragraph concerning plaintiffs' and class  
22 members' status. Otherwise, Defendant denies, generally and specifically, each and  
23 every allegation contained therein.

24          106. Answering paragraph 106, Defendant responds that the statute speaks  
25 for itself.

26          107. Answering paragraph 107, Defendant denies, generally and  
27 specifically, each and every allegation contained therein.

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**SECOND AFFIRMATIVE DEFENSE**

**(Lack of Standing)**

113. Plaintiffs' claims are barred, in whole or in part, because plaintiffs lack standing to assert any or all of the causes of action alleged in the Complaint and lack standing to recover on behalf of the purported class and/or the general public.

**THIRD AFFIRMATIVE DEFENSE**

**(Arbitration)**

114. Any claim brought on behalf of purchasers of Defendant's products is subject to a written agreement to arbitrate all disputes with Defendant.

**FOURTH AFFIRMATIVE DEFENSE**

**(Adequacy of Remedy at Law)**

115. The injury or damage suffered by plaintiffs, if any exists, would be adequately compensated in an action at law for damages. Accordingly, plaintiffs have a complete and adequate remedy at law and is not entitled to seek equitable relief.

**FIFTH AFFIRMATIVE DEFENSE**

**(Limitation of Remedies)**

116. Plaintiffs' and purported class members' remedies pursuant to applicable warranty agreements are the exclusive remedies available. Accordingly, all of plaintiffs' and/or class members' causes of action herein are barred.

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**SIXTH AFFIRMATIVE DEFENSE**

**(Equitable Defenses)**

117. The Complaint, and the purported causes of action alleged therein, is barred by the equitable doctrines of estoppel, waiver, laches and/or unclean hands.

**SEVENTH AFFIRMATIVE DEFENSE**

**(Failure to Mitigate Damages)**

118. Plaintiffs and/or purported class members have failed to take reasonable, necessary, appropriate and feasible steps to mitigate their alleged damages, and to the extent of such failure to mitigate, plaintiffs and/or purported class members should be barred from recovering some or all of the alleged damages they seek.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Waiver and Release)**

119. The Complaint, and the purported causes of action alleged therein, are barred to the extent plaintiffs and/or purported class members have waived, released, relinquished or abandoned any claim for relief against Defendant with respect to the matters which are the subject of the Complaint.

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**NINTH AFFIRMATIVE DEFENSE**

**(Comparative Fault)**

120. Defendant is informed and believes and thereupon alleges that if plaintiffs suffered or sustained any loss, damage or injury as alleged in the Complaint, such loss, damage, or injury was the direct and proximate result of the acts and omissions of plaintiffs or of other persons or entities for whom Defendant is not legally responsible.

**TENTH AFFIRMATIVE DEFENSE**

**(Misuse of Product)**

121. Defendant is informed and believes and thereupon alleges that if plaintiffs and/or purported class members suffered or sustained any loss, damage or injury as alleged in the Complaint, such loss, damage, or injury was the direct and proximate result of the unforeseeable misuse of the products at issue, by plaintiffs, purported class members and/or other parties.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Improper Venue)**

122. Although, Defendant does not presently contest venue, it expressly reserves the right to assert that venue in this judicial district is improper as to plaintiffs and/or members of the putative class whose claims are subject to valid forum selection clauses.



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**TWELFTH AFFIRMATIVE DEFENSE**

**(Defendant's Practices Not Misleading)**

123. Any statements made by Defendant were truthful and accurate and were not likely to mislead plaintiffs, the purported class members or the general public.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Defendant's Practices Not Unlawful)**

124. Defendant alleges that, to the extent plaintiffs prove Defendant conducted any of the activities alleged in the Complaint, those activities conformed with and were pursuant to any and all applicable statutes and regulations and were not unlawful.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(No Injury Or Damage)**

125. Defendant denies that plaintiffs and/or any purported class members have suffered any injury or damage whatsoever, and further denies it is liable to plaintiffs and/or to any purported class member for any of the injury or damage claimed or for any injury or damage whatsoever.

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**FIFTEENTH AFFIRMATIVE DEFENSE**

**(Alleged Injury or Damage Caused by Others)**

126. To the extent plaintiffs and/or the purported class members suffered injury or damage, which Defendant denies, such injury or damage was caused by the actions or conduct of others, not of Defendant.

**SIXTEENTH AFFIRMATIVE DEFENSE**

**(No Causation)**

127. To the extent plaintiffs and/or the purported class members suffered injury or damage, which Defendant denies, such injury or damage was not proximately caused by any conduct or inaction of Defendant, or was not foreseeable, or both.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

**(Ratification)**

128. The alleged causes of action are barred, in whole or in part, because of ratification, agreement, assent, acquiescence or consent to Defendant's alleged conduct.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

**(Justified and Privileged Conduct)**

129. The alleged causes of action are barred because Defendant's conduct was at all times justified and privileged, and did not result in any wrongful benefit or unjust enrichment to Defendant.

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**NINETEENTH AFFIRMATIVE DEFENSE**

**(Lawful business means and objectives)**

130. The alleged causes of action are barred because Defendant employed lawful, proper and justified means to accomplish legitimate business objectives

**TWENTIETH AFFIRMATIVE DEFENSE**

**(Reasonable and Good Faith Conduct)**

131. The alleged causes of action are barred because Defendant acted reasonably and in good faith at all times material to the Complaint based on all relevant facts and circumstances known to it at the time Defendant so acted.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

**(Incompetence of Plaintiff)**

132. This action is not brought by a competent plaintiff for the benefit of the assertedly injured persons.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

**(Lack of Uniform Claims)**

133. The claims plaintiffs purport to assert do not present issues sufficiently uniform to allow representative treatment.

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**TWENTY-THIRD AFFIRMATIVE DEFENSE**  
**(Unmanageable and Inequitable Relief Requested)**

134. The alleged causes of action are barred, in whole or part, because the relief requested by plaintiffs is unmanageable and inequitable.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**  
**(Industry Standards)**

135. The alleged causes of action are barred, in whole or in part, because the alleged conduct of which plaintiffs complain comported with the prevailing business practices and standards of the industry at issue.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**  
**(Unconstitutionality)**

136. Plaintiffs' claims are violative of the Federal and California Constitutions, including, without limitation, the Federal Due Process Clause and the separation of powers embodied in the California Constitution.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**  
**(No Disgorgement)**

137. Plaintiffs and/or the purported class are not entitled to restitution or disgorgement of profits under California law interpreting Cal. Bus. & Prof. Code § 17200 et. seq. and/or Cal. Bus. & Prof. Code § 17500 et. seq.

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**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

**(First Amendment)**

138. The statements against which plaintiffs' claims are directed are constitutionally protected by the First Amendment to the United States Constitution and by Article 1, Section 2 of the California Constitution.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

**(Indemnity)**

139. If Defendant is found in some manner responsible to plaintiffs and/or the purported class for the matters alleged in the Complaint, any such injury, damage, or other costs were proximately caused and contributed to by the negligence, fault, acts or omissions of other individuals or entities for whose conduct Defendant is not responsible. By reason of the foregoing, Defendant requests a court declaration of its right to be indemnified and held harmless by such persons or entities.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

**(Non-Actionable Opinion)**

140. Although Defendant does not admit to engaging in any conduct alleged in the Complaint, to the extent any conduct by Defendant could be construed as relating to matters alleged in the Complaint, that conduct, including the statements and/or representations described in the Complaint, is not actionable because such statements and/or representations contain statements of opinion, not fact.

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**THIRTIETH AFFIRMATIVE DEFENSE**

**(Puffing)**

141. Although Defendant does not admit to engaging in any conduct alleged in the Complaint, to the extent any conduct by Defendant could be construed as relating to matters alleged in the Complaint, that conduct, including the statements and/or representations described in the Complaint, is not actionable because the alleged deceptive statements were such that no reasonable consumer could have reasonably relied on or understood Defendant's statements to be claims of fact.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

**(Uncertainty)**

142. The Complaint and the allegations thereof are uncertain.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

**(Bona Fide Error)**

143. The claims asserted by plaintiffs are barred because, although Defendant denies each and every claim of plaintiffs and denies that Defendant engaged in wrongdoing or error of any kind, any alleged error on Defendant's part was unintentional and resulted from a bona fide error notwithstanding Defendant's use of reasonable procedures adopted to avoid any such error.

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**THIRTY-THIRD AFFIRMATIVE DEFENSE**

**(Attorney's Fees)**

144. To the extent that plaintiffs seeks recovery of attorney's fees, such fees are not recoverable.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

**(Statute of Limitations)**

145. The Complaint, and the purported causes of action alleged therein, are barred by the applicable statutes of limitation, including, without limitation, Code of Civil Procedure Sections 337, 338(d), 340 and 343, and Business and Professions Code Sections 17208 and 17535.

**THIRTY-FIFTH AFFIRMATIVE DEFENSE**

**(Failure to Follow Statutory Requirements)**

146. The Complaint, and the purported causes of action alleged therein, are barred by the plaintiffs' failure to follow the procedural requirements of the statutes under which they purport to bring their claims.

WHEREFORE, Defendant prays for a judgment as follows:

1. That plaintiffs take nothing by reason of the Complaint;
2. That judgment be entered in favor of Defendant and against plaintiffs;
3. That the Complaint be dismissed with prejudice;
4. That Defendant be awarded its costs of suit, including reasonable attorneys' fees; and

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5. For such other relief as this Court deems just and proper.

DATED: May 30, 2006

QUINN EMANUEL URQUHART OLIVER &  
HEDGES, LLP

By  \_\_\_\_\_  
Stan Karas  
Attorneys for GATEWAY, INC.



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**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017-2543.

On May 30, 2006, I served true copies of the following document(s) described as **DEFENDANT'S ANSWER TO THE SECOND AMENDED COMPLAINT**, on the parties in this action as follows:

**SEE ATTACHED LIST**

**BY MAIL:** I enclosed the foregoing into sealed envelope(s) addressed as shown above, and I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

**BY FEDEX:** I deposited such document(s) in a box or other facility regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by FedEx to receive documents, in sealed envelope(s) or package(s) designed by FedEx with delivery fees paid or provided for, addressed to the person(s) being served.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 30, 2006, at Los Angeles, California.

  
\_\_\_\_\_  
**OLGA ROSTOVTSEV**

**SERVICE LIST**

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Anton N. Handal  
Pamela C. Chalk

Counsel for Plaintiffs

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Anas A. Akel

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