



October 19, 2011

Federal Trade Commission,  
Office of the Secretary  
Room H-113 (Annex D), 600  
Pennsylvania Avenue, NW  
Washington, DC 20580

Submitted Online (10/19/2011)

**Re: OPPOSE unless withdrawn and amended:  
Proposed Consent Agreement In the Matter of Phusion Projects, LLC; Jaisen Freeman;  
Christopher Hunter; and Jeffrey Wright; FTC File No. 112 3084**

Dear Commissioners:

Alcohol Justice (formerly Marin Institute) is a nonprofit organization fighting to protect the public from the impact of the alcohol industry's negative practices. For many years Alcohol Justice has been a leader in the national effort to properly regulate flavored malt beverages, also known as alcopops. Our 2007 groundbreaking report, *Alcohol, Energy Drinks, and Youth: A Dangerous Mix*, furthered the campaign that ultimately led to the FDA and FTC joint action on alcoholic energy drinks in November 2010. We also sounded the first alarms about current problems related to the supersized alcopops that remain in the wake of producers reformulating their alcopop products without caffeine.

### **Agreement with FTC's Finding and Allegations**

While we applaud the FTC investigation into deceptive marketing practices by Phusion Projects, we also have serious concerns regarding the proposed consent order. We are especially pleased that FTC acknowledges both the implied and explicit representations made by Phusion Projects regarding the nature and use of its product, and agree with the following findings and/or allegations:

- Phusion Projects represented in its marketing materials that a 23.5 oz can of 12% ABV of Four Loko contains the alcohol equivalent of one or two regular, 12 oz beers and could safely be consumed in its entirety on a single occasion.
- Such claims are false or misleading because a 23.5 oz can of 11% ABV Four Loko contains alcohol equivalent to 4.3 regular beers and a 23.5 oz can of 12% ABV Four Loko contains alcohol equivalent to 4.7 regular beers.
- Phusion Projects' failure to disclose the actual amount of alcohol contained in its drinks "was deceptive, in light of their representation that a can of Four Loko contained a single serving."

24 Belvedere Street, San Rafael, CA 94901-4817 • t 415-456-5692 • f 415-456-0491

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- An individual cannot safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion because it contains the equivalent of 4.3 or 4.7 regular beers, and “consuming a single can of Four Loko on a single occasion constitutes binge drinking.”
- Phusion Projects’ marketing and packaging practices encourage consumption of its products in a manner that increases the risks of binge drinking.
- Such excessive drinking typically raises a person’s blood alcohol concentration to 0.08 percent or more and “typically results in acute intoxication that can be harmful for a variety of reasons.”
- These marketing and packaging practices by Phusion Projects “constitute unfair or deceptive acts or practices, and the making of false advertisements, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.”

### **Concerns Regarding Serving Size Levels**

Given the gravity of these allegations, we are disappointed with the FTC’s proposed solution to Phusion Projects’ pattern of deceptive marketing. The agreement sets forth labeling and container requirements but exempts Phusion varieties that contain less than the alcohol contained in 2.5 beers, thus giving the false impression that 2.5 beers is an acceptable amount of alcohol to consume in one sitting. We disagree with this new single-serving drink size standard that FTC appears to be endorsing.

Such a standard defies current federal government drinking guidelines and public health research. The Dietary Guidelines for Americans recommend no more than 2 drinks per day for men and one per day for women. Decades of research—much of it funded by federal agencies—continues to show that consuming more than these recommended amounts can lead to serious adverse health and safety outcomes. The FTC itself favorably referenced these moderate drinking guidelines in its 2008 comments submitted to the U.S. Alcohol and Tobacco Tax and Trade Bureau regarding drink size labeling.

Moreover, these relatively new products warrant especially conservative drink size standards given their particular characteristics and youth appeal. With all the added sugar and flavors masking the flavor of alcohol, a drinkers’ ability to self-regulate intake is markedly inhibited.

### **Concerns Regarding Labeling Requirement and Resealable Containers**

The proposed consent order requires Phusion Projects to label its products with the number of alcohol servings. The idea that FTC considers this a viable solution to the company’s pattern of deceptive marketing is baffling for a number of reasons:

1. There is zero scientific evidence that such labeling will be effective. At the very minimum, the FTC should conduct scientific research to determine whether this labeling is actually effective before requiring this type of labeling.
2. The labeling will not ameliorate the similarities in design, marketing, and price between Phusion Project products and youth-oriented, nonalcoholic beverages such as energy drinks that are often sold right next to each other in convenience store coolers.

3. Given the low price points of these products, such labels will make it easier for youth to calculate how to get the most alcohol for the least money, based on alcohol content. There are numerous smart phone apps to help underage consumers shop for the most ethyl alcohol for the price.
4. It's quite possible that such labeling will backfire with this particular consumer base and serve as a marketing device, as opposed to a warning.
5. The labeling will not improve or prevent the dangerous effects of consuming 4.7 drinks in one sitting, which an individual will still be able (and likely) to do with this product.
6. Such labeling does nothing to address the fundamental implied deceptive practice alleged in the FTC complaint: **The high alcohol content in the large single-serving container is itself deceptive.**

Similarly, the FTC's proposed requirement that Phusion Projects products come in resealable containers is based neither on science nor common sense. We have no evidence that making the can resealable (which is not even specifically defined in the agreement) will discourage drinking the entire container at one time. These are not containers of milk or juice that drinkers put back in the fridge after pouring a glass. To the contrary, these are products sold largely from coolers in convenience stores, intended for immediate consumption, just like a can of Coke or Red Bull. It's absurd to even imagine how a cap will deter youth from drinking an entire container at once. Again, without conducting any research, such a remedy seems wildly premature.

### **Concerns Regarding Industry-Wide Impacts and State-level Actions**

Alcohol Justice is deeply concerned about the broader implications of this consent order. Will this new "FTC-approved" container now become the industry standard? How will other companies making similar products respond? FTC appears to have given the entire industry the green light for large, single-serving containers with high alcohol content, as long as the cans are labeled and resealable. This cannot be the outcome FTC has in mind, yet it is entirely conceivable.

Moreover, the political implications at the state levels are deeply troubling. Several states are considering regulation, including legislation based on our model bill, to require that alcoholic products sold in single serve containers be limited to 12 oz. containers with 6% ABV. With this consent order, Phusion Projects and the rest of the industry can claim "problem solved" with FTC approval. On a practical level, such weak federal action can do serious damage to state regulatory efforts nationwide.

Worse than taking no action at all, with this consent order, FTC is potentially undermining public safety and health. We respectfully request that FTC withdraw this agreement based on lack of science, as well as lack of support from the public health community, and propose a more effective solution to the problems detailed above.

Sincerely,

Bruce Lee Livingston, MPP  
Executive Director/CEO

Sarah Mart, MS, MPH  
Director of Research