

December 1, 2011

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

Re: Phusion Projects, File No. 112 3084

Dear Sir or Ms:

This letter provides comments from Project Extra Mile, a network of coalitions and community efforts across Nebraska working to prevent underage alcohol use and youth access to alcohol. We write in reference to the proposed consent order to resolve charges against Phusion Projects and its principal officers regarding the marketing of Four Loko, a fruit-flavored alcopop in 23.5 ounce containers with 11% or 12% alcohol by volume.

Precisely because these products are so aligned with binge drinking, we note that the FTC attention to these products is warranted, and we thank you for your investigation and work on this issue is critical to the well-being of America's young people, specifically in examining both the implied and explicit representations made by Phusion Projects regarding the nature and use of its product, Four Loko. Phusion Projects has placed all consumers, particularly youthful consumers, at serious risk of harm as a result of its deceptive and unfair business practices.

Project Extra Mile has serious concern about the health and economic costs of excessive drinking for all Americans; we have a mission focus that brings our greatest concern around the tragic harms these products cause to our youth.

As you are likely aware, the Centers for Disease Control and Prevention (CDC) has recently documented the adverse health and safety consequences of excessive alcohol consumption as well as the economic costs at approximately \$224 billion for the nation in 2006 alone.

Project Extra Mile has had the privilege to provide technical assistance and leadership on the prevention of underage drinking and youth access to alcohol across Nebraska and the nation since our inception in 1995. As an organization that provides 'boots on the ground' efforts, we serve as one of the important leaders in the country addressing the tragic harms associated with alcopops from a community and state perspective.

Our struggles to protect the health and safety of young people have been significant. Most notable, Project Extra Mile is the lead plaintiff in a lawsuit against our state regulatory agency –

the Nebraska Liquor Control Commission – to appropriately classify alcopops under current Nebraska law. Although we won the case in February of this year, the district court’s decision has been appealed to our State Supreme Court, requiring a further delay in implementing the most basic regulatory and tax standards, all the while continuing the heightened exposure to Nebraska’s young people. Products such as Four Loko represent a second generation of alcopops that are clearly targeted to our young people with their fruity, sweet flavors and aggressive and deceptive marketing practices. *We absolutely need the strong and fair leadership of the FTC to support our efforts to reduce youth access, exposure, and harm associated with the excessive consumption of Four Loko and related, super-sized products by young people.*

We recognize and appreciate FTC for focusing on both implied and explicit representations by Phusion Projects, and we support your decision to develop clear, concise requirements to address the unfair and deceptive practices alleged in the complaint. We also support FTC’s findings that:

- An individual cannot safely consume a 23.5 oz can of 11% or 12% ABV Four Loko on a single occasion because it contains the equivalent of 4.7 regular beers, and consuming it constitutes binge drinking;
- Binge drinking can lead to a variety of adverse health and safety outcomes and Phusion Projects’ marketing and packaging practices encourage consumption of its products in a manner that increases the risks of this dangerous consumption pattern;
- Through its packaging and marketing, Phusion Projects has made both implied and explicit representations that Four Loko’s 23.5 oz. cans are single servings and are designed to be consumed on a single occasion;
- Phusion Projects has failed to disclose to consumers the relevant facts regarding the amount of alcohol contained in its 23.5 oz. cans;
- These marketing and packaging activities by Phusion Projects constitute unfair and deceptive business practices under the FTC Act.

Several of the requirements noted by FTC in the consent order will begin to address the unfair and deceptive business practices of Phusion Projects:

- Requirement that Phusion Projects not depict consumers drinking the company’s products directly from the container if the product contains more than 2.5 standard drinks;
- Requirement that containers be resealable;
- Requirement that that Phusion Projects not misrepresent, either expressly or by implication, the alcohol content of its Four Loko product line.

Project Extra Mile offers additional observations to add to those that FTC has identified through its findings, adding further strength to the consent order and ensuring that the deceptive and unfair business practices of Phusion Projects are sufficiently and more fully addressed.

Again, our concern comes from strong, community-based work, and leadership on this issue. We solidly believe that the consent order must be strengthened to further protect our young people while also providing great benefit to those of a legal drinking age.

It is of significance to note that all those who produce and market alcopops are watching the final decision and direction of FTC. You will set the tone for the entire industry since the standard that you set will likely be embraced by other producers of super-sized products.

An improved definition of “single serve” is necessary. Containers with the equivalent of 2.5 standard drinks or less should not be exempt from the order. If they are, FTC would be establishing a precedent that 2.5 standard drinks constitute a single serving. Establishing a precedent that allows 2.5 standard drinks to constitute a single serving would be a terrible, ill-advised precedent that would surely undermine federal guidelines for moderate drinking, defined as no more than 2 drinks a day for men and 1 drink a day for women. These definitions are widely accepted by governmental agencies and organizations across the country, including our public health partners. Furthermore, containers with 2 standard drinks are also in need of review and corrective action.

Alcopop containers should be limited to no more than the equivalent of one standard drink. Doing so will diminish the likelihood that the consumption of these products will lead to binge drinking. This is of particular importance since the products are so heavily marketed to our young people, who, when they drink alcohol, most often consume in a binge drinking manner. We know that some companies have begun to look at smaller serving containers/sizes. If FTC will not consider the one standard drink container size for alcopops, it seems at least prudent for FTC to require all producers to limit container sizes to the 16-ounce size adopted by some producers already on a voluntary basis; Miller/Coors (Sparks) has voluntarily agreed to reduce the serving sizes of its products to no more than 8 percent alcohol content in 16 ounce cans and Anheuser-Busch Company (Tilt) agreed to reduce the content of its alcopop products to no more than 8 percent alcohol content in 16 and 24 ounce cans

Research shows that consuming more than these recommended amounts can lead to serious adverse health and safety outcomes. Again, our primary concern is for underage drinkers, particularly girls and young women – the very market share that Phusion Projects targets with its unfair and deceptive marketing. Phusion Projects, and others, should be prohibited from marketing their product to encourage binge drinking in any fashion. This practice poses both an urgent and serious health and safety concerns.

We’re especially concerned that the proposed order does not address the appeal that Four Loko has for youth and the increased risks posed by use of the product. As mentioned earlier in our comments, our work and mission rest solely on protecting America’s youth, and the appeal of this product to young people is of serious concern to us as we endeavor to effectively meet our mission. We support a requirement that Phusion Projects provide FTC with its marketing data and other documentation regarding its marketing practices as it relates to the youth market. This would provide the cornerstone for FTC to engage an expanded investigation of Phusion Projects’ deceptive and unfair business practices.

The consent order requires Phusion Projects to make its supersized containers resealable; however, we have concern that FTC does not define ‘resealable.’ A specific definition of ‘resealable’ should be noted, and it should apply to any product containing more than one standard drink. Further, there is no evidence that merely requiring a resealable container will

alter the perception of drinkers who believe they are consuming a single serving because it is in a single container.

We would encourage FTC to broaden its investigation using additional federal regulatory and statutory provisions to assure that other violations have not occurred with regard to the unfair and deceptive business practices of Phusion Projects. We would urge financial penalties if any such violations are identified.

In closing, we again commend FTC for the work done thus far to review the unfair and deceptive business practices in Phusion Projects implied and explicit representations regarding the nature and use of its product. We encourage FTC to broaden and strengthen its Consent Order, and further, we ask that FTC continue its investigation of the youth marketing practices of both Phusion Projects and other producers of alcopops. Our children rely upon the kind of protection that is garnered through not only the efforts of those of us working in communities across this country, but on the strong, necessary regulations that come from our federal government. Again, thank you for your work on behalf of America's youngest citizens.

Respectfully submitted,

Diane E. Riibe
Executive Director
Project Extra Mile