**IN THE MATTER OF**

# APPLE INC.

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

*Docket No. C-4444; File No. 112 3108*
*Complaint, March 25, 2014 – Decision, March 25, 2014*

This consent order addresses Apple Inc.'s billing for charges incurred by children in apps that are likely to be used by children without having obtained the account holders' express informed consent. The complaint alleges that Apple offers thousands of apps, including games that children are likely to play, and that in many instances, children can obtain virtual items within a game app that cost money. The complaint further alleges that, Apple often fails to obtain parents' informed consent to charges incurred by children, which constitutes an unfair practice under Section 5 of the FTC Act. The consent order requires Apple to obtain express, informed consent to in-app charges before billing for such charges, and to allow consumers to revoke consent to prospective in-app charges at any time. The order also requires Apple to provide full refunds to Apple account holders who have been billed by Apple for unauthorized in-app charges incurred by minors. Apple will refund no less than $32.5 million for these in-app charges in the year following entry of the order, and if such refunds total less than $32.5 million, Apple will remit any remaining balance to the Commission to be used for informational remedies, further redress, or payment to the U.S. Treasury as equitable disgorgement.

## *Participants*

For the *Commission*: *Jason Adler, Duane Pozza*, and *Miya Rahamim.*

For the *Respondent*: *Richard Cunningham, Sean Royall*, and *Robert Walters, Gibson Dunn*; and *Emily Blumsack, Andrew Farthing, Noreen Krall*, and *Heather Moser, in-house counsel.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Apple Inc. ("Apple" or "Respondent") has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a California corporation with its principal place of business at 1 Infinite Loop, Cupertino, California 95014.

2. Respondent has billed for charges related to activity within software applications ("apps") consumers download to their iPhone, iPod Touch, or iPad devices ("Apple mobile devices") from Respondent's app store.

3. 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 FTC Act.

## RESPONDENT'S BUSINESS PRACTICES

4. Apple offers thousands of apps for free or a specific dollar amount, including games that children are likely to play. In many instances, after installation, children can obtain virtual items within a game, many of which cost money. Apple bills charges for items that cost money within an app—"in-app charges"—to the parent. In connection with billing for children's in-app charges, Apple sometimes requests a parent's iTunes password. In many instances, Apple "caches" (that is, stores) the iTunes password for fifteen minutes after it is entered. During this process, Apple in many instances does not inform account holders that password entry will approve a charge or initiate a fifteen-minute window during which children using the app can incur charges without further action by the account holder. Through these practices, Apple often fails to obtain parents' informed consent to charges incurred by children. Since at least March 2011, tens of thousands of consumers have complained about unauthorized in-app charges by children, and many consumers have reported hundreds to thousands of dollars in such charges. Parents and other iTunes account holders therefore have suffered significant monetary injury.

### Background on Apple's App Store

5. Apple offers apps through its App Store, a digital store preloaded on Apple mobile devices. Apps provide a wide variety of mobile computing functionality, allowing users to, for example, browse the Internet, check the weather, or play games.

6. According to Apple's app developer guidelines, before it agrees to offer any app designed by a third-party developer in the App Store, it reviews the app's functionality, content, and user experience. Apple generally assigns each app it sells to at least one topical category, such as "Games" or "News." Certain categories expand into subcategories. The "Games" category, for instance, includes subcategories like "Family," "Kids," and "Strategy." Apple also groups apps by price, including the top "Free" apps and top "Paid" apps.

7. Apple charges account holders for certain user activities within some apps. These in-app charges generally range from $0.99 to $99.99 and can be incurred in unlimited amounts. In many instances, the apps containing in-app charges are games that children are likely to play.

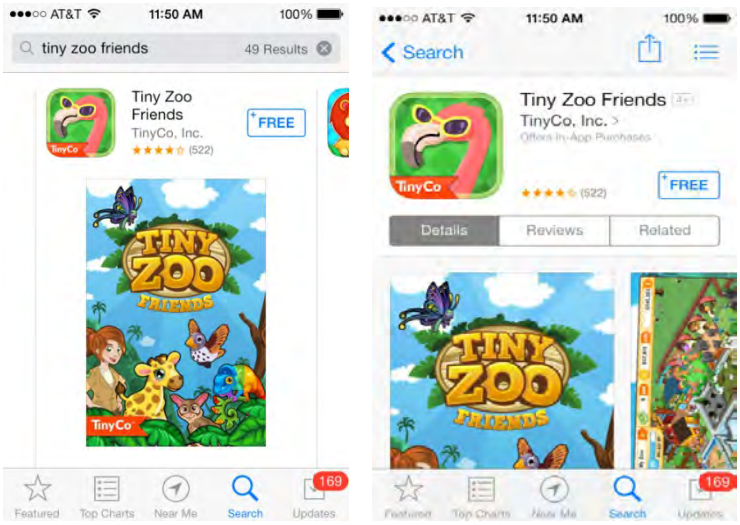
8. Before consumers can install any app, Apple requires that consumers link their Apple mobile device to an iTunes account, funded by a credit card, PayPal account, gift certificates, prepaid cards, or allowance credits. Apple bills consumers' iTunes accounts for App Store transactions and in-app charges, and retains thirty percent of all revenue. According to Apple's stated policy, all App Store transactions (including in-app charges) are final.

**Installing an App from Apple's App Store**

9. To install an app, a parent or other account holder must first locate it by searching for the app by keyword (*e.g.*, the name of the app) or by browsing the various categories and subcategories within the App Store. If an account holder searches for an app by keyword, the search results display as scrollable tiles (referred to herein as "Search Tiles"). If an account holder finds an app listed in a category or subcategory, he or she can click on the name of the app to access additional information (displayed on an "Info" page).

10. Each Search Tile and Info page contains a button (the "Price Button") labeled with the price of the app: either "FREE" or a specific dollar amount. Clicking on the Price Button—on either the Search Tile or the Info page—will begin the app

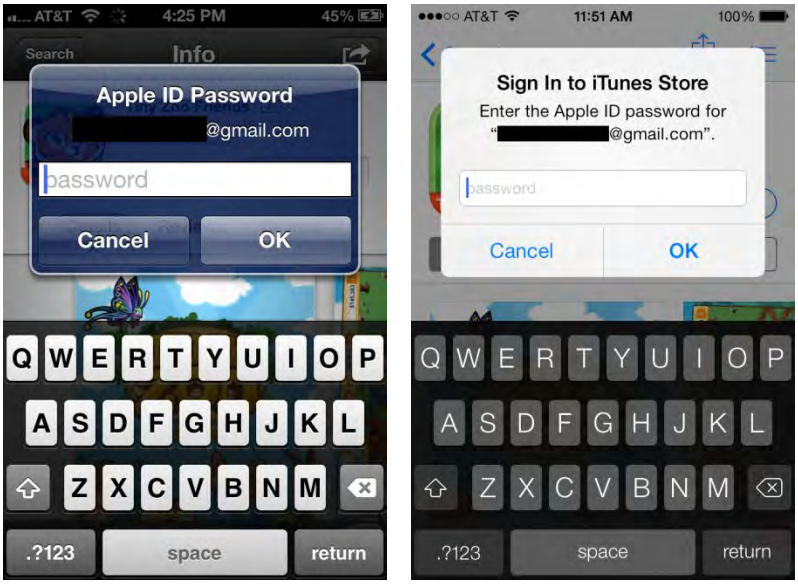
installation process. A sample Search Tile (on the left) and Info page (on the right) appear below.




As pictured above, Apple displays the words "Offers In-App Purchases" in small print on the Info pages (not the Search Tiles) of apps with in-app charges. Prior to spring 2013, Apple did not display that language. Neither the Search Tile nor the Info Page explain what "In-App Purchases" are (including that they cost real money or how much) or that entering the iTunes password within the app will approve a charge and initiate a fifteen-minute window during which children can incur charges without further action by the account holder.

11. To initiate app installation, the account holder must press the Price Button on the app's Search Tile or Info page. When pressed, the Price Button changes so that it displays the word "INSTALL" instead of the price. If pressed again, the app installation process begins.

12. Next, Apple prompts account holders for their iTunes account password before installation proceeds. This prompt (the "Password Prompt") is the same or similar to the ones depicted below.




The Password Prompt does not contain any information about in-app charges. Once the account holder enters the iTunes account password and presses "OK," the app is installed on the device.

13. As described in paragraph 4, Apple often caches the iTunes password for fifteen minutes after it is entered. During this fifteen-minute window, Apple does not display the Password Prompt again.

**Incurring In-App Charges**

14. After an account holder installs an app, a user can incur in-app charges. In many instances—particularly for apps that children are likely to play and that are, for example, rated as appropriate for four-year-olds—these users are children. In many instances, parents have complained that their children could not or did not understand that their activities while playing the app could result in charges that cost real money.

15. When a user engages in an activity associated with an in-app charge (*e.g.*, clicking on a button to acquire virtual treats for use in a game), Apple displays a popup containing information about the virtual item and the amount of the charge (the "Charge

Popup"). A child, however, can clear the Charge Popup simply by pressing a "Buy" button.

16. In many instances, during the fifteen-minute window following installation of an app (as described in paragraph 13 above), Apple has not displayed a Password Prompt for any in-app charges. This has allowed children to incur in-app charges simply by pressing the "Buy" button on each Charge Popup displayed during that fifteen-minute period. Regardless of the number or amount of charges incurred during this period, Apple has not prompted for additional password entry in these instances.

17. In many other instances, Apple displays a Password Prompt—identical to the Password Prompt displayed prior to installation of the app—after a child clears the Charge Popup. A sample Password Prompt appearing within an app is below.


The Password Prompt does not contain any information about in-app charges. Once the account holder enters the iTunes account password and presses "OK," Apple bills the in-app charge to the linked iTunes account. By default, entering the iTunes password and pressing "OK" triggers a fifteen-minute window during which Apple does not display the Password Prompt for subsequent in-app charges, allowing children to incur charges without password entry for fifteen minutes.

18. In September 2013, on devices running Apple's latest operating system, Apple reversed the order of the process described in paragraphs 15-17, displaying the Password Prompt before the Charge Popup. If the account holder enters the iTunes

password and presses "OK," Apple displays the Charge Popup. Once a user clicks "Buy" on the Charge Popup, Apple bills the in-app charge to the linked iTunes account. By default, Apple also initiates a fifteen-minute window during which it does not display the Password Prompt for subsequent in-app charges.

19. Neither the Password Prompt nor the Charge Popup explains that entering the iTunes password may approve the charge described on the Charge Popup and initiate a fifteen-minute window during which children can incur charges without further action by the account holder.

20. In many instances, Apple does not obtain an account holder's informed consent before billing for in-app charges by children. In particular, nowhere during the processes described in paragraphs 9 through 19 does Apple inform account holders that password entry—whether at installation or before incurring a particular in-app charge—triggers a window during which users can incur unlimited charges without further action by the account holder.

**Apple Bills Many Parents for Unauthorized In-App Charges Incurred by Children**

21. Many of the apps that charge for in-app activities are apps that children are likely to use. Indeed, many such apps, according to age ratings Apple uses in the App Store (4+, 9+, and 12+), are expressly described as appropriate for children. In addition to the age ratings, many apps that charge for in-app activities are listed in the "Kids" or "Family" categories in the App Store, are described or marketed as suitable for children, or are widely used by children.

22. Many of these games invite children to obtain virtual items in contexts that blur the line between what costs virtual currency and what costs real money. The app "Dragon Story," for example, is a game in which children hatch, raise, and breed virtual dragons. Children use "gold," "coins," and "food" to play the game. The game sometimes informs children that they are "low on food!" and that a dragon is "hungry," and provides a link to a screen titled "Stock Up!" The "Stock Up!" screen sells "gold" (virtual currency that costs real money) alongside "coins"

(virtual currency that can only be obtained with other virtual currency) and "food" (a virtual item that can only be obtained with virtual currency). Various quantities of gold cost various amounts of real money, with the largest amount (2900 gold) costing $99.99. The App Store describes Dragon Story, which is rated 4+, as the "BEST looking FREE dragon game" for Apple mobile devices.

23. Similarly, the app "Tiny Zoo Friends" challenges children to build and maintain a zoo whose "Zoo Value" is described in terms of dollars. That figure, however, does not correspond to real money, and instead is a score that varies based on a child's progress within the game. By contrast, the prices of the game's virtual currency—"coins" and "bucks"—are also described in terms of dollars, but that currency costs real money to obtain. From a screen called "Zoo Bucks," for instance, a child may obtain various quantities of "bucks," including "10 Bucks" for $0.99 or "3,500 Bucks" (also called a "Mountain of Bucks") for $99.99. Apple lists Tiny Zoo Friends with a rating of 4+.

24. Since at least March 2011, Apple has received at least tens of thousands of complaints related to unauthorized in-app charges by children in these and other games.

25. Many consumers report that they and their children were unaware that in-app activities would result in real monetary loss. For example, one App Store reviewer complaining about $534 in unauthorized charges incurred in two days described Dragon Story as "sucker[ing] young children into spending huge amounts of money" without their parents' knowledge. A parent whose seven-year-old incurred $500 in unauthorized charges playing Tiny Zoo Friends one afternoon commented that "children . . . cannot possibly understand" that they are spending real money.

26. In many games with in-app charges, consumers report that Apple billed for in-app activities without obtaining their consent. For example, one parent learned from her credit card company that her daughter had incurred $2600 in charges in the 9+ app "Tap Pet Hotel." Another consumer reported that her niece incurred $113.46 in unauthorized charges while playing the 4+ app "Racing Penguin, Flying Free." According to the consumer, her niece did not know the iTunes password, but was able to incur

the charges inside the fifteen-minute window during which Apple does not prompt account holders for a password. Apple has continued to receive complaints about millions of dollars of unauthorized in-app charges by children.

27. Many children incur unauthorized in-app charges without their parents' knowledge. Even parents who discover the charges and want to request a refund face a process that many consumers describe as cumbersome, involving steps that do not clearly explain whether and how a consumer can seek a refund for unauthorized in-app charges incurred by children. Indeed, as noted in paragraph 8 above, Apple's stated policy is that all App Store transactions are final.

## COUNT I

### Unfair Billing of In-App Charges

28. In numerous instances, Respondent bills parents and other iTunes account holders for children's activities in apps that are likely to be used by children without having obtained the account holders' express informed consent.

29. Respondent's practices as described in paragraph 28 cause or are likely to cause substantial injury to consumers that consumers themselves cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

30. Respondent's practices as described in paragraph 28 therefore constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a) and (n).

**THEREFORE**, the Federal Trade Commission this twenty-fifth day of March, 2014, has issued this complaint against Respondent.

By the Commission, Commissioner Wright dissenting.

## 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 Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with a violation of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45 *et seq*; and

Respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits 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 has reason to believe that Respondent has violated the FTC Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered any comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Apple Inc. ("Apple") is a California corporation with its principal place of business at 1 Infinite Loop, Cupertino, California 95014.

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

## ORDER

## DEFINITIONS

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

A. "**Account Holder**" means an individual or entity, with a billing address in the United States, that controls an account to which Apple may bill In-App Charges.

B. "**Application**" or "**App**" means any software application that can be installed on a mobile device.

C. "**Clear and Conspicuous**" or "**Clearly and Conspicuously**" means:

1. In textual communications, the disclosure must be in a noticeable type, size, and location, using language and syntax comprehensible to an ordinary consumer;

2. In communications disseminated orally or through audible means, the disclosure must be delivered in a volume, cadence, language, and syntax sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means: (1) written disclosures must be in a form consistent with definition 3.A and appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and be in the same language as the predominant language that is used in the communication; and (2) audio disclosures must be consistent with definition 3.B; and

4. The disclosure cannot be combined with other text or information that is unrelated or immaterial to the subject matter of the disclosure. No other

representation(s) may be contrary to, inconsistent with, or in mitigation of, the disclosure.

D. "**Defendant**" means Apple Inc. and its successors and assigns.

E. "**Express, Informed Consent**" means, upon being presented with options to provide or withhold consent, an affirmative act communicating informed authorization of In-App Charge(s), made proximate to an In-App Activity for which there is an In-App Charge and to Apple's Clear and Conspicuous disclosure of all material information related to the billing, including:

1. If consent is sought for a specific In-App Charge: (1) the In-App Activity associated with the charge (as provided to Apple by the App's developer); (2) the specific amount of the charge; and (3) the account that will be billed for the charge; or

2. If consent is sought for potential future In-App Charges: (1) the scope of the charges for which consent is sought, including the duration and Apps to which consent applies; (2) the account that will be billed for the charge; and (3) method(s) through which the Account Holder can revoke or otherwise modify the scope of consent on the device, including an immediate means to access the method(s).

*Provided that* the solicitation of the "affirmative act" and the disclosure of the information in definitions 5.A and 5.B above must be reasonably calculated to ensure that the person providing Express, Informed Consent is the Account Holder.

*Provided also that* if Apple obtains Express, Informed Consent to potential future In-App Charges as set forth in definition 5.B above, it must do so a minimum of once per mobile device.

F. "**In-App Activity**" or "**In-App Activities**" means any user conduct within an App including the acquisition of real or virtual currency, goods, or services, or other Apps.

G. "**In-App Charge**" means a charge associated with In-App Activity billed by Apple.

H. "**Consumer Redress Period**" means the twelve (12) month period of time between the entry and the first anniversary of this order.

**I.**

**IT IS FURTHER ORDERED** that Apple and its officers, agents, and employees, and all other persons in active concert or participation with it, who receive actual notice of this order, whether acting directly or indirectly, are restrained and enjoined for the term of this order from billing an account for any In-App Charge without having obtained Express, Informed Consent to Apple's billing that account for the In-App Charge. If Apple seeks and obtains Express, Informed Consent to billing potential future charges for In-App Activities, Apple must allow the Account Holder to revoke such consent at any time. Apple shall fully comply with this Section I by no later than March 31, 2014.

**II.**

**IT IS FURTHER ORDERED** that Apple shall provide full refunds to Account Holders who have been billed by Apple for unauthorized In-App Charges incurred by minors as follows:

A. Apple shall provide prompt refunds to Account Holders for the full purchase price of any Eligible In-App Charge(s). For purposes of this Section II, an "Eligible In-App Charge" is an In-App Charge that the Account Holder indicates was incurred by a minor and was accidental or not authorized by the Account Holder. For purposes of this Section II.A, a "prompt" refund means a refund provided within the later of fourteen (14) days of a request for refund of an

Eligible In-App Charge by the Account Holder or the completion of a fraud investigation. Apple may decline a refund request for an Eligible In-App Charge only if it has sufficient credible evidence that the refund request is fraudulent. Apple may process all refund requests through its customer service channels, which include a contact phone number and web form through which consumers may contact Apple directly.

B. Apple shall refund no less than $32,500,000.00 for Eligible In-App Charges pursuant to section II.A of this order, and such amount shall not constitute a penalty. Solely for the purposes of this section II.B of this order, Apple may approximate that 50% of all refunds provided to Account Holders for In-App Charges relate to Eligible In-App Charges.

C. Within thirty (30) days of the end of the Consumer Redress Period, Apple shall provide the Commission with records sufficient to show the refunds requested and paid to Account Holders for In-App Charges during the Consumer Redress Period, and any requests that were denied under Section II.A of this order.

D. If Apple fails to refund $32,500,000.00 pursuant to section II.B of this order, the balance of that amount shall be remitted to the Commission within forty-five (45) days of the end of the Consumer Redress Period.

E. All funds paid to the Commission pursuant to section II.D of this order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, at the Commission's sole discretion, for informational remedies regarding In-App Charges by children or consumer redress and any attendant expenses for the administration of any redress fund. Any money not used for such purposes shall be deposited to the United States Treasury. Apple shall have no right to challenge the Commission's choice of remedies under this Paragraph.

F. Apple shall provide an electronic notice to any Account Holder who has made an In-App Purchase prior to March 31, 2014. Apple shall send such notice within fifteen (15) days after March 31, 2014. The electronic notice shall include a subject line relating to the content of the notice and contain the following information, disclosed in a Clear and Conspicuous manner and in writing: (1) that refunds are available for Account Holders that have been billed for In-App Charges incurred by minors that were accidental or not authorized by the Account Holder, (2) that such refunds are available until the end of the Consumer Redress Period, and (3) instructions regarding how to obtain refunds pursuant to section II.A of this order, including means of contacting Apple for a refund. Apple shall send the notice to the current or last known email address for the Account Holder.

G. Sections II.A and II.B of this order shall be effective beginning on the date that the order is entered, and will terminate at the end of the Consumer Redress Period.

## III.

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns for five (5) years after the date of issuance of this order, shall maintain and upon request make available to the Federal Trade Commission business records demonstrating their compliance with the terms and provisions of this order, including but not limited to:

A. All consumer complaints conveyed to Respondent, or forwarded to Respondent by a third party, that relate to the conduct prohibited by this order and any responses to such complaints;

B. Refund requests related to In-App Charges, and refunds paid by Respondent related to In-App Charges; and

C. Records necessary to demonstrate full compliance with each provision of this order.

## IV.

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall deliver a copy (written or electronic) of this order to all current and future principals, officers, and corporate directors, and to all current and future managers, employees, agents, and representatives who participate in the design or implementation of Respondent's process through which Account Holders incur In-App Charges; the billing by Respondent of such charges; or Respondent's customer service relating to such charges, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

## V.

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns shall notify the Commission within fourteen (14) days of 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 corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

## VI.

**IT IS FURTHER ORDERED** that Respondent or its successors and assigns shall, ninety (90) days after March 31, 2014, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) business days of receipt of a written notice from a representative of the Commission, Respondent shall submit additional compliance reports.

## VII.

This order will terminate on March 25, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years; and

B. 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. Respondent may seek modification of this order pursuant to 15 U.S.C. § 45(b) and 16 C.F.R. 2.51(b) to address relevant developments that affect compliance with this order, including, but not limited to, technological changes and changes in methods of obtaining Express, Informed Consent.

By the Commission, Commissioner Wright dissenting.

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Apple Inc. ("Apple").

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 and take appropriate action or make final the agreement's proposed order.

Apple bills consumers for charges related to activity within software applications ("apps") that consumers download to their iPhone, iPod Touch, or iPad devices from Apple's App Store. This matter concerns Apple's billing for charges incurred by children in apps that are likely to be used by children without having obtained the account holders' express informed consent.

The Commission's proposed complaint alleges that Apple offers thousands of apps, including games that children are likely to play, and that in many instances, children can obtain virtual items within a game app that cost money. Apple bills parents and other adult account holders for items that cost money within an app—"in-app charges." In connection with billing for children's in-app charges, Apple sometimes requests a parent's iTunes password. In many instances, Apple "caches" (that is, stores) the iTunes password for fifteen minutes after it is entered. During this process, Apple in many instances has not informed account holders that password entry will approve a charge or initiate a fifteen-minute window during which children using the app can incur charges without further action by the account holder. The Commission's proposed complaint alleges that, through these practices, Apple often fails to obtain parents' informed consent to charges incurred by children, which constitutes an unfair practice under Section 5 of the FTC Act.

The proposed order contains provisions designed to prevent Apple from engaging in the same or similar acts or practices in the future. Part I of the proposed order requires Apple to obtain express, informed consent to in-app charges before billing for such charges, and to allow consumers to revoke consent to prospective in-app charges at any time. As defined in the proposed order, express, informed consent requires an affirmative act communicating authorization of an in-app charge (such as entering a password), made proximate to both an in-app activity

for which Apple is billing a charge and a clear and conspicuous disclosure of material information about the charge. Under the definition, the act and disclosure must be reasonably calculated to ensure that the person providing consent is the account holder (as opposed to the child). The proposed order would require the disclosure to appear at least once per mobile device. Apple must come into compliance with the Part I requirements by March 31, 2014.

Part II of the proposed order requires Apple to provide full refunds to Apple account holders who have been billed by Apple for unauthorized in-app charges incurred by minors. Apple will refund no less than $32.5 million for these in-app charges in the year following entry of the order, and if such refunds total less than $32.5 million, Apple will remit any remaining balance to the Commission to be used for informational remedies, further redress, or payment to the U.S. Treasury as equitable disgorgement. To effectuate refunds, Apple must send an electronic notice to its consumers that clearly and conspicuously discloses the availability of refunds and instructions on how to obtain such refunds. Within 30 days of the end of the one-year redress period, Apple must provide the Commission with records of refund requests, refunds paid, and any refunds denied.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III of the proposed order requires Apple to maintain and upon request make available certain compliance-related records, including certain consumer complaints and refund requests, for a period of five years. Part IV is an order distribution provision that requires Apple to provide the order to current and future principals, officers, and corporate directors, as well as current and future managers, employees, agents, and representatives who participate in certain duties related to the subject matter of the proposed complaint and order, and to secure statements acknowledging receipt of the order.

Part V requires Apple to notify the Commission of corporate changes that may affect compliance obligations within 14 days of such a change. Part VI requires Apple to submit a compliance report 90 days after March 31, 2014, the date by which Apple is required to come into full compliance with Part I of the order. It also requires Apple to submit additional compliance reports

within 10 business days of a written request by the Commission. Part VII is a provision "sunsetting" the order 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 complaint or proposed order, or to modify in any way the proposed order's terms.

**Statement of Chairwoman Edith Ramirez and Commissioner Julie Brill**

The Commission has issued a complaint and proposed consent order to resolve allegations that Apple Inc. unfairly failed to obtain informed consent for charges incurred by children in connection with their use of mobile apps on Apple devices in violation of Section 5 of the Federal Trade Commission Act. Consistent with prior application of the Commission's unfairness authority, our action today reaffirms that companies may not charge consumers for purchases that are unauthorized – a principle that applies regardless of whether consumers are in a retail store, on a website accessed from a desktop computer, or in a digital store using a mobile device.

As alleged in the Commission's complaint, Apple violated this basic principle by failing to inform parents that, by entering a password, they were permitting a charge for virtual goods or currency to be used by their child in playing a children's app and at the same time triggering a 15-minute window during which their child could make unlimited additional purchases without further parental action. As a consequence, at least tens of thousands of parents have incurred millions of dollars in unauthorized charges that they could not readily have avoided. Apple, however, could have prevented these unwanted purchases by including a few words on an existing prompt, without disrupting the in-app user experience. As explained below, we believe the Commission's allegations are more than sufficient to

satisfy the standard governing the FTC Act's prohibition against "unfair acts or practices."

## I. Overview of In-App Purchases on Apple Mobile Devices

Apple distributes apps, including games, that are likely to be used by children on Apple mobile devices through its iTunes App Store. While playing these games, kids may incur charges for the purchase of virtual items such as digital goods or currency (known as "in-app charges") at prices ranging from $.99 to $99.99. These in-app charges are billed to their parents' iTunes accounts. Apple retains thirty percent of the revenues from in-app charges. As part of the in-app purchasing process, Apple displays a general prompt that calls for entry of the password for the iTunes account associated with the mobile device. Apple treats this password entry as authorizing a specific transaction and simultaneously allowing additional in-app purchases for 15 minutes.

While key aspects of the in-app purchasing sequence have changed over time, as described in the Commission's complaint, one constant has been that Apple does not explain to parents that entry of their password authorizes an in-app purchase and also opens a 15-minute window during which children are free to incur unlimited additional charges. We allege that, since at least March 2011, tens of thousands of consumers have complained about millions of dollars in unauthorized in-app purchases by children, with many of them individually reporting hundreds to thousands of dollars in such charges. As a result, we have reason to believe, and have alleged in our complaint, that Apple's failure to disclose the 15-minute window is an unfair practice that violates Section 5 because it has caused or is likely to cause substantial consumer injury that is neither reasonably avoidable by consumers nor outweighed by countervailing benefits to consumers or competition.[1]

The proposed consent order resolves these allegations by requiring Apple to obtain informed consent to in-app charges. The order also requires Apple to provide full refunds, an amount

1 15 U.S.C. § 45(n).

no less than $32.5 million, to all of its account holders who have been billed for unauthorized in-app charges incurred by minors.[2]

## II. Application of the Unfairness Standard

Importantly, the Commission does not challenge Apple's use of a 15-minute purchasing window in apps used by kids. Rather, our charge is that, even after receiving at least tens of thousands of complaints about unauthorized charges relating to in-app purchases by kids, Apple continued to fail to disclose to parents and other Apple account holders that entry of a password in a children's app meant they were approving a single in-app charge plus 15 minutes of further, unlimited charges.

In asserting that Apple violated Section 5's prohibition against unfair practices by failing to obtain express informed consent for in-app charges incurred by kids, we follow a long line of FTC cases establishing that the imposition of unauthorized charges is an unfair act or practice.[3] This basic tenet applies regardless of the technology or platform used to bill consumers and regardless of whether a company engages in deliberate fraud. Indeed, there is nothing in the unfairness authority we have been granted by Congress or in the Commission's Unfairness Policy Statement to suggest that our power is in any way constrained or should be applied differently depending on the technology or platform at issue, or the intentions of the accused party.[4]

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2 Any sum below $32.5 million that is not returned to account holders is to be paid to the FTC.

3 *See, e.g.*, *FTC v. Willms*, No. 2:11-CV-828 MJP, 2011 WL 4103542, at *9 (W.D. Wash. Sept. 13, 2011); *FTC v. Inc21.com Corp*., 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd*, 475 Fed. Appx. 106 (9th Cir. Mar. 30, 2012); *FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); *see also* Complaint, *FTC v. Jesta Digital, LLC*, No. 1:13-cv-01272 (D.D.C. filed Aug. 20, 2013).

4 The FTC need not prove intent to establish a violation of the FTC Act. *See, e.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988); **Federal Trade Commission Policy Statement on Unfairness,** appended to *Int'l Harvester Co*., 104 F.T.C. 949, 1070 (1984) ("FTC Unfairness Statement").

Our task here, as in all instances in which we assert jurisdiction over unfair acts or practices, is to determine whether the alleged unlawful conduct causes or is likely to cause substantial injury that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. After a full investigation, we have reason to believe that Apple's conduct constitutes an unfair practice.

### A. Substantial Injury to Consumers

We begin by addressing the issue of harm. It is well established that substantial injury may be demonstrated by a showing of either small harm to a large number of people or large harm in the aggregate.[5] Both are present here. As alleged in the complaint, in many individual instances, Apple customers paid hundreds of dollars in unauthorized charges while thousands of others incurred lower charges that together totaled large sums. We allege that, in the aggregate, at least tens of thousands of consumers have complained of millions of dollars of unauthorized in-app charges by children. Moreover, we have reason to believe that, for a variety of reasons, many more affected customers never complained. Some, for example, were undoubtedly deterred by Apple's stated policy that all App Store transactions are final. Others who incurred low charges likely did not protest because of the relatively small dollar value at issue. Indeed, extensive Commission experience teaches that consumer complaints typically represent only a small fraction of actual consumer injury.[6]

In his dissent, Commissioner Wright expresses the view that the harm alleged by the Commission involves "a miniscule percentage of consumers" and is therefore insubstantial.[7] We

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5 *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010), *amended*, 2010 WL 2365956 (9th Cir. June 15, 2010); *Orkin*, 849 F.2d at 1365; FTC Unfairness Statement n.12.

6 Likewise, there is research indicating consumers do not register the vast majority of their complaints about problems with goods and services. *See* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 286 (2012).

7 Dissenting Statement of Commissioner Joshua D. Wright ("Wright Dissent")

respectfully disagree. We find it of little consequence that the number of complainants is a small fraction of all app downloads, as Commissioner Wright asserts.[8] As an initial matter, our complaint focuses on conduct affecting Apple account holders whose children may unwittingly incur in-app charges in games likely to be played by kids. The proportion of complaints about children's in-app purchases as compared to total app downloads, revenue from the sale of Apple mobile devices, or Apple's total sales revenue sheds no light on the extent of harm alleged in this case. More fundamentally, the FTC Act does not give a company with a vast user base and product offerings license to injure large numbers of consumers or inflict millions of dollars of harm merely because the injury affects a small percentage of its customers or relates to a fraction of its product offerings.

It is also incorrect that "in order to qualify as substantial, the harm must be large compared to any offsetting benefits."[9] This conflates the third prong of the unfairness test, calling for a weighing of countervailing benefits against the relevant harm, with the substantial injury requirement. As shown above, the allegations in the complaint are more than sufficient to establish substantial injury.[10]

### B. Injury Not Reasonably Avoidable by Consumers

We also have reason to believe that consumers could not reasonably avoid the alleged injury. An injury is not reasonably

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at 1.

8 *See id*. at 6.

9 *Id.* (citation and internal quotation marks omitted).

10 *See, e.g.*, *Orkin*, 849 F.2d at 1365 (substantial injury demonstrated by small injury to large number of customers); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (substantial consumer injury resulted from unauthorized charges to tens of thousands of consumers), *aff'd*, 604 F.3d 1150 (9th Cir. 2010); *FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1288-89 (M.D. Fla. 2008) (millions of dollars in unlawful charges demonstrated substantial injury); *FTC v. Windward Mktg., Inc.*, No. 1:96-CV-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997) (harm to large number of consumers sufficient to establish substantial injury).

preventable by consumers unless they had an opportunity to make a "free and informed choice" to avoid the harm.[11] Before billing parents for in-app charges by children, Apple presented parents with a generic password prompt devoid of any explanation that password entry approves a single charge as well as all charges within the 15 minutes to follow. We do not think parents acted unreasonably by not averting harm from a 15-minute window that was not disclosed to them. Consumers cannot avoid or protect themselves from a practice of which they are not made aware, and companies like Apple cannot impose on consumers the responsibility for ferreting out material aspects of payment systems, as FTC enforcement actions in a variety of contexts make clear.[12] Apple's disclosure of the 15-minute window in its Terms and Conditions was not sufficient to provide consumers with adequate notice.

Over time, through experience, some parents may infer that entry of a password opens a 15-minute window during which unlimited purchases can be made. The receipt of an invoice with unauthorized charges may be sufficient to alert some parents about the unwanted charges. But that does not relieve Apple of the obligation to take reasonable steps to inform consumers of the 15-minute window before the user opens that window and before Apple places charges on a bill. In light of Apple's failure to disclose the 15-minute purchasing window, it was reasonable for parents not to expect that when they input their iTunes password they were authorizing 15 minutes of unlimited purchases without the child having to ask the parent to input the password again. There was nothing to suggest this and thus no "obligation for them to investigate further" as Commissioner Wright suggests.[13]

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11 *Neovi*, 598 F. Supp. 2d at 1115.

12 *See, e.g.*, *Facebook, Inc.*, No. C-4365, at 4 (F.T.C. July 27, 2012) (consent order) (requiring "clear and prominent" disclosure of certain information material to privacy protections "separate and apart from" the detailed privacy policy or terms of use); *Google Inc*., No.C-4336, at 3-4 (F.T.C. Oct. 13, 2011) (consent order) (setting similar requirements).

13 Wright Dissent at 10.

### C. Injury Not Outweighed by Benefits to Consumers or Competition

Finally, we also have reason to believe that the harm alleged outweighs any countervailing benefits to consumers or competition from Apple's practices. This is not a case about Apple's "choice to integrate the fifteen-minute window into Apple users' experience on the platform," as Commissioner Wright implies.[14] What is at issue is Apple's failure to disclose the 15-minute window to parents and other account holders in connection with children's apps, not Apple's use of a 15-minute window as part of the in-app purchasing sequence.

Under the proposed consent order, Apple is permitted to bill for multiple charges within a 15-minute window upon password entry provided it informs consumers what they are authorizing, allowing consumers to make an informed choice about whether to open a period during which additional charges can be incurred without further entry of a password.[15] The order gives Apple full discretion to determine how to provide this disclosure. But we note that the information called for, while important, can be conveyed through a few words on an existing prompt. The burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is *de minimis*.[16] Nor do we believe the required disclosure would detract in any material way from a streamlined and seamless user experience. In our view, the absence of such minimal, though essential, information does not constitute an offsetting benefit to Apple's users that even comes close to outweighing the substantial injury the Commission has identified.

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14 *Id.* at 4.

15 *See* Proposed Order ¶¶ 3, 5 (defining "Clear and Conspicuous" and "Express, Informed Consent").

16 For this reason alone, it was unnecessary for the Commission to undertake a study of how consumers react to different disclosures before issuing its complaint against Apple, as Commissioner Wright suggests. We also note that the Commission need only determine that it has a "reason to believe" that there has been an FTC Act violation in order to issue a complaint. 15 U.S.C. § 45(b).

Moreover, we are confident that our action today fully preserves the incentive to innovate and develop digital platforms that are user-friendly and beneficial for consumers. In this respect, we emphasize that we do not expect companies "to anticipate *all* things that might go wrong" when designing a complicated platform or product.[17] Our action against Apple is based on its failure to provide any meaningful disclosures about the 15-minute window in the purchase sequence, despite receiving at least tens of thousands of complaints about unauthorized in-app purchases by children and despite having the issue flagged in high-profile media reports in late 2010 and early 2011.[18] We recognize that Apple did make certain changes to its in-app purchase sequence in an attempt to resolve the issue. Most notably, Apple added a password prompt to the in-app purchase sequence in March 2011. But for well over two-and-a-half years after that point, the password prompt has lacked any information to signal that the account holder is about to open a 15-minute window in which unlimited charges could be made in a children's app.

The extent and duration of the unauthorized in-app charges alleged in the complaint support our conclusion that, while Apple has strong incentives to cultivate customer goodwill in order to encourage the purchase of in-app goods and currency and promote the sale of its mobile devices, these incentives may not be sufficient to produce the necessary disclosures. Because customers are often unaware of the way in-app charges work, let alone the possibility of Apple disclosing its practices, we do not think that Commissioner Wright's belief that Apple "has more than enough incentives to disclose"[19] is justified. Indeed, his argument appears to presuppose that a sufficient number of Apple

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17 Wright Dissent at 15 (emphasis in original).

18 *See, e.g.*, Cecilia Kang, *In-app purchases in iPad, iPhone, iPod kids' games touch off parental firestorm*, WASH. POST, Feb. 8, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706073.html; Associated Press, *Apple App Store: Catnip for Free-Spending Kids?*, CBS NEWS, Dec. 9, 2010, *available at* http://www.cbsnews.com/news/apple-app-store-catnip-for-free-spending-kids/.

19 Wright Dissent at 14.

customers will respond to the lack of adequate information by leaving Apple for other companies. But customers cannot switch suppliers easily or quickly. Mobile phone and data contracts typically last two years, with a penalty for early termination. In addition, the time and effort required to learn another company's operating system and features, not to mention the general inertia often observed for consumers with plans for cellular, data, and Internet services, could very well mean that Apple customers may not be as responsive to Apple's disclosure policies as seems to be envisioned by Commissioner Wright.

* * *

We applaud the innovation that is occurring in the mobile arena. Today, parents have access to an enormous number and variety of apps for use by their children. We firmly believe that technological innovation and fundamental consumer protections can coexist and, in fact, are mutually beneficial. Such innovation is enhanced, and will only reach its full potential, if all marketplace participants abide by the basic principle that they must obtain consumers' informed consent to charges before they are imposed.

## Statement of Commissioner Maureen K. Ohlhausen

I voted to accept for public comment the accompanying proposed administrative complaint and consent order, settling allegations that Apple Inc. engaged in unfair acts or practices by billing iTunes account holders for charges incurred by children in apps that are likely to be used by children without the account holders' express informed consent.[1] I write separately to emphasize that our action today is consistent with the fundamental

1 For the reasons given in the Statement of Chairwoman Ramirez and Commissioner Brill, I believe the complaint meets the requirements of 15 U.S.C. § 45(n) and the Commission's Unfairness Statement.

principle that any commercial entity, before billing customers, has an obligation to notify such customers of what they may be charged for and when, a principle that applies even to reputable and highly successful companies that offer many popular products and services.

In his dissent, Commissioner Wright lauds the iterative software design process of rapid prototyping, release, and revision based on market feedback; this approach has proven to be one of the most successful methods for balancing design tradeoffs. He also notes that it can be difficult to forecast problems that may arise with complicated products across millions of users and expresses concern that our decision today requires companies to anticipate and fix all such problems in advance.

I agree with Commissioner Wright that we should avoid actions that would chill an iterative approach to software development or that would unduly burden the creation of complex products by imposing an obligation to foresee all problems that may arise in a widely-used product.[2] I do not believe, however, that today's action implicates such concerns. First, Apple's iterative approach was not the cause of the harm the complaint challenges. In fact, Apple's iterative approach should have made it easier for the company to update its design in the face of heavy consumer complaints. Second, we are not penalizing Apple for failing to have anticipated every potential issue in its complex platform.[3] The complaint challenges only one billing issue of

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2 I am concerned about any action that this agency takes that is likely to have adverse effects on firms' incentives to innovate. For example, in the antitrust context, I voted against the Commission's complaints in *Bosch* and *Google/MMI* based in significant part on my concern that those enforcement actions would hamper intellectual property rights and innovation more generally. *See In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Jan. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen (Nov. 26, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschohlhausenstatement.pdf.

3 The complaint challenges harm that occurred since March 2011, after Apple changed its process to require the entry of the account holder's iTunes password before incurring any in-app charges immediately after installation.

which Apple became well aware but failed to address in subsequent design iterations. By March 2011, consumers had submitted more than ten thousand complaints to Apple stating that its billing platform for in-app purchases for children's apps was failing to inform them about what they were being billed for and when. Although Apple adjusted certain screens in response and offered refunds, it still failed to notify account holders that by entering their password they were initiating a fifteen-minute window during which children using the app could incur charges without further action by the account holder. Even if Apple chose to forgo providing this information—the type of information that is critical for any billing platform, no matter how innovative, to provide—in favor of what it believed was a smoother user experience for some users, the result was unfair to the thousands of consumers who subsequently experienced unauthorized in-app charges totaling millions of dollars.[4]

Commissioner Wright also argues that under our unfairness authority "substantiality is analyzed relative to the magnitude of any offsetting benefits,"[5] and concludes that compared to Apple's total sales or in-app sales, injury was not substantial and that any injury that did occur is outweighed by the benefits to consumers and competition of Apple's overall platform. The relevant statutory provision focuses on the substantial injury caused by an individual act or practice, which we must then weigh against countervailing benefits to consumers or competition from that act or practice.[6] Thus, we first examine whether the harm caused by

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Previously, the entry of the password to install an app also opened a fifteen-minute window during which charges could be incurred without again entering a password.

4 It is also important to note that the Commission's proposed order does not prohibit the use of the fifteen-minute window nor require that the account holder input a password for each purchase.

5 Dissenting Statement of Commissioner Joshua D. Wright at 5.

6 "The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

the practice of not clearly disclosing the fifteen-minute purchase window is substantial and then compare that harm to any benefits from that particular practice, namely the benefits to consumers and competition of not having a clear and conspicuous disclosure of the fifteen-minute billing window. It is not appropriate, however, to compare the injury caused by Apple's lack of clear disclosure with the benefits of the entire Apple mobile device ecosystem. To do so implies that all of the benefits of Apple products are contingent on Apple's decision not to provide a clear disclosure of the fifteen-minute purchase window for in-app purchases. Such an approach would skew the balancing test for unfairness and improperly compare injury "oranges" from an individual practice with overall "Apple" ecosystem benefits.

## Dissenting Statement of Commissioner Joshua D. Wright

Today, through the issuance of an administrative complaint, the Commission alleges that Apple, Inc. ("Apple") has engaged in "unfair acts or practices" by billing parents and other iTunes account holders for the activities of children who were engaging with software applications ("apps") likely to be used by children that had been downloaded onto Apple mobile devices.[1] In particular, the Commission takes issue with a product feature of Apple's platform that opens a fifteen-minute period during which a user does not need to re-enter a billing password after completing a first transaction with the password.[2] Because Apple does not expressly inform account holders that the entry of a password upon the first transaction triggers the fifteen-minute window during which users can make additional purchases

1 Complaint, Apple, Inc., FTC File No. 1123108, at para. 28-30 (Jan. 15, 2014) [hereinafter *Apple Complaint*].

2 As indicated in the complaint, initially the fifteen-minute window was triggered when an app was downloaded. *Id.* at para. 16. Apple changed the interface in March 2011 and subsequently the fifteen-minute window was triggered upon the first in-app purchase. *Id.* at para. 17. *See also infra* note 13.

without once again entering the password, the Commission has charged that Apple bills parents and other iTunes account holders for the activities of children without obtaining express informed consent.[3]

Today's action has been characterized as nothing more than a reaffirmance of the concept that "companies may not charge consumers for purchases that are unauthorized."[4] I respectfully disagree. This is a case involving a miniscule percentage of consumers – the parents of children who made purchases ostensibly without their authorization or knowledge. There is no disagreement that the overwhelming majority of consumers use the very same mechanism to make purchases and that those charges are properly authorized. The injury in this case is limited to an extremely small – and arguably, diminishing – subset of consumers. The Commission, under the rubric of "unfair acts and practices," substitutes its own judgment for a private firm's decisions as to how to design its product to satisfy as many users as possible, and requires a company to revamp an otherwise indisputably legitimate business practice. Given the apparent benefits to some consumers and to competition from Apple's allegedly unfair practices, I believe the Commission should have conducted a much more robust analysis to determine whether the injury to this small group of consumers justifies the finding of unfairness and the imposition of a remedy.

Section 5 of the FTC Act prohibits, in part, "unfair . . . acts or practices in or affecting commerce."[5] As set forth in Section 5(n), in order for an act or practice to be deemed unfair, it must "cause[] or [be] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition."[6]

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3 *Apple Complaint*, *supra* note 1, at para. 4, 20, 28.

4 Statement of Chairwoman Ramirez and Commissioner Brill at 1.

5 15 U.S.C. § 45(a).

6 15 U.S.C. § 45(n).

The test the Commission uses to evaluate whether an unfair act or practice is unfair used to be different. Previously the Commission considered: whether the practice injured consumers; whether it violated established public policy; and whether it was unethical or unscrupulous.[7] Only after an aggressive enforcement initiative that culminated in a temporary rulemaking suspension and Congressional threats of stripping the Commission of its unfairness authority altogether, was the current iteration of the unfairness test reached.[8] Importantly, this articulation, as set forth in the FTC Policy Statement on Unfairness ("Unfairness Statement"), not only requires that the alleged injury be substantial, it also includes the critical requirements that such injury "must not be outweighed by any countervailing benefits to consumers or competition that the practice produces" and "it must be an injury that consumers themselves could not reasonably have avoided."[9]

As set forth in more detail below, I do not believe the Commission has met its burden to satisfy all three requirements in the unfairness analysis. In particular, although Apple's allegedly unfair act or practice has harmed some consumers, I do not believe the Commission has demonstrated the injury is substantial. More importantly, any injury to consumers flowing from Apple's choice of disclosure and billing practices is outweighed considerably by the benefits to competition and to consumers that flow from the same practice. Accordingly, I respectfully dissent from the issuance of this administrative complaint and consent order.

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7 FTC Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/ftc-policy-statement-on-unfairness [hereinafter *Unfairness Statement*].

8 ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION LAW DEVELOPMENTS, 57-59 (2009); J. Howard Beales, III, Director, Bureau of Consumer Protection, Fed. Trade Comm'n, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection at 9 (May 2003), *available at* http://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection [hereinafter *Beales' Unfairness Speech*].

9 *Unfairness Statement*, *supra* note 7, at 1073.

## Introduction

This case requires the Commission to analyze consumer injury under the unfairness theory in a novel context: an allegation of a failure to disclose a product feature to consumers that results in some injury to one group of consumers but that generates benefits for another group.

The circumstances surrounding Apple's decision to forgo disclosing during the transaction the fifteen-minute window to its users – and according to the Commission's complaint, thereby failing to obtain express informed consent – are distinguishable from any other prior Commission case alleging unfairness. The economic consequences of the allegedly unfair act or practice in this case – a product design decision that benefits some consumers and harms others – also differ significantly from those in the Commission's previous unfairness cases.

The Commission commonly brings unfairness cases alleging failure to obtain express informed consent. These cases invariably involve conduct where the defendant has intentionally obscured the fact that consumers would be billed. Many of these cases involve unauthorized billing or cramming – the outright fraudulent use of payment information.[10] Other cases involve conduct just shy of complete fraud – the consumer may have agreed to one transaction but the defendant charges the consumer for additional, improperly disclosed items. [11] Under this scenario,

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10 *See, e.g.*, Complaint at 6, FTC v. Jesta Digital, LLC, Civ. No. 1:13-cv-01272 (D.D.C. Aug. 20, 2013) (alleging that "Jesta charged consumers who did not click on the subscribe button and charged consumers for products they did not order."); Complaint, FTC v. Wise Media, LLC, Civ. No. 1:13-CV-1234 (N.D. Ga. Apr. 16, 2013) (alleging that defendants charge consumers for purported services without consumers ever knowingly signing up for such services).

11 Complaint at 15-16, FTC v. JAB Ventures, LLC, Civ No. CV08-04648 (RZx) (C.D. Cal. July 8, 2008) (alleging unauthorized billing when defendants charged consumers who had cancelled their enrollment or who had not been adequately informed about negative option features); FTC v. Crescent Publ'g Group, Inc., 129 F. Supp. 2d 311 (S.D.N.Y. 2001) (pornography website failing to disclose the point at which a "free tour" ended and a monthly membership would begin).

the allegedly unfair act or practice injures consumers and does not provide economic value to consumers or competition. In such cases, the requirement to provide adequate disclosure itself does not cause significant harmful effects and can be satisfied at low cost.

However, the particular facts of this case differ in several respects from the above scenario. First, there is no evidence Apple intended to harm consumers by not disclosing the fifteen-minute window.[12] For example, when Apple began receiving complaints about children making unauthorized in-app purchases on their parents' iTunes accounts, the company took steps to address the problem.[13] In addition, Apple has an established relationship with its customers and its business model depends upon customer satisfaction and repeat business.

Second, rather than an unscrupulous or questionable practice, the nature of Apple's disclosures on its platform is an important attribute of Apple's platform that affects the demand for and consumer benefits derived from Apple devices and services. Disclosures made on the screen while consumers interact with mobile devices are a fundamental part of the user experience for products like mobile computing devices. It is well known that Apple invests considerable resources in its product design and functionality.[14] In streamlining disclosures on its platform and in

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12 By distinguishing the facts of this case from other unfairness cases brought by the Commission alleging the failure to obtain express informed consent, I do not imply that intent is a required element of the analysis. However, I think drawing the distinction informs the discussion. Furthermore, I am unaware that the Commission has ever exercised its unfairness authority where it has alleged only that the defendant inadvertently charged consumers.

13 *See* Chris Foresman, *Apple facing class-action lawsuit over kids' in-app purchases*, arstechnica, Apr. 15, 2011, http://arstechnica.com/apple/2011/04/apple-facing-class-action-lawsuit-over-kids-in-app-purchases/ ("After entering a password to purchase an app from the App Store, the password now has to be reentered in order to make any initial in-app purchases.").

14 Nigel Hollis, *The Secret to Apple's Marketing Genius (Hint: It's Not Marketing)*, The Atlantic, July 11, 2011, http://www.theatlantic.com/business/archive/2011/07/the-secret-to-apples-marketing-genius-hint-its-not-marketing/241724/ (in discussing Apple's functionality, "[u]sing an Apple product feels so natural, so intuitive, so transparent, that sometimes, even people paid to know what makes products great completely miss the cause of

its choice to integrate the fifteen-minute window into Apple users' experience on the platform, Apple has apparently determined that most consumers do not want to experience excessive disclosures or to be inconvenienced by having to enter their passwords every time they make a purchase.

The Commission has long recognized that in utilizing its authority to deem an act or practice as "unfair" it must undertake a much more rigorous analysis than is necessary under a deception theory.[15] As a former Bureau Director has noted, "the primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits. Instead, it presumes that false or misleading statements either have no benefits, or that the injury they cause consumers can be avoided by the company at very low cost."[16] It is also well established that one of the primary benefits of performing a cost-benefit analysis is to ensure that government action does more good than harm.[17] The discussion below explains why I believe the Commission's action today fails to satisfy the elements of the unfairness framework and thereby conclude that placing Apple under a twenty-year order in a marketplace in which consumer

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their addiction to Apple products. It's the natural, intuitive transparency of the technology. The superlative product experience comes from an unusual combination of human and technical understanding, and it creates the foundation of all the other positive aspects of the brand."); Peter Eckert, *Dollars And Sense: The Business Case For Investing In UI Design*, Fast Company, Mar. 15, 2012, http://www.fastcodesign.com/1669283/dollars-and-sense-the-business-case-for-investing-in-ui-design ("As we have seen with Apple's success, creating products that offer as much simplicity as functionality drives market share and premium pricing."). *See also* Neil Hughes, *Apple's research & development costs ballooned 32% in 2013 to $4.5B*, Apple Insider, Oct. 30, 2013, http://appleinsider.com/articles/13/10/30/apples-research-development-costs-ballooned-32-in-2013-to-45b; Cliff Kuang, *The Six Pillars of Steve Jobs' Design Philosophy*, Fast Company, Nov. 7, 2011, http://www.fastcodesign.com/1665375/the-6-pillars-of-steve-jobss-design-philosophy.

15 Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984); *Beales' Unfairness Speech*, *supra* note 8, § III.

16 *Beales' Unfairness Speech*, *supra* note 8, § III.

17 Int'l Harvester, 104 F.T.C. at 1070.

preferences and technology are rapidly changing is very likely to do more harm to consumers than it is to protect them.

## I. The Evidence Does Not Support a Finding of Substantial Injury as Required by the Unfairness Analysis

Apple's choice to include the fifteen-minute window in its platform design, and its decision on how to disclose this window, resulted in harm to a small fraction of consumers. Any consumer harm is limited to parents who incurred in-app charges that would have been avoided had Apple instead designed its platform to provide specific disclosures about the fifteen-minute window for apps with in-app purchasing capability that are likely to be used by children. That harm to some consumers results from a design choice for a platform used by millions of users with disparate preferences is not surprising. The failure to provide perfect information to consumers will always result in "some" injury to consumers. The relevant inquiry is whether the injury to the subset of consumers is "substantial" as contemplated by the Commission's unfairness analysis.

Consumer injury may be established by demonstrating the allegedly unfair act or practice causes "a very severe harm to a small number"[18] of people or "a small harm to a large number of people."[19] While it is possible to demonstrate substantial injury occurred as a result of an act or practice causing a small harm to a large number of consumers, substantiality is analyzed relative to the magnitude of any offsetting benefits.[20] This is particularly critical when the allegedly unfair practice is not a fraudulent activity such as unauthorized billing or cramming, where there are no offsetting benefits.

By reasonable measures of the potential harms and benefits available to the Commission, the injury is relatively small and not

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18 Int'l Harvester, 104 F.T.C. at 1064.

19 *Unfairness Statement*, *supra* note 7, at n.12.

20 *Beales' Unfairness Speech*, *supra* note 8, § III ("relative to the benefits, the injury may still be substantial" and "[t]o qualify as substantial, an injury must be real, and it must be large compared to any offsetting benefits.").

necessarily substantial in this case. The complaint alleges Apple has received "at least tens of thousands of complaints related to unauthorized in-app charges by children"[21] while playing games acquired on Apple's platform, which supports all music, books, and applications purchased for use with Apple mobile devices (e.g., iPhone, iPad, iPod, hereinafter "iDevices"). Although "tens of thousands" sounds like a large number, the unfairness inquiry requires this number be evaluated in an appropriate context. Apple announced its 50 billionth app download in May 2013.[22] Even 200,000 complaints in 50 billion downloads would represent only four complaints in a million, which is quite a small fraction.

In addition, the complaint presents a few examples in which children made unauthorized in-app purchases that were relatively large, some greater than $500, and one bill as high as $2,600.[23] There is undoubtedly consumer harm in these instances, assuming the purchases are correctly attributed to the alleged failure to disclose, but again, in order to qualify as substantial, the harm "must be large compared to any offsetting benefits."[24]

The relevant economic context required to understand substantiality of injury in this case includes the proportions of populations potentially harmed and benefitted by the failure to disclose product features in this case. A measure of harm that gives weight to both the number of consumers harmed and the size of the individual harms is the ratio of the value of unauthorized purchases to the total sales affected by the practice. We can construct such a measure as follows. The $32.5 million in consumer refunds required by the consent decree presumably relates in some way to the harm arising from Apple's disclosure practices. Recognizing that monetary amounts emerging from consent decrees are a product of compromise and an assessment

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21 *Apple Complaint*, *supra* note 1, at para. 24.

22 Press Release, Apple, Inc., Apple's App Store Marks Historic 50 Billionth Download (May 16, 2013), *available at* http://www.apple.com/pr/library/2013/05/16Apples-App-Store-Marks-Historic-50-Billionth-Download.html.

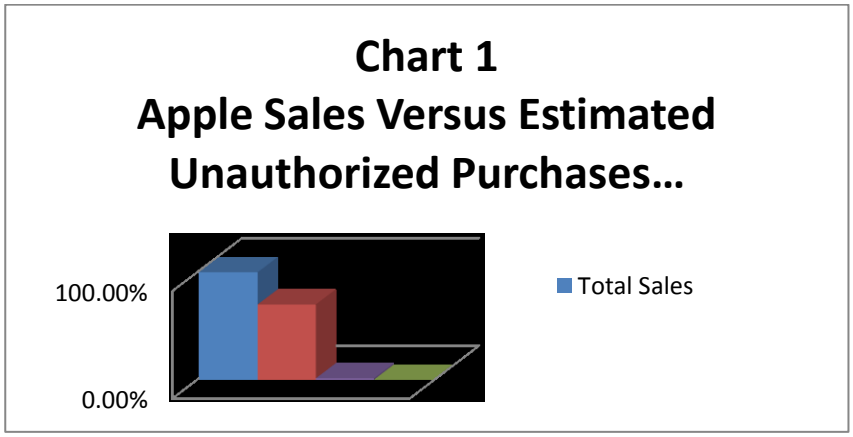
23 *Apple Complaint*, *supra* note 1, at para. 25-26.

24 *Beales' Unfairness Speech*, *supra* note 8, § III.

of litigation risk, suppose that the value of unauthorized purchases is ten times higher than the negotiated settlement amount. This assumption gives a conservatively high estimate of $325 million in unauthorized purchases since the inception of the App Store.

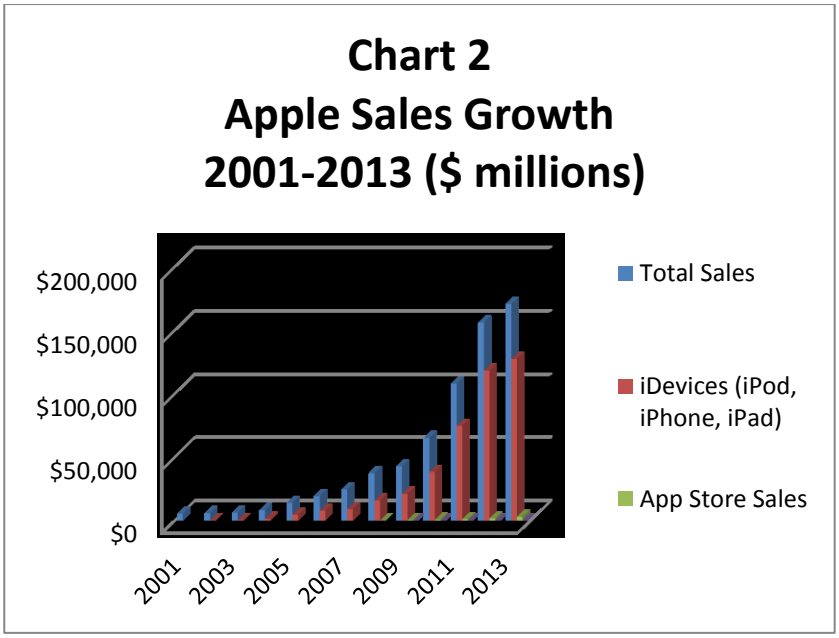
The total sales affected by Apple's disclosure practices likely include not only the sale of apps and in-app purchases, but also the sale of iDevices. This is likely because the benefits from using apps and making in-app purchases are components of the stream of benefits generated by iDevices, and a customer's decision to purchase an iDevice will depend upon the stream of benefits derived from the device. Indeed, the degree of integration across all components of Apple's platform is remarkably high, suggesting that Apple's disclosure practices may affect all Apple's sales. For completeness, Charts 1 and 2 below measure the estimated harm as a fraction of all three variants of Apple's sales – App Store sales, iDevice sales, and total sales. These data are available from Apple's Annual Reports and press releases.

Chart 1 shows that the estimated value of the harm is a miniscule fraction of both Apple total sales (about six one-hundredths of one percent) and iDevice sales (about eight one-hundredths of one percent) over the five-year period from the inception of the App Store to September 2013. This measure of harm, a conservatively high estimate, is also a relatively small fraction of App Store sales (about 4.6 percent).



*Sources*: Apple, Inc., Annual Reports for 2009-2013 (Form 10-K); Marin Perez, *Apple App Store A $1.2 Billion Business In 2009*, InformationWeek, June 11, 2008, *available at* http://www.informationweek.com/mobile/mobile-devices/apple-app-store-a-$12-billion-business-in-2009/d/d-id/1068794; *Apple Complaint*, *supra* note 1 (for the $32.5 million settlement amount).

Chart 2 illustrates the same relationship with respect to Apple sales growth over the last 13 years.




*Sources:* Same as Chart 1, plus Apple, Inc., Annual Reports for 2002-2008 (Form 10-K). Calculations assume the App Store sales and estimated unauthorized purchases grew at a constant percentage growth rate from 2009 through 2013.

Taking into account the full economic context of Apple's choice of disclosures relating to the fifteen-minute window undermines the conclusion that any consumer injury is substantial.

## II. At Least Some of the Injury Could Be Reasonably Avoided by Consumers

The Unfairness Statement provides that the "injury must be one which consumers could not reasonably have avoided."[25] In explaining that requirement the Commission noted, "[i]n some senses any injury can be avoided – for example, by hiring independent experts to test all products in advance, or by private legal actions for damages – but these courses may be too expensive to be practicable for individual consumers to pursue."[26] The complaint does not allege that the undisclosed fifteen-minute window is an unfair practice as to any consumer other than parents of children playing games likely to be played by children that have in-app purchasing capability.[27] In the instant case, it is very likely that most parents were able to reasonably avoid the potential for injury, and this avoidance required nothing as drastic as hiring an independent expert, but rather common sense and a modicum of diligence.

The harm to consumers contemplated in the complaint involves app functionality that changed over time. In the earliest timeframe, the harm occurred when a parent typed in their Apple password to download an app with in-app purchase capability, handed the Apple device to their child, and then unbeknownst to the parent, the child was able to make in-app purchases by pressing the "buy" button during the fifteen-minute window in which the password was cached. This was apparently an oversight on Apple's part. When it came to the company's attention, Apple implemented a password prompt for the first in-app purchase after download.[28]

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25 *Unfairness Statement*, *supra* note 7, at 1074.

26 *Unfairness Statement*, *supra* note 7, at n.19.

27 Indeed, there are many financial, banking, and retail apps and websites that allow consumers to conduct a series of transactions after entering a password only once. These services usually only require re-entry of a password after a certain amount of time has elapsed, or the session expires because of inactivity on the user's part. It is doubtful that the Commission would bring an unfairness case because these services do not disclose this window.

28 *See* Foresman, *supra* note 13.

During the later timeframe, after being handed the Apple device, a child again would press the "buy" button to make an in-app purchase. At this point, the child would have needed to turn the device back over to the parent for entry of the password. Alternatively, some children may have known their parent's password and entered it themselves. In either case, the fifteen-minute window was opened and additional in-app purchases could be made without further password prompts.

Under the first scenario, account holders received no password prompt for the first in-app purchase and thus the injury experienced by some consumers arguably may not have been reasonably avoidable. Because the opening of the fifteen-minute window *in this context* does not appear to be a product design feature, but rather an unintended oversight, I will focus my attention upon the harm experienced by consumers in the latter scenario and discuss their ability to reasonably avoid it.

Irrespective of the existence of the fifteen-minute window, a user can only make an in-app purchase by pressing a "buy" button while engaging with the app. In other words, the user must decide to make an in-app purchase. To execute the first in-app purchase, the user must enter a password. The fifteen-minute window eliminates the second step of verification – entering a password – only *after* the user has made the first in-app purchase by clicking the "buy" button and entering the password.

By entering their password into the Apple device – an action that is performed in response to a request for permission – parents were effectively put on notice that they were authorizing a transaction.[29] Although the complaint alleges that the fifteen-minute window was not expressly disclosed to parents, regular users of Apple's platform become familiar with the opportunity to make purchases without entering a password every time.[30] Even

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29 Furthermore, Apple sends an email receipt to the iTunes account holder after a purchase has been made in the either the iTunes or App Store. *See e.g.*, http://www.apple.com/privacy/.

30 To the extent that users read the Apple Terms and Conditions when they opened their iTunes accounts, consumer injury would also have been avoided. The Terms and Conditions explain the fifteen-minute window and other aspects of how Apple's platform works, including the App Store. It appears that Apple

if some parents were not familiar with the fifteen-minute window, the requirement to re-enter their password to authorize a transaction arguably triggered some obligation for them to investigate further, rather than just to hand the device back to the child without further inquiry.[31]

## III. Any Consumer Injury Caused by Apple's Platform is Outweighed by Countervailing Benefits to Consumers and Competition

Assuming for the moment there is at least some harm that consumers cannot reasonably avoid, the question turns to whether the harms are substantial relative to any benefits to competition or consumers attributable to the conduct. In performing this balancing, the Commission must also take "account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."[32] I now turn to that question.

### *A. Apple's Platform as a Benefit to Consumers and Competition*

Unfairness analysis requires an evaluation and comparison of the benefits and costs of Apple's decision not to increase or

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has included these explanations since at least June 2011. *See* http://www.apple.com/legal/internet-services/itunes/us/terms.html#SALE (Apple's current Terms and Conditions) and http://www.proandcontracts.com/wp-content/uploads/2011/06/2011.06.09-iTunes-Terms-and-Conditions-June-2011-Update-with-Highlighting.pdf (cached copy of what appears to be its Terms and Conditions as of June 2011).

31 The Terms and Conditions also explain how to use the parental control settings to control how the App Store works. *See* http://support.apple.com/kb/HT1904 and http://support.apple.com/kb/HT4213. These parental control settings allow users to disable in-app purchasing capability as well as establish settings that require a password each time a purchase is made, thereby eliminating the fifteen-minute window.

32 *Unfairness Statement*, *supra* note 7, at 1073-74.

enhance its disclosure of how Apple's platform works, including the fifteen-minute window. The fifteen-minute window is a *feature* of Apple's platform that applies to purchases of songs, books, apps, and in-app purchases. This feature has long been a part of the iTunes Store for downloading music, and regular users of iTunes apparently value it. In the context here, disclosure is perhaps better thought of as a product attribute—*guidance*—that Apple provides to the customer through on-screen and other explanations of how to use Apple's platform.[33]

In deciding what guidance to provide and how to provide it, firms face two important issues. First, since it is generally not possible to customize guidance for every individual customer, the optimal guidance inevitably balances the needs of different customers. In drawing this balance, the potential for harm from misinterpretation is likely important in deciding which customer on the sophistication spectrum might represent the least common denominator for directing the guidance. For any given degree of guidance, some customers will get it immediately, while others will have to work harder. If the potential for harm is very large, e.g., harm from a drug overdose, then both the firm and consumers want obvious, strong disclosures about dosage, and perhaps other steps like childproof caps. If the potential for harm is small, then strong guidance (or caps that are hard to open in the drug context) may make it more costly for consumers to use the product. Platform designers clearly face such tradeoffs in their decision-making regarding guidance and disclosures. Apple clearly faces the same tradeoff with respect to its decisions concerning the fifteen-minute window. This tradeoff is relevant for evaluating the benefit-cost test at the core of unfairness analysis.

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33 Compare the disclosure contemplated here with disclosure in the mortgage context, for example. Here, the disclosure itself – or the guidance offered while the user is interacting with the product – is an intrinsic part of the product's value. Indeed, Apple's business model is built on offering an integrated platform with a clean design that customers find intuitive and easy to use. The way the platform is presented, including disclosures or guidance offered during use, is a critically important component of value. In the mortgage context, the disclosures signed at closing are not a significant component of the value of the mortgage.

Second, because it is difficult to anticipate the full set of issues that might benefit from guidance of various types, the firm must decide how much time to spend researching, discovering, and potentially fixing possible issues *ex ante* versus finding and fixing issues as they arise. With complex technology products such as computing platforms, firms generally find and address numerous problems as experience is gained with the product. Virtually all software evolves this way, for example. This tradeoff—between time spent perfecting a platform up front versus solving problems as they arise—is also relevant for evaluating unfairness.

Apple presumably weighs the costs and benefits to Apple of different ways to provide guidance. In doing so, Apple must consider: (i) the benefit to Apple of greater sales of mobile devices, music, books, apps, and in-app components to customers who benefit from the additional guidance and make more purchases; (ii) the cost to Apple of fewer sales of mobile devices, music, books, apps, and in-app components by customers who find that more real-time guidance hampers their experience; and (iii) the cost to Apple of developing and implementing more guidance. In weighing (i) and (ii), Apple is particularly concerned about the effects on the sales of mobile devices that use Apple's platform, as they constitute the bulk of Apple's business, as indicated in Charts 1 and 2.[34]

The relevant universe for assessing unfairness of Apple's guidance provision, including disclosures relating to the fifteen-minute window, is the set of users to whom the guidance is directed. This includes all users of Apple's platform who might make online purchases through the platform.

The ratio of estimated unauthorized purchases in this case to all purchases made by users of Apple's platform is miniscule, as Charts 1 and 2 illustrate. This fact, by itself, does not establish that the benefits of Apple's decision to forgo additional guidance

34 In 2012, sales of the iPhone, iPad, and iPod accounted for over 76 percent of Apple's $157 billion in sales. *See* Apple, Inc., Annual Report (Form 10-K), at 73 (Oct. 31, 2012), *available at* http://files.shareholder.com/downloads/AAPL/2661211346x0xS1193125-12-444068/320193/filing.pdf.

of the type required by the consent order outweigh its costs. However, the remarkably low ratio does provide perspective on the following question: How much would the average non-cancelling customer need to be harmed by a requirement of additional guidance in order to outweigh the benefit of preventing harm to other consumers? Suppose the fraction of customers that would benefit from additional guidance is approximated by the ratio of estimated unauthorized purchases to total sales of iDevices. The analysis in Charts 1 and 2 indicates that estimated unauthorized purchases have been about 0.08 percent of iDevice-related sales since the App Store was launched. Suppose that customers that make unauthorized purchases cancel them and seek a refund. Suppose also that the time cost involved in seeking a refund return is $11.95.[35] Then, if the average harm to non-cancelling customers from additional guidance sufficient to prevent cancellations is more than about a penny per transaction, the additional guidance will be counter-productive.[36]

To be clear, the sales of iDevices are not an estimate of consumer benefits but rather they approximate the total universe of economic activity implicated by the Commission's consent order. Similarly, estimated unauthorized purchases merely approximate the total universe of consumers potentially harmed by Apple's practices. The harm from Apple's disclosure policy is limited to users that actually make unauthorized purchases. However, the potential benefits from Apple's disclosure choices are available to the entire set of iDevice users because these are

35 The $11.95 figure represents the seasonally adjust average earnings per half hour across all employees on private nonfarm payrolls, as reported by the Bureau of Labor and Statistics in May 2013. See http://www.bls.gov/news.release/empsit.t19.htm for the most recent report. The assumption is that customers that asked for returns were reimbursed for the charges as Apple attests, and that obtaining a reimbursement takes half an hour.

36 Let Y be the harm to non-cancelling customers from additional guidance sufficient to prevent cancellations. This harm will just equal the benefit of avoiding cancellations if (% Cancelling) x (Refund Time Cost) - (% Not Cancelling) x Y = 0. Assuming (% Cancelling) is .0008, (Refund Time Cost) is $11.95, and (% Not Cancelling) is .9992, solving for Y gives Y = $.009. In other words, if the harm to non-cancelling customers from additional guidance is more than roughly one cent for each transaction, then then the costs of the additional guidance will outweigh the benefits.

the consumers capable of purchasing apps and making in-app purchases. The disparity in the relative magnitudes of these universes of potential harms and benefits suggests, at a minimum, that further analysis is required before the Commission can conclude that it has satisfied its burden of demonstrating that any consumer injury arising from Apple's allegedly unfair acts or practices exceeds the countervailing benefits to consumers and competition. [37]

Nonetheless, the Commission effectively rejects an analysis of tradeoffs between the benefits of additional guidance and potential harm to some consumers or to competition from mandating guidance by assuming that "the burden, if any, to users who have never had unauthorized charges for in-app purchases, or to Apple, from the provision of this additional information is *de minimis*" and that any mandated disclosure would not "detract in any material way from a streamlined and seamless user experience." I respectfully disagree. These assumptions adopt too cramped a view of consumer benefits under the Unfairness Statement and, without more rigorous analysis to justify their application, are insufficient to establish the Commission's burden.

### *B. The Costs and Benefits to Consumers and Competition of Apple's Product Design and Disclosure Choices*

To justify a finding of unfairness, the Commission must demonstrate the allegedly unlawful conduct results in net consumer injury. This requirement, in turn, logically implies the Commission must demonstrate Apple's chosen levels of guidance are less than optimal because consumers would benefit from additional disclosure. There is a considerable economic literature on this subject that sheds light upon the conditions under which

37 Commissioner Ohlhausen suggests that our unfairness analysis compares inappropriately the injury caused by Apple's lack of clear disclosure with the benefits of Apple's disclosure policy to the entire ecosystem. She argues that this approach "skew[s] the balancing test for unfairness and improperly compare[s] injury 'oranges' from an individual practice with overall 'Apple' ecosystem benefits." Statement of Commissioner Ohlhausen at 3. For the reasons discussed, this analysis misses the point.

one might reasonably expect private disclosure levels to result in net consumer harm.[38]

To support the complaint and consent order the Commission issues today requires evidence sufficient to support a reason to believe that Apple will undersupply guidance about its platform relative to the socially optimal level. Economic theory teaches that such a showing would require evidence that "marginal" customers – the marginal consumer is the customer that is just indifferent between making the purchase or not at the current price – would benefit *less* from the consent order than the "inframarginal" customers who are willing to pay significantly more for the product than the current price and therefore would purchase the product irrespective of a small adjustment in an attribute. Nobel Laureate Michael Spence points out in his seminal work on the subject that this analysis generally requires information on the valuations of inframarginal consumers.[39] Here, marginal consumers are those who would not have made in-app purchases if Apple would have disclosed the fifteen-minute window. Inframarginal consumers are those Apple customers who would not change their purchasing behavior in response to a change in Apple's disclosures.

Staff has not conducted a survey or any other analysis that might ascertain the effects of the consent order upon consumers. The Commission should not support a case that alleges that Apple has underprovided disclosure without establishing this through rigorous analysis demonstrating – whether qualitatively or quantitatively – that the costs to consumers from Apple's disclosure decisions have outweighed benefits to consumers and the competitive process. The absence of this sort of rigorous analysis is made more troublesome in the context of a platform with countless product attributes and where significant consumer

38 Disclosure in this context is analogous to a quality decision that may affect different customers differently. A. Michael Spence, *Monopoly, Quality and Regulation*, 6 BELL J. OF ECON. 417-29 (1975); Eytan Sheshinski, *Price, Quality and Quantity Regulation in Monopoly Situations*, 43 ECONOMICA 127-37 (1976). The analysis of this issue is also explained in JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION § 2.2.1 (MIT Press 1988).

39 Spence, *supra* note 38.

benefits are intuitively obvious and borne out by data available to the Commission. We cannot say with certainty whether the average consumer would benefit more or less than the marginal consumer from additional disclosure without empirical evidence. This evidence might come from a study of how customers react to different disclosures. However, given the likelihood that the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers who are likely to be customers closer to the margin, I am inclined to believe that Apple has more than enough incentive to disclose.[40]

### *C. Other Considerations When Examining the Costs and Benefits of Platforms and other Multi-Attribute Products*

Unfairness analysis also requires the Commission to consider the impact of contemplated remedies or changes in the incentives to innovate new product features upon consumers and competition.[41] I close by discussing some additional dimensions of an economic analysis of the costs and benefits of product disclosures in the context of complicated products and platforms with many attributes, like Apple's platform, where such disclosures are a critical component of the user experience and have considerable impact upon the value consumers derive from the product.

For complicated products – for example, a web-based platform for purchasing and interacting with potentially millions of items using a mobile device – there are many things that can

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40 This argument does not, as Chairwoman Ramirez and Commissioner Brill suggest, "*presuppose* that a sufficient number of Apple customers will respond to the lack of adequate information by leaving Apple for other companies." Statement of Chairwoman Ramirez and Commissioner Brill at 5-6. Nor does the economic logic require any belief about the magnitude of switching costs. Rather, the analysis relies only upon the standard economic assumption that Apple chooses disclosure to maximize shareholder value, weighing how customers react to different disclosure policies. If Apple behaves this way, the average benefit of more disclosure to unaffected customers is less than the benefit to affected customers, and affected customers are more likely to be on the margin than unaffected customers, then economic theory implies that Apple is likely to have more than enough incentive to disclose.

41 *Unfairness Statement*, *supra* note 7, at 1073-74.

negatively impact user experience. The number of potential issues for products that involve hardware, software, and a human interface is large. This is the nature of technology. When designing a complex product, it is prohibitively costly to try to anticipate *all* the things that might go wrong. Indeed, it is very likely impossible. Even when potential problems are found, it is sometimes hard to come up with solutions that that one can be confident will fix the problem. Sometimes proposed solutions make it worse. In deciding how to allocate its scarce resources, the creator of a complex product weighs the tradeoffs between (i) researching and testing to identify and determine whether to fix potential problems in advance, versus (ii) waiting to see what problems arise after the product hits the marketplace and issuing desirable fixes on an ongoing basis. We observe the latter strategy in action for virtually all software.

The relevant analysis of benefits and costs for allegedly unfair omissions requires weighing of the benefits and costs of discovering and fixing the issue that arose *in advance* versus the benefits and costs of finding the problem and fixing it *ex post*. These considerations fit comfortably within the unfairness framework laid out by the Commission.[42] The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased regulatory burdens on the flow of information, reduced incentives to innovate and invest capital, and other social costs.[43]

Here, Apple did not anticipate the problems customers would have with children making in-app purchases that parents did not expect. When the problem arose in late 2010, press reports indicate that Apple developed a strategy for addressing the problem in a way that it believed made sense, and it also refunded customers that reported unintended purchases.[44] This is precisely

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42 The Commission must take "account of the various costs that a remedy would entail" including "reduced incentives to innovation and capital formation, and similar matters." *Unfairness Statement*, *supra* note 7, at 1073-74.

43 *Unfairness Statement*, *supra* note 7, at 1073-74.

44 *See* Foresman, *supra* note 13.

the efficient strategy described above when complex products like Apple's platform develop problems that are difficult to anticipate and fix in advance. Establishing that it is "unfair" unless a firm anticipates and fixes such problems in advance – precisely what the Commission's complaint and consent order establishes today – is likely to impose significant costs in the context of complicated products with countless product attributes. These costs will be passed on to consumers and threaten consumer harm that is likely to dwarf the magnitude of consumer injury contemplated by the complaint.

This investigation began largely because of complaints that arose when in-app purchases were first introduced into the marketplace and Apple had not had enough experience with the platform to recognize how parents and children would use the App Store. In late 2010, complaints began to emerge. In March 2011, Apple first altered its platform to address complaints about unauthorized in-app purchases. It is not unreasonable to surmise that as Apple has modified its policies based on experience, and customers have learned more about how to use the platform, unauthorized in-app purchases by children have most likely steadily declined.

The Commission has no foundation upon which to base a reasonable belief that consumers would be made better off if Apple modified its disclosures to confirm to the parameters of the consent order. Given the absence of such evidence, enforcement action here is neither warranted nor in consumers' best interest.

Complaint

**IN THE MATTER OF**

# L'OCCITANE, INC.

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

*Docket No. C-4445; File No. 122 3115*
*Complaint, March 27, 2014 – Decision, March 27, 2014*

This consent order addresses L'Occitane, Inc.'s advertising, marketing, and sale of "Almond Beautiful Shape" and "Almond Shaping Delight." The complaint alleges that respondent represented, in various advertisements, that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; topical use of Almond Beautiful Shape significantly slims the user's thighs and buttocks; topical use of Almond Beautiful Shape significantly reduces cellulite; and topical use of Almond Shaping Delight significantly slims the body in just four weeks. The complaint also alleges that respondent represented, in various advertisements, that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. The consent order requires respondent to pay four hundred and fifty thousand dollars ($450,000) to the Commission to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief. The order also prohibits respondent from making any representation that use of a drug or cosmetic reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is 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 the representation is true.

## *Participants*

For the *Commission*: *Matthew D. Gold* and *Evan Rose.*

For the *Respondent*: *Richard P. Jacobson, Colucci & Umans; Georgia Ravitz, Arent Fox LLP*; and *Thomas Perrelli, Jenner & Block.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that L'Occitane, Inc., a corporation ("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 L'Occitane, Inc., is a New York corporation with its principal office or place of business at 1430 Broadway, Second Floor, New York, New York 10018.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including "Almond Beautiful Shape" and "Almond Shaping Delight." Almond Beautiful Shape and Almond Shaping Delight are "drugs" and/or "cosmetics" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. 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.

4. Almond Beautiful Shape and Almond Shaping Delight are skin creams that contain almond extracts and other ingredients. Respondent promotes Almond Beautiful Shape and Almond Shaping Delight as able to slim and reshape the body.

5. Respondent disseminated or caused to be disseminated advertisements for Almond Beautiful Shape and Almond Shaping Delight, including but not necessarily limited to the attached Exhibits A to D. These advertisements contain the following statements:

a. Shape magazine advertisement (Exhibit A)

***Body Sculpting Solved***
***with L'OCCITANE***

L'OCCITANE has harnessed nature's secret, with body sculpting almond extracts cultivated in the south of France. We've teamed up with the Shaping Experts

to bring you a firmer, smoother body… and it's all just 4 weeks away!

. . . .

**Almond**
**Shaping Delight**
***3 out of 4 women saw***
***firmer, lifted skin.****
This luxuriously lightweight
massage gel instantly melts
into the skin to help visibly **{SCULPTING EXPERT}**
refine and sculpt the
silhouette.
*Reported by 25 women after 4 weeks.

. . . .

**Almond Beautiful Shape**
***Trim 1.3 inches in just 4 weeks***.*
This ultra-fresh gel-cream helps to visibly
reduce the appearance of cellulite, while
smoothing and firming the skin.
*Centimetric loss measurement of thigh circumference.
**{CELLULITE FIGHTER}**

b. Direct mail advertisement (Exhibit B)

**TIME TO SHAPE UP!**
NEW Almond Shaping Delight

**CLINICALLY PROVEN**
**SLIMMING EFFECTIVENESS**

. . . .

A noticeably **slimmer, firmer, you...**
(in just 4 weeks!)

NEW! ALMOND SHAPING DELIGHT

**SCULPTING EXPERT**

**3 OUT OF 4** WOMEN SAW
FIRMER, LIFTED SKIN.*

This luxuriously lightweight massage gel instantly melts into the skin to help visibly refine and sculpt the silhouette. Almond bud extracts and almond proteins naturally slim, smooth and lift the skin's surface.

*Reported by 25 women after 4 weeks.

NEW! ALMOND BEAUTIFUL SHAPE

**CELLULITE FIGHTER**

**TRIM 1.3 INCHES**
IN JUST 4 WEEKS.*

Concentrated in a powerful combination of Almond and a NEW lemon micro-exfoliating extract, this ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite, while smoothing and firming the skin.

*Centimetric loss measurement of thigh circumference.

c. Almond Beautiful Shape packaging (Exhibit C)

This ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite and to slim the thighs and buttocks, while smoothing and firming the skin.

. . . .

• **ANTI-FAT STORAGE:** slows the appearance of new fat cells on the thighs and buttocks with Peruvian liana, quinoa extract and carrot essential oil.

• **FAT RELEASE:** releases existing fat cells particularly with almond tree buds, rich in draining flavonoids, natural caffeine, immortelle, palmarosa and peppermint essential oils.

. . . .

**Effectiveness clinically proven on the Beautiful Shape formula:**

- Trims up to 3,3cm from the circumference of thighs
- Cellulite is significantly reduced

d. Almond Shaping Delight packaging (Exhibit D)

This fresh massage gel instantly melts into the skin to contribute to visibly refine and reshape the silhouette, to resculpt and tone the body contours.

. . . .

**Slimming effectiveness clinically proven***

. . . .

*25 women after 28 days

6. Through the means described in Paragraph 5, respondent has represented, directly or indirectly, expressly or by implication, that:

a. Topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Topical use of Almond Beautiful Shape significantly slims the user's thighs and buttocks;

c. Topical use of Almond Beautiful Shape significantly reduces cellulite; and

d. Topical use of Almond Shaping Delight significantly slims the body in just four weeks.

7. 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 6, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 5, respondent has represented, directly or indirectly, expressly or by implication, that:

a. Scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and

c. Scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks.

10. In truth and in fact:

a. Scientific tests do not prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks;

b. Scientific tests do not prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and

c. Scientific tests do not prove that Almond Shaping Delight significantly slims the body in just four weeks.

Among other things, the evidence relied on by respondent for its representations concerning Almond Beautiful Shape consisted primarily of results from a single unblinded, uncontrolled clinical trial. Moreover, respondent exaggerated the results of the trial; the average reported reduction in thigh circumference was less than one quarter of an inch, and only one participant out of fifty was reported to have achieved a reduction of 1.3 inches. The evidence relied on by respondent for its representation concerning Almond Shaping Delight consisted primarily of results from a single nonrandomized, unblinded, uncontrolled clinical trial. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

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

**THEREFORE**, the Federal Trade Commission this twenty-seventh day of March, 2014, has issued this complaint against respondent.

By the Commission

Complaint

## Exhibit A

**Exhibit A: *Shape* magazine advertisement**

ADVERTISEMENT

# The *Shape Up* Plan

**Peel off the layers of winter and reveal a sleek new you just in time for Spring**

Out with the negative, in with the positive. Learn to lighten up, and let go of the emotional build up. Replace each negative thought with a positive affirmation and see what a difference it makes in your state of mind.

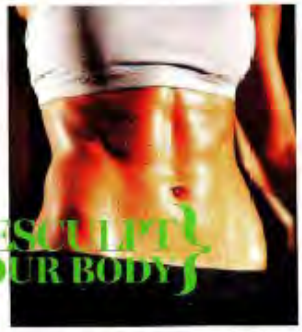
## {RENEW YOUR SPIRIT}

## {REFRESH YOUR LOOK}

Get a more polished look by paring down your closet to essential pieces that you can mix and match to make an array of stylish outfits for every occasion. Multi-tasking "musts" like a white button down shirt or a neutral colored cardigan will be easier to pair up than last year's trendy top.

## {REFINE YOUR DIET}

Consuming a healthy, balanced diet and eliminating refined foods (white bread and rice, sugary cereals and pastries) from your diet may lower your overall body fat percentage and can help to reduce the appearance of unsightly dimples. The high fiber content in whole grains also helps to treat and prevent cellulite, according to the University of Maryland Medical Center.



## {RESCULPT YOUR BODY}

Strong, toned muscles increase your metabolism and burn calories more than cardio-only workouts, walking or stair climbing. Incorporate core strengthening exercises and resistance training into your usual workout. Be sure to pay attention to your form so you get the best results.

**Exhibit A-1**


ADVERTISEMENT
Body Sculpting Solved
with L'OCCITANE
L'OCCITANE has harnessed nature's secret, with body sculpting almond extracts cultivated in the south of France. We've teamed up with the Shaping Experts to bring you a firmer, smoother body... and it's all just 4 weeks away!
Almond Shower Oil
Use as a cleanser or a shaving base to leave skin silky, supple and ready for application of your targeted shaping expert.
{BEST SELLER!}
Almond Milk Concentrate
96% of women saw smoother skin.*
This velvety, multi-tasking body cream for daily use nourishes, firms and tones the skin.
{BODY SMOOTHER}
Almond Shaping Delight
3 out of 4 women saw firmer, lifted skin.*
This luxuriously lightweight massage gel instantly melts into the skin to help visibly refine and sculpt the silhouette.
{SCULPTING EXPERT}
Almond Beautiful Shape
Trim 1.3 inches in just 4 weeks.*
This ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite, while smoothing and firming the skin.
{CELLULITE FIGHTER}
Mark Your Calendar
Exclusive event with L'OCCITANE and SHAPE!
WHEN: Thursday, April 5th
WHAT: Enjoy an exclusive party with expert tips and detoxifying beauty treatments. Plus, receive a special gift with any $25 purchase.
WHERE: To find an event near you, visit usa.loccitane.com/ShapeUpEvent
Your Gift! A $40 Value

Exhibit A-2

Complaint

## Exhibit B


Exhibit B: Direct mail advertisement

Exhibit B-1


A noticeably slimmer, firmer you...
(in just 4 weeks!)
NEW! ALMOND SHAPING DELIGHT
SCULPTING EXPERT
3 OUT OF 4 WOMEN SAW FIRMER, LIFTED SKIN.*
This luxuriously lightweight massage gel instantly melts into the skin to help visibly refine and sculpt the silhouette. Almond bud extracts and almond proteins naturally slim, smooth and lift the skin's surface.
NEW! ALMOND BEAUTIFUL SHAPE
CELLULITE FIGHTER
TRIM 1.3 INCHES IN JUST 4 WEEKS.*
Concentrated in a powerful combination of Almond and a NEW lemon micro-exfoliating extract, this ultra-fresh gel-cream helps to visibly reduce the appearance of cellulite, while smoothing and firming the skin.
*Reported by 15 women after 4 weeks.
*Conforms to measures of high consumer preference.
Our products are available in our boutiques at us.loccitane.com or via phone at 888 623 2880. Pickermay van in Hawaii.

**Exhibit B-2**


THE TRUE STORY OF
ALMOND BODY CARE
A true customer favorite, Almond body care combines the sweet fragrance of sustainably cultivated almonds from Provence with incredibly firming and nourishing benefits.
Just in time for spring, you can now reveal a firmer, smoother body!
YOUR EXCLUSIVE GIFT!
Shape-Up Ritual
L'OCCITANE
EN PROVENCE
CONCENTRÉ DE LAIT
MILK CONCENTRATE
ALMOND MILK CONCENTRATE
$44 7 oz. #26LC20XA0
BODY SMOOTHER
96% OF WOMEN SAW SMOOTHER SKIN.*
This multi-tasking body cream nourishes, firms and tones the skin with the help of almond protein and silicium.

**Exhibit B-3**

Complaint


Exhibit B-4

Complaint

## Exhibit C

**Exhibit C: Almond Beautiful Shape packaging**

**Front**


**Side**

**Back**

**Exhibit C-1**

## Exhibit D

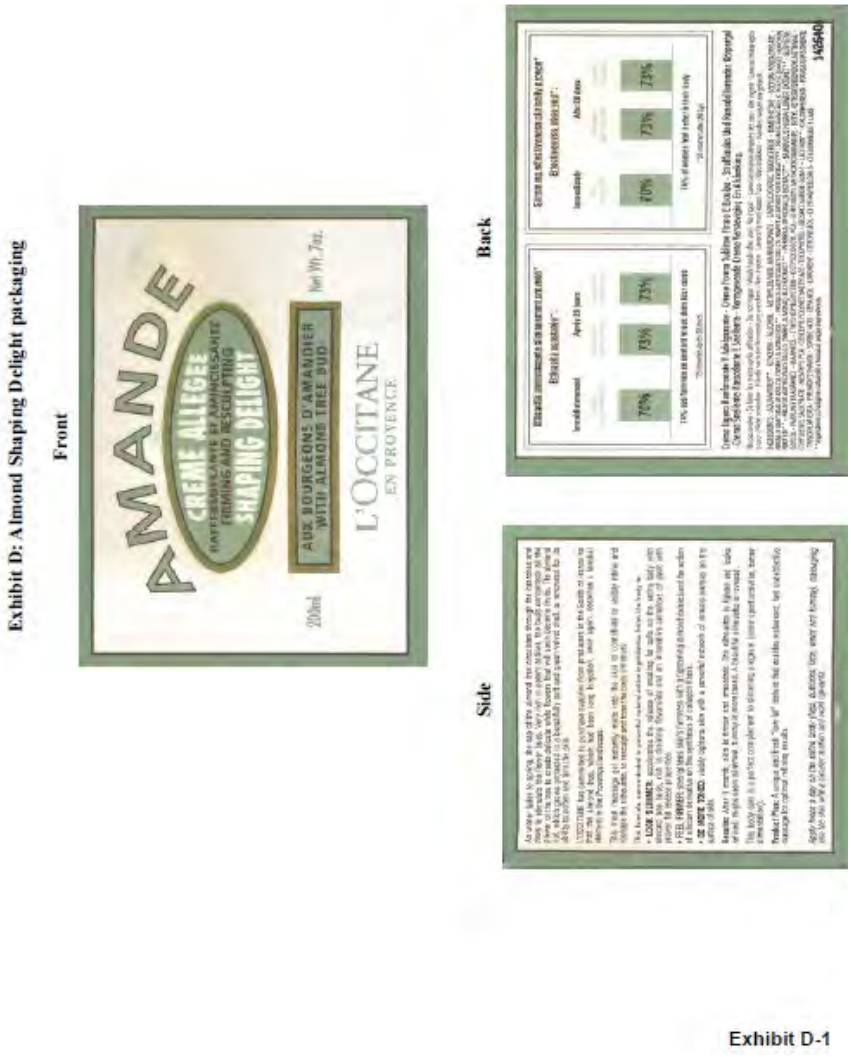



Exhibit D-1

## DECISION AND ORDER

The Federal Trade Commission ("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 Western Region-San Francisco 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 respondent that it neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, and, only for purposes of this action, admits 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, and having duly considered the comments received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent L'Occitane, Inc., is a New York corporation with its principal office or place of business at 1430 Broadway, Second Floor, New York, New York 10018.

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. Unless otherwise specified, "respondent" shall mean L'Occitane, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.

B. "Adequate and well-controlled human clinical study" means a human clinical study that is randomized, double-blind, placebo controlled, and conducted by persons qualified by training and experience to conduct such study.

C. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

D. "Covered Product" means any drug or cosmetic.

E. "Drug" and "cosmetic" mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

F. "Essentially Equivalent Product" means a product that contains the identical ingredients, except for inactive ingredients (e.g., binders, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the Covered Product; *provided that* the Covered Product may contain additional ingredients if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount and combination of additional ingredients is unlikely to impede or inhibit the effectiveness of the ingredients in the Essentially Equivalent Product.

## I.

**IT IS ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of Almond Beautiful Shape, Almond Shaping Delight, or any other topically applied product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product causes substantial weight or fat loss or a substantial reduction in body size.

## II.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation, other than representations covered under Part I of this order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product causes weight or fat loss or a reduction in body size, unless the representation is non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part, competent and reliable scientific evidence shall consist of at least two adequate and well-controlled human clinical studies of the Covered Product, or of an Essentially Equivalent Product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. Respondent shall have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

## III.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, shall not make any representation, other than representations covered under Parts I and II of this order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that use of such product reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that is 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 the representation is true. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, and that are generally accepted in the profession to yield accurate and reliable results.

## IV.

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication, including through the use of any product name or endorsement:

A. The existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or

B. That the benefits of the product are scientifically proven.

## V.

**IT IS FURTHER ORDERED** that nothing in this order shall prohibit respondent from making any representation for:

A. Any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and

B. Any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

## VI.

**IT IS FURTHER ORDERED** that respondent shall, within thirty (30) days after the date of entry of this order, provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased Almond Beautiful Shape or Almond Shaping Delight from March 19, 2012 through the date of entry of this order, to the extent it has such information in its possession or control, including information available upon request from franchisees or others. Such file: (1) shall include each consumer's name and address, the product(s) purchased, the total amount of moneys paid less any amount credited for returns or refunds, the date(s) of purchase, and, if available, the consumer's telephone number and email address; (2) shall be updated through the National Change of Address database; and (3) shall be accompanied by a sworn affidavit attesting to its accuracy.

## VII.

**IT IS FURTHER ORDERED** that respondent shall pay to the Federal Trade Commission the sum of four hundred fifty thousand dollars ($450,000). This payment shall be made in the following manner:

A. The payment shall be made by electronic funds transfer within ten (10) days after the date that this order becomes final and in accordance with instructions provided by a representative of the Federal Trade Commission.

B. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment. In the event such default continues for ten (10) calendar days beyond the date that payment is due, the entire amount shall immediately become due and payable.

C. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress to consumers (which shall be the first priority for dispensing the funds set forth above) is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to respondent's practices alleged in the complaint. Any funds not used for such equitable relief shall be deposited in the United States Treasury as disgorgement. Respondent shall be notified as to how the funds are distributed, but shall have no right to challenge the Commission's choice of remedies under this Part. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under this Part shall be deemed a payment of any fine, penalty, or punitive assessment.

D. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand for

return of the funds, directly or indirectly, through counsel or otherwise.

E. Respondent agrees that the facts as alleged in the complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further agrees that the facts alleged in the complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and that this order shall have collateral estoppel effect for such purposes.

F. In accordance with 31 U.S.C. § 7701, respondent is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying number, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of respondent's relationship with the government.

G. Proceedings instituted under this Part are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order.

## VIII.

**IT IS FURTHER ORDERED** that respondent L'Occitane, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, upon reasonable notice and request, make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

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.

**IX.**

**IT IS FURTHER ORDERED** that respondent L'Occitane, Inc., and its successors and assigns shall deliver a copy of this order to all current and, for the next three (3) years, all future principals, officers, directors, and other employees having primary responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent L'Occitane, Inc., and its successors and assigns 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.

**X.**

**IT IS FURTHER ORDERED** that respondent L'Occitane, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent 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, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of L'Occitane, Inc., FTC File Number 122 3115. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

## XI.

**IT IS FURTHER ORDERED** that respondent L'Occitane, Inc., and its successors and assigns 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 of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

## XII.

This order will terminate on March 27, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld

on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

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 Consent Order from L'Occitane, Inc. ("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 and take appropriate action or make final the agreement's proposed order.

This matter involves the advertising, marketing, and sale of "Almond Beautiful Shape" and "Almond Shaping Delight" (collectively, "the almond products") by respondent. Respondent has marketed the almond products to consumers through its retail stores and website, and through third-party retail outlets.

The almond products are skin creams that contain almond extracts and other ingredients. According to the FTC complaint, respondent promoted the almond products as able to slim and reshape the body.

Specifically, the FTC complaint alleges that respondent represented, in various advertisements, that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; topical use of Almond Beautiful Shape significantly

slims the user's thighs and buttocks; topical use of Almond Beautiful Shape significantly reduces cellulite; and topical use of Almond Shaping Delight significantly slims the body in just four weeks. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented, in various advertisements, that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. The complaint alleges that these claims are false and thus violate the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from claiming that the almond products or any other topically applied product causes substantial weight or fat loss or a substantial reduction in body size. Part I of the order is designed to fence in respondent by ensuring that extreme, scientifically unfeasible claims will not be made in the future.

Part II addresses the slimming claims at issue in this matter. It covers any representation, other than representations covered under Part I, that a drug or cosmetic causes weight or fat loss or a reduction in body size. Part II prohibits respondent from making such representations unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of Part II, the proposed order defines "competent and reliable scientific evidence" as at least two randomized, double-blind, placebo-controlled human clinical studies that are conducted by independent, qualified researchers and that conform to acceptable designs and protocols, and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

Part III of the proposed order prohibits respondent from making any representation, other than representations covered

under Parts I or II, that use of a drug or cosmetic reduces or eliminates cellulite or affects body fat or weight, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is 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 the representation is true. For purposes of Part III, the proposed order defines "competent and reliable scientific evidence" as tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, and that are generally accepted in the profession to yield accurate and reliable results.

Part IV of the proposed order addresses the allegedly false claims that scientific tests prove that topical use of Almond Beautiful Shape trims 1.3 inches from the user's thighs in just four weeks; scientific tests prove that topical use of Almond Beautiful Shape significantly reduces cellulite; and scientific tests prove that Almond Shaping Delight significantly slims the body in just four weeks. Part IV prohibits respondent, when advertising any product, from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, or misrepresenting that the benefits of the product are scientifically proven.

Part V of the proposed order states that the order does not prohibit respondent from making representations for any drug that are permitted in labeling for that drug under any tentative or final standard promulgated by the Food and Drug Administration ("FDA"), or under any new drug application approved by the FDA. This part of the proposed order also states that the order does not prohibit respondent from making representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Part VII of the proposed order requires respondent to pay four hundred and fifty thousand dollars ($450,000) to the Commission to be used for equitable relief, including restitution, and any attendant expenses for the administration of such equitable relief.

To facilitate the payment of redress, Part VI of the proposed order requires L'Occitane to provide to the Commission a searchable electronic file containing the name and contact information of all consumers who purchased the almond products from March 19, 2012 through the date of entry of the order.

Parts VIII, IX, X, and XI of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

**IN THE MATTER OF**

# GOLDENSHORES TECHNOLOGIES, LLC
**AND**
# ERIK M. GEIDL

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

*Docket No. C-4446; File No. 132 3087*
*Complaint, March 31, 2014 – Decision, March 31, 2014*

This consent order addresses Goldenshores Technologies, LLC, and Erik M. Geidl's marketing of the "Brightest Flashlight Free" mobile application to consumers for use on their Android mobile devices. The complaint alleges that fail to disclose, or adequately disclose, that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks. The complaint further alleges that the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA. The consent order requires respondents to give users of their mobile applications a clear and prominent notice and to obtain express affirmative consent prior to collecting their geolocation information; and to delete any "covered information" in their possession, custody, or control that they collected from users of the Brightest Flashlight App prior to the entry of the order. The order also prohibits respondent from misrepresenting (1) the extent to which "covered information" is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of "covered information" collected from or about them, their computers or devices, or their online activities.

## *Participants*

For the *Commission*: *Kerry O'Brien* and *Sarah Schroeder*.

For the *Respondents*: *Samuel T. Creason, Creason, Moore, Dokken & Geidl, PLLC.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Goldenshores Technologies, LLC, a limited liability company, and Erik M. Geidl, individually and as the managing member of the limited liability company ("respondents"), have 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 Goldenshores Technologies, LLC, is a Delaware limited liability company with its principal office or place of business at 1205 Ponderosa Drive, Moscow, ID 83843.

2. Respondent Erik M. Geidl is the managing member of the limited liability company. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Goldenshores Technologies, LLC.

3. The acts and practices of respondents, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

## Brightest Flashlight Free Application

4. Since at least February 2011, respondents have advertised and distributed products to the public, including the "Brightest Flashlight Free" mobile application ("Brightest Flashlight App") developed for Google's Android operating system. Consumers have downloaded the Brightest Flashlight App from a variety of sources, including the Google Play application store. As of May 2013, the Google Play application store ranked the Brightest Flashlight App as one of the top free applications available for download. Users have downloaded the Brightest Flashlight App tens of millions of times via Google Play.

5. The Brightest Flashlight App purportedly works by activating all lights on a mobile device, including, where available, the device's LED camera flash and screen to provide outward-facing illumination. While running, however, the application also transmits, or allows the transmission of, data from the mobile device to various third parties, including advertising networks. The types of data transmitted include, among other things, the device's precise geolocation along with persistent device identifiers that can be used to track a user's location over time.

6. Respondents have disseminated or have caused to be disseminated application promotion pages ("app promotion pages") for the Brightest Flashlight App in Google Play, including but not limited to the attached Exhibit A. The app promotion pages provide a description of the application. (*See* Exhibit A, screens 1 to 3) This description does not make any statements relating to the collection or use of data from users' mobile devices. The app promotion pages also include the general "permission" statements that appear for all Android applications. (*See* Exhibit A, screens 12 to 30)

7. Android "permissions" provide notice to consumers regarding what sensitive information (*e.g.*, location information) or sensitive device functionality (*e.g.*, the ability to take photos with the device's camera) an application may access. The permissions, however, do not explain whether the application shares any information with third parties.

## Respondents' Privacy Policy

8. Consumers may view respondents' Privacy Policy by clicking on a Privacy Policy link on the Brightest Flashlight app promotion pages in Google Play. (See Exhibit A, screen 9) The Privacy Policy also is available at respondents' website, www.goldenshorestechnologies.com.

9. Respondents have disseminated or have caused to be disseminated respondents' Privacy Policy, including but not limited to the attached Exhibit B. Their Privacy Policy contains the following statements concerning the collection and use of device data:

> Consent to Use of Data. Goldenshores Technologies and its subsidiaries and agents may collect, maintain, process and use diagnostic, technical and related information, including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Goldenshores Technologies Software, and to verify compliance with the

> terms of the License. Goldenshores Technologies may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.
>
> (Exhibit B-1, Privacy Policy)

Following this summary, the Privacy Policy provides the contents of the Brightest Flashlight end user license agreement ("EULA"), described below.

10. Respondents' Privacy Policy does not disclose or adequately disclose to consumers that the Brightest Flashlight App transmits or allows the transmission of device data, including precise geolocation along with persistent device identifiers, to third parties, including advertising networks.

**Respondents' End-User License Agreement Document**

11. After installing the Brightest Flashlight App, the application presents users with a Brightest Flashlight EULA, including but not limited to the attached Exhibit C. The Brightest Flashlight EULA instructs consumers to:

> [R]ead this software license agreement ("license") carefully before using the Goldenshores Technologies Software. By using the Goldenshores Technologies software, you are agreeing to be bound by the terms of this license. If you do not agree to the terms of this license, do not install and/or use the software.
>
> (Exhibit C, screens 4-5)

The Brightest Flashlight EULA also represents that users must "Accept" or "Refuse" the EULA by selecting the appropriate button. (Exhibit C) Those buttons appear at the bottom of each screen displaying the EULA.

12. The Brightest Flashlight EULA reiterates respondents' Privacy Policy, including the following statements relating to the collection and use of device data:

> 3. Consent to Use of Data. You agree that Goldenshores Technologies and its subsidiaries and agents may collect, maintain, process and use diagnostic, technical and related information, including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Goldenshores Technologies Software, and to verify compliance with the terms of this License. Goldenshores Technologies may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.

(Exhibit C, screens 14-15)

13. As described in Paragraph 12, the Brightest Flashlight EULA does not disclose or adequately disclose to consumers that the Brightest Flashlight App transmits or allows the transmission of device data, including precise geolocation along with persistent device identifiers, to third parties, including advertising networks.

14. While the "Refuse" button, described in Paragraph 11, appears to give consumers the option to refuse the terms of the Brightest Flashlight EULA, including the terms relating to the collection and use of device data, that choice is illusory. Based upon the statements made in the EULA, as described in Paragraphs 11 and 12, consumers would not expect the application to operate on their mobile devices, including collecting and using their device data, until after they have accepted the terms of the EULA. In fact, while consumers are viewing the Brightest Flashlight EULA, the application transmits or causes the transmission of their device data, including the device's precise geolocation and persistent identifier, even before they accept or refuse the terms of the EULA.

## COUNT I

15. Through the means described in Paragraphs 9 and 12, respondents represented, expressly or by implication, that respondents may periodically collect, maintain, process, and use information from users' mobile devices to provide software updates, product support, and other services to users related to the Brightest Flashlight App, and to verify users' compliance with respondents' EULA. In numerous instances, in which respondents have made such representations, respondents have failed to disclose or failed to adequately disclose that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks. These facts would be material to users in their decision to install the application. The failure to disclose, or adequately disclose, these facts, in light of the representation made, was, and is, a deceptive practice.

## COUNT II

16. Through the means described in Paragraphs 11 and 12, respondents represented, expressly or by implication, that consumers have the option to refuse the terms of the Brightest Flashlight EULA, including those relating to the collection and use of device data, and thereby prevent the Brightest Flashlight App from ever collecting or using their device's data.

17. In truth and in fact, consumers cannot prevent the Brightest Flashlight App from ever collecting or using their device's data. Regardless of whether consumers accept or refuse the terms of the EULA, the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA. Therefore, the representation set forth in Paragraph 16 was, and is, false or misleading.

18. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission this thirty-first day of March, 2014, has issued this complaint against respondents.

By the Commission.

Complaint

# Exhibit A





Exhibit A-1


Apps
Brightest Flashlight Free™


Apps
Brightest Flashlight Free™


Apps
Brightest Flashlight Free™
REVIEWS
4.8


Apps
Brightest Flashlight Free™

Exhibit A-2

Complaint





Exhibit A-3


Modify or delete the contents of your USB storage
Allows the app to write to the USB storage
OK


Apps
Brightest Flashlight Free™
Storage
System tools
Your location
Camera


System tools
Install shortcuts
Allows an app to add shortcuts without user intervention
Uninstall shortcuts
Allows the app to remove shortcuts without user intervention
OK


Apps
Brightest Flashlight Free™
Storage
System tools
Your location
Camera

Exhibit A-4

Complaint

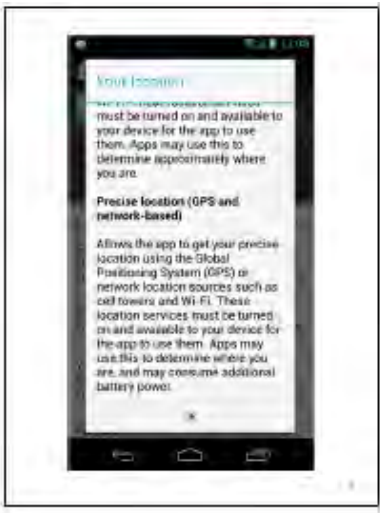






Exhibit A-5


Apps
Brightest Flashlight Free*
Phone calls
Network communication
Hide
System tools
Network communication


Read phone status and identity
Allows the app to access the phone features of the device. This permission allows the app to determine the phone number and device IDs, whether a call is active, and the remote number connected by a call.
OK


Apps
Brightest Flashlight Free*
Phone calls
Network communication
Hide
System tools
Network communication


Full network access
Allows the app to create network sockets and use custom network protocols. The browser and other applications provide means to send data to the internet, so this permission is not required to send data to the internet.
OK

Exhibit A-6

Complaint





Exhibit A-7


Apps
Brightest Flashlight Free*
Network communication
Hide
System tools
Network communication
Affects Battery


Affects Battery
Control flashlight
Allows the app to control the flashlight.
Prevent phone from sleeping
Allows the app to prevent the phone from going to sleep

Exhibit A-8

Complaint

## Exhibit B


Exhibit B-1

PLEASE READ THIS SOFTWARE LICENSE AGREEMENT ("LICENSE") CAREFULLY BEFORE USING THE GOLDENSHORES TECHNOLOGIES SOFTWARE. BY USING THE GOLDENSHORES TECHNOLOGIES SOFTWARE, YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS LICENSE. IF YOU DO NOT AGREE TO THE TERMS OF THIS LICENSE, DO NOT INSTALL AND/OR USE THE SOFTWARE.

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(a) Subject to the terms and conditions of this License and as permitted in the "Usage Rules" set forth in the Android Market Terms and Conditions, you are granted a limited non-transferable license to install and use the Goldenshores Technologies Software on any Android-branded mobile device that you own or control. You may not distribute or make the Goldenshores Technologies Software available

Exhibit B-2

Complaint

over a network where it could be used by multiple devices at the same time. You may not rent, lease, lend, sell, redistribute or sublicense the Goldenshores Technologies Software.

(b) You may not and you agree not to, or to enable others to, copy (except as expressly permitted by this License and the "Usage Rules"), decompile, reverse engineer, disassemble, attempt to derive the source code of, decrypt, modify, or create derivative works of the Goldenshores Technologies Software or any services provided by the Goldenshores Technologies Software, or any part thereof (except as and only to the extent any foregoing restriction is prohibited by applicable law or to the extent as may be permitted by the licensing terms governing use of any open sourced components included with the Goldenshores Technologies Software). Any attempt to do so is a violation of the rights of Goldenshores Technologies and its licensors of the Goldenshores Technologies Software.

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Exhibit B-3

Goldenshores Technologies Software or that desired results will be obtained.

3. Consent to Use of Data. You agree that Goldenshores Technologies and its subsidiaries and agents may collect, maintain, process and use diagnostic, technical and related information,including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Goldenshores Technologies Software, and to verify compliance with the terms of this License. Goldenshores Technologies may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.

4. Termination. This License is effective until terminated. Your rights under this License will terminate automatically or otherwise cease to be effective without notice from Goldenshores Technologies if you fail to comply with any term(s) of this License. Upon the termination of this License, you shall cease all use of the Goldenshores Technologies Software and destroy all copies, full or partial, of the Goldenshores Technologies Software. Sections 6, 7, 10 and 11 of this License shall survive any such termination.

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(a) The Goldenshores Technologies Software enables access to third party services and web sites (collectively and individually, "Services"). Such services may not be available in all languages or in all countries. Use of the Services requires Internet access and use of certain Services requires you to accept additional terms.

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Exhibit B-4

Complaint

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Exhibit B-5

6. Disclaimer of Warranties.
6.1 If you are a customer who is a consumer (someone who uses the Goldenshores Technologies Software outside of your trade, business or profession), you may have legal rights in your country of residence which would prohibit the following limitations from applying to you, and where prohibited they will not apply to you. To find out more about rights, you should contact a local consumer advice organization.

6.2 YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT TO THE EXTENT PERMITTED BY APPLICABLE LAW, USE OF THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES IS AT YOUR SOLE RISK AND THAT THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY AND EFFORT IS WITH YOU.

6.3 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES ARE PROVIDED "AS IS", WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND GOLDENSHORES TECHNOLOGIES AND GOLDENSHORES TECHNOLOGIES'S LICENSORS (COLLECTIVELY REFERRED TO AS "GOLDENSHORES TECHNOLOGIES" FOR THE PURPOSES OF SECTIONS 6 AND
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THE GOLDENSHORES TECHNOLOGIES SOFTWARE OR SERVICES WILL BE CORRECTED.

6.5 YOU FURTHER ACKNOWLEDGE THAT THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES ARE NOT INTENDED OR SUITABLE FOR USE IN SITUATIONS OR
ENVIRONMENTS WHERE THE FAILURE OF, OR ERRORS OR

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12. Third Party Acknowledgements. Portions of the

Exhibit B-8

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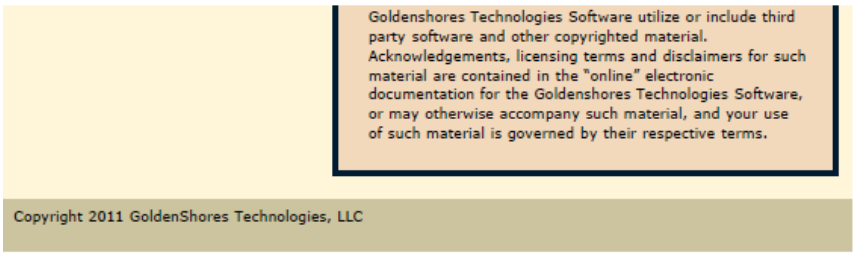


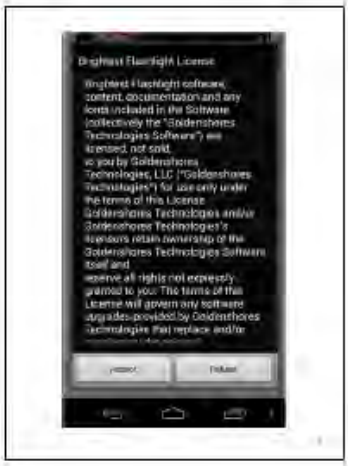

Exhibit B-9

Complaint

## Exhibit C




Complaint



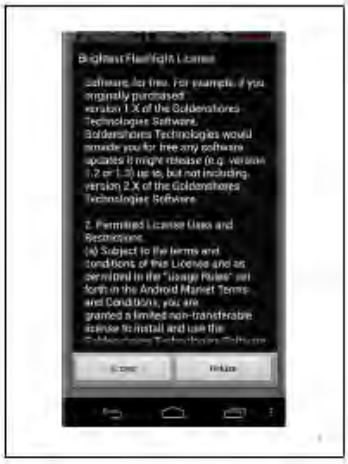



Exhibit C - 2

Complaint

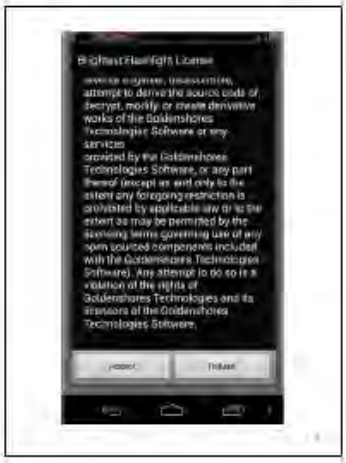






Exhibit C - 3

Complaint


Exhibit C - 4

Complaint



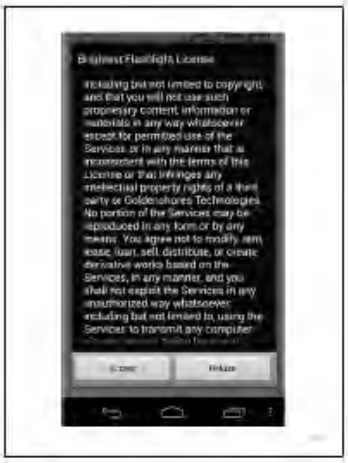




Exhibit C - 5

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Exhibit C - 6


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5.5 YOU FURTHER ACKNOWLEDGE THAT THE GOLDENSHORES TECHNOLOGIES SOFTWARE AND SERVICES ARE NOT INTENDED OR SUITABLE FOR USE IN SITUATIONS OR ENVIRONMENTS WHERE THE


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5.6 NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY GOLDENSHORES TECHNOLOGIES

Exhibit C - 7

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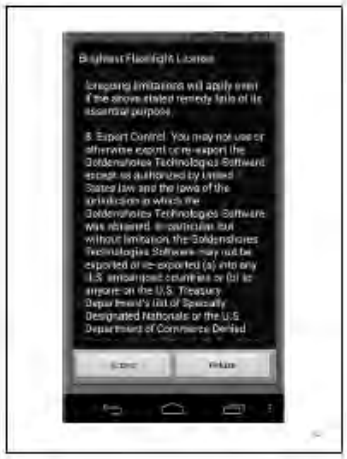
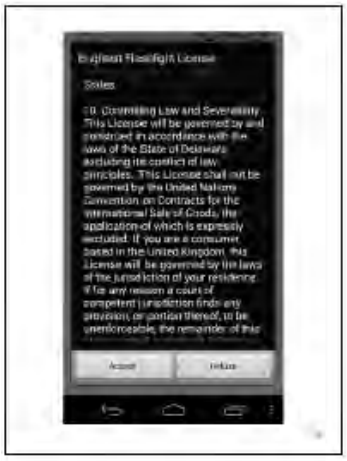



Exhibit C - 8



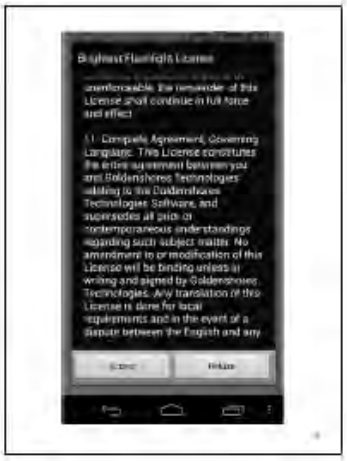


Exhibit C - 9

Complaint


Exhibit C -10

Complaint

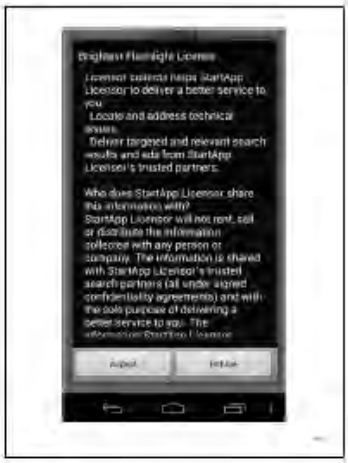
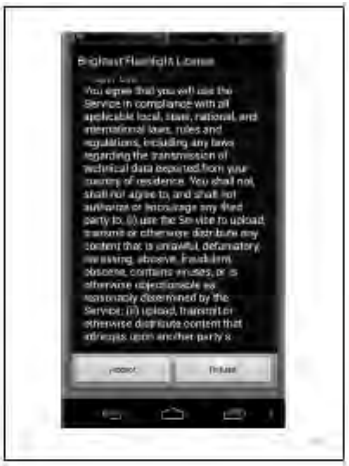


Exhibit C -11

Complaint


Exhibit C -12


Brightest Flashlight License
StartApp Licensor collects
Although taking high standards of
security, no digital information is
100% secure. StartApp Licensor
cannot guarantee the safety of the
information.
Data Retention
StartApp Licensor will retain your
information for as long as your
account is active or as needed to
provide you Services. StartApp
Licensor will retain and use your
information as necessary to comply
with StartApp Licensor's legal
obligations, resolve disputes and
enforce StartApp Licensor's
agreements.
Proper Use
You agree that you will use the


Brightest Flashlight License
You agree that you will use the
Service in compliance with all
applicable local, state, national, and
international laws, rules and
regulations, including any laws
regarding the transmission of
technical data exported from your
country of residence. You shall not,
shall not agree to, and shall not
authorize or encourage any third
party to, (i) use the Service to upload,
transmit or otherwise distribute any
content that is unlawful, defamatory,
harassing, abusive, fraudulent,
obscene, contains viruses, or is
otherwise objectionable as
reasonably determined by the
Service; (ii) upload, transmit or
otherwise distribute content that
infringes upon another party's


Brightest Flashlight License
otherwise distribute content that
infringes upon another party's
intellectual property rights or other
proprietary, commercial or fiduciary
rights or obligations, (iii) prevent
others from using the Service; (iv)
use the Service for any fraudulent or
inappropriate purpose; (v) interfere
with, damage, disable, overburden,
impair or disrupt in any way the
Service; (vi) act in any way that
violates the Service policies, as may
be revised from time to time.
Violation of any of the foregoing may
result in immediate termination of
this Agreement, and may subject you
to state and federal penalties and
other legal consequences. StartApp
Licensor reserves the right, but shall
have no obligation, to investigate

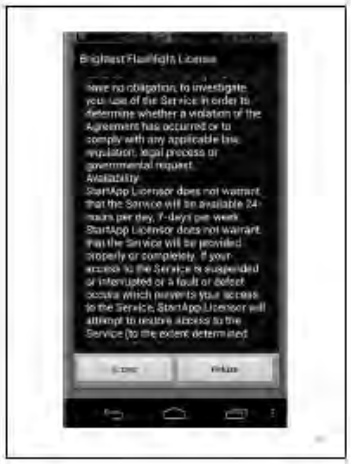
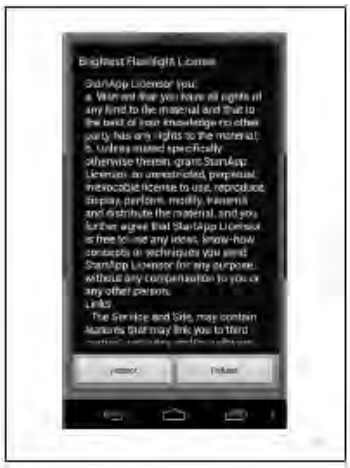

Brightest Flashlight License
have no obligation, to investigate
your use of the Service in order to
determine whether a violation of the
Agreement has occurred or to
comply with any applicable law,
regulation, legal process or
governmental request.
Availability
StartApp Licensor does not warrant
that the Service will be available 24-
hours per day, 7-days per week.
StartApp Licensor does not warrant
that the Service will be provided
properly or completely. If your
access to the Service is suspended
or interrupted or a fault or defect
occurs which prevents your access
to the Service, StartApp Licensor will
attempt to restore access to the
Service (to the extent determined

Exhibit C -13

Complaint



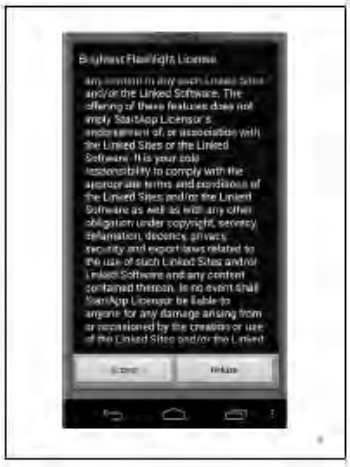



Exhibit C -14


Brightest Flashlight License
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Termination
StartApp Licensor may, at its sole discretion, terminate the Service or your use of the Service, permanently or temporarily, at any time and without cause.
DISCLAIMER OF WARRANTIES
THE SERVICE AND SITE ARE
Brightest Flashlight License
DISCLAIMER OF WARRANTIES
THE SERVICE AND SITE ARE PROVIDED "AS IS" AND "AS AVAILABLE," WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED. WITHOUT LIMITATION OF THE FOREGOING, STARTAPP LICENSOR SPECIFICALLY DISCLAIMS, FOR THE AVOIDANCE OF DOUBT (ON BEHALF OF ITSELF, ITS SUBSIDIARIES, ITS PARTNERS AND ITS AFFILIATES) OF ANY AND ALL WARRANTIES, INCLUDING, BUT NOT LIMITED TO, (I) ANY WARRANTIES CONCERNING THE AVAILABILITY, ACCURACY, SECURITY, USEFULNESS, INTEROPERABILITY, OR CONTENT OF THE SOFTWARE, SERVICE OR SITE; AND (II) ANY WARRANTIES OF
Brightest Flashlight License
SITE; AND (II) ANY WARRANTIES OF TITLE, WARRANTY OF NON-INFRINGEMENT, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THIS DISCLAIMER OF LIABILITY APPLIES TO ANY DAMAGES OR INJURY CAUSED BY THE SERVICE OR SITE, INCLUDING WITHOUT LIMITATION AS A RESULT OF ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, VIRUS, COMMUNICATION LINE FAILURE, THEFT OR DESTRUCTION OR UNAUTHORIZED ACCESS TO, ALTERATION OF OR USE OF RECORD, WHETHER FOR BREACH OF CONTRACT, TORT, NEGLIGENCE,

Exhibit C -15


Exhibit C -16

## DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of a

complaint which the Western Region-San Francisco proposed to present to the Commission for its consideration and which, if issued, would charge the respondents with violations of the Federal Trade Commission Act; and

The respondents, their 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 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 respondents have 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, and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1.a. Respondent Goldenshores Technologies, LLC, is a Delaware limited liability company with its principal office or place of business at 1205 Ponderosa Drive, Moscow, ID 83843.

1.b. Respondent Erik M. Geidl is the managing member of the limited liability company. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company. His principal office or place of business is the same as that of Goldenshores Technologies, LLC.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

respondents, and the proceeding is in the public interest.

## ORDER

## DEFINITIONS

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

A. Unless otherwise specified, "respondents" shall mean Goldenshores Technologies, LLC, its successors and assigns; and Erik M. Geidl, individually and as the managing member of the limited liability company.

B. "Affected Consumers" shall mean persons who, prior to the date of issuance of this order, downloaded and installed the "Brightest Flashlight Free" mobile application on their mobile device.

C. "Clearly and prominently" shall mean:

1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a mobile device or computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts highly with the background on which they appear;

2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration

sufficient for an ordinary consumer to read and comprehend them;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and

5. In all instances, the required disclosures are presented in an understandable language and syntax; in the same language as the predominant language that is used in the communication; and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

D. "Covered Information" shall mean information from or about an individual consumer, including but not limited to (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) credit or debit card information; (i) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; (j) precise geolocation data of an individual or mobile device, including but not limited to GPS-based, WiFi-based, or cell-based location information ("geolocation information"); (k) an authentication credential, such as a username and password; or (l) any other communications or content stored on a consumer's mobile device.

E. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

## I.

**IT IS ORDERED** that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or dissemination of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication:

A. The extent to which Covered Information is collected, used, disclosed, or shared; and

B. The extent to which users may exercise control over the collection, use, disclosure, or sharing of Covered Information collected from or about them, their computers or devices, or their online activities.

## II.

**IT IS FURTHER ORDERED** that respondents and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or dissemination of any mobile application that collects, transmits, or allows the transmission of geolocation information, in or affecting commerce, shall not collect, transmit, or allow the transmission of such information unless such application:

A. Clearly and prominently, immediately prior to the initial collection of or transmission of such information, and on a separate screen from, any final "end user license agreement," "privacy policy," "terms of use" page, or similar document, discloses to the consumer the following:

1. That such application collects, transmits, or allows the transmission of, geolocation information;

2. How geolocation information may be used;

3. Why such application is accessing geolocation information; and

4. The identity or specific categories of third parties that receive geolocation information directly or indirectly from such application; and

B. Obtains affirmative express consent from the consumer to the transmission of such information.

## III.

**IT IS FURTHER ORDERED** that respondents, within ten (10) days from the date of entry of this Order, shall delete all Covered Information relating to Affected Consumers that is within their possession, custody, or control and was collected at any time prior to the date of entry of this Order.

## IV.

**IT IS FURTHER ORDERED** that respondents shall, for five (5) years from the entry of this order or from the date of preparation, whichever is later, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing any representation covered by this order, including but not limited to respondents' terms of use, end-user license agreements, frequently asked questions, privacy policies, and other documents publicly disseminated relating to: (a) the collection of data; (b) the use, disclosure or sharing of such data; and (c) opt-out practices and other mechanisms to limit or prevent such collection of data or the use, disclosure, or sharing of data;

B. All materials that were relied upon in disseminating any representation covered by this order;

C. Complaints or inquiries relating to any Covered Application, and any responses to those complaints or inquiries; and

D. Documents that are sufficient to demonstrate compliance with each provision of this order.

**V.**

**IT IS FURTHER ORDERED** that respondents shall for five (5) years from the entry of this order deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**VI.**

**IT IS FURTHER ORDERED** that respondent Goldenshores Technologies, LLC, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent 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, Washington, DC 20580. The subject line must begin: *In the Matter of Goldenshores Technologies, LLC*, File No. 132-3087.

## VII.

**IT IS FURTHER ORDERED** that respondent Erik M. Geidl, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. 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, Washington, DC 20580. The subject line must begin: *In the Matter of Goldenshores Technologies, LLC*, File No. 132-3087.

## VIII.

**IT IS FURTHER ORDERED** that respondents, within sixty (60) days after the date of service of this order, shall each file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of their own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, they shall submit additional true and accurate written reports.

## IX.

This order will terminate on March 31, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

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 consent order from Goldenshores Technologies, LLC, and Erik M. Geidl ("respondents").

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 decide whether it should withdraw from the agreement or make the proposed order final.

Since at least February 2011, respondents have marketed a mobile application called the "Brightest Flashlight Free" mobile application ("Brightest Flashlight App") to consumers for use on their Android mobile devices. The Brightest Flashlight App purportedly works by activating all lights on a mobile device, including, where available, the device's LED camera flash and screen to provide outward-facing illumination. As of May 2013,

users have downloaded the Brightest Flashlight App tens of millions of times.

The Commission's complaint alleges two violations of Section 5(a) of the FTC Act, which prohibits deceptive and unfair acts or practices in or affecting commerce, by respondents. First, according to the complaint, respondents represent in the Brightest Flashlight App's privacy policy statement and end-user license agreement ("EULA") that respondents may periodically collect, maintain, process, and use information from users' mobile devices to provide software updates, product support, and other services to users related to the Brightest Flashlight App, and to verify users' compliance with respondents' EULA. The complaint alleges that this claim is deceptive because respondents fail to disclose, or adequately disclose, that, when users run the Brightest Flashlight App, the application transmits, or allows the transmission of, their devices' precise geolocation along with persistent device identifiers to various third parties, including third party advertising networks.

Second, the complaint alleges that respondents falsely represent in the Brightest Flashlight EULA that consumers have the option to refuse the terms of the Brightest Flashlight EULA, including those relating to the collection and use of device data, and thereby prevent the Brightest Flashlight App from ever collecting or using their device's data. In fact, regardless of whether consumers accept or refuse the terms of the EULA, the Brightest Flashlight App transmits, or causes the transmission of, device data as soon as the consumer launches the application and before they have chosen to accept or refuse the terms of the Brightest Flashlight EULA.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts or practices in the future. Specifically, Part I prohibits respondent from misrepresenting (1) the extent to which "covered information" is collected, used, disclosed, or shared and (2) the extent to which users may exercise control over the collection, use, disclosure, or sharing of "covered information" collected from or about them, their computers or devices, or their online activities. "Covered information" is defined as "(a) a first and last name; (b) a home or other physical address, including street name and name of city or

town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other state-issued identification number; (g) a financial institution account number; (h) credit or debit card information; (i) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; (j) precise geolocation data of an individual or mobile device, including but not limited to GPS-based, WiFi-based, or cell-based location information ("geolocation information"); (k) an authentication credential, such as a username and password; or (l) any other communications or content stored on a consumer's mobile device."

Part II requires respondents to give users of their mobile applications a clear and prominent notice and to obtain express affirmative consent prior to collecting their geolocation information. Part III requires respondents to delete any "covered information" in their possession, custody, or control that they collected from users of the Brightest Flashlight App prior to the entry of the order.

Parts IV, V, VI, VII, and VIII of the proposed order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.