

Complaint

IN THE MATTER OF

WARNER BROS. HOME ENTERTAINMENT INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4595; File No. 152 3034**Complaint, November 17, 2016 – Decision, November 17, 2016*

This consent order addresses Warner Bros. Home Entertainment Inc.’s use of social media influencers to advertise the video game, *Middle Earth: Shadow of Mordor*. The complaint alleges that Warner Bros., through its ad agency, Plaid Social Labs, LLC, hired individuals who had earned reputations as video game enthusiasts on YouTube (“YouTube influencers”) for hundreds of dollars to tens of thousands of dollars to post positive videos promoting *Shadow of Mordor* on YouTube, which did not necessarily reflect the independent experiences of the individual YouTube influencers. The complaint further alleges that, in numerous instances, YouTube influencers did not disclose or adequately disclose that Warner Bros., through Plaid Social, offered compensation to the influencers in exchange for creating and uploading gameplay videos as part of a *Shadow of Mordor* advertising campaign. The consent order prohibits Warner Bros., in connection with the advertising of any home entertainment product or service, from misrepresenting in any influencer campaign that an influencer or endorser of such product or service is an independent user or ordinary consumer of the product or service.

Participants

For the *Commission*: Linda K. Badger, Matthew D. Gold, and Evan Rose.

For the *Respondents*: Kelly DeMarchis, Leonard Gordon, and Stuart Ingis, Venable LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Warner Bros. Home Entertainment 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 Warner Bros. Home Entertainment Inc. (“WBHE”) is a Delaware corporation with its principal office or

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place of business at 4000 Warner Blvd., Burbank, California 91522. Warner Bros. Interactive Entertainment (“WBIE”) is a division of WBHE.

2. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

3. Respondent produces and distributes home entertainment content to consumers. Respondent, through its division, WBIE, has manufactured, advertised, labeled, offered for sale, sold, and distributed interactive entertainment for consumers, including but not limited to the video game title, *Middle Earth: Shadow of Mordor* (“*Shadow of Mordor*”). WBIE is a major worldwide publisher and distributor of video game titles.

4. In 2014, respondent hired an advertising agency, Plaid Social Labs, LLC (“Plaid Social”), to coordinate a “YouTube Influencer Campaign” for its soon-to-be-released video game, *Shadow of Mordor*. Through the YouTube Influencer Campaign, respondent intended to maximize consumer awareness of the game when it became available for sale and to persuade consumers to purchase it.

5. Respondent, through Plaid Social, hired individuals who had earned reputations as video game enthusiasts on YouTube (“YouTube influencers”) to post positive videos promoting *Shadow of Mordor* on YouTube. These YouTube influencers were given free access to a pre-release version of *Shadow of Mordor* and cash payments often ranging from hundreds of dollars to tens of thousands of dollars, provided that the videos they created about *Shadow of Mordor* met certain requirements defined by respondent. These requirements were communicated to the YouTube influencers through Plaid Social.

6. In respondent’s contract with Plaid Social, any work performed on behalf of respondent is respondent’s property, or “work made for hire,” and respondent is the “the sole owner of all rights in and to the [w]ork of every kind and character whatsoever in perpetuity and throughout the universe.” Similarly, the influencers agreed that respondent “will be deemed the author and

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exclusive owner” of any work arranged for by Plaid Social on behalf of the respondent.

7. Respondent, through Plaid Social, required that each influencer’s video meet the following requirements:

- Video will feature gameplay of the [*Shadow of Mordor* video game]
- Video will have a strong verbal call-to-action to click the link in the description box for the viewer to go to the [game’s] website to learn more about the [game], to learn how they can register, and to learn how to play the game.
-
- Video will promote positive sentiment about the [game].
- Video will not show bugs or glitches that may exist.
-
- Video will not communicate negative sentiment about WBIE, its affiliates or the [game].
- One Facebook post or one Tweet by Influencer in support of Video.

Consequently, these videos are sponsored advertisements, and do not necessarily reflect the independent experiences of the individual YouTube Influencers.

8. Respondent also required that the YouTube influencers be instructed to place specified information in the written text or “description box” that typically appears underneath the portion of the web page where a consumer can view a YouTube video. For example:

- Description box will contain information about the [game] above the fold.
-
- Description box will include FTC disclaimer disclosing that the post is sponsored.

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9. As described in Paragraph 8, respondent, through Plaid Social, instructed the YouTube influencers to provide a written disclosure that their videos had been sponsored (“FTC disclaimer”), and to place this disclosure in the description box appearing below the YouTube videos. Respondent did not require that the YouTube influencers be instructed to place a sponsorship disclosure clearly and conspicuously in the video itself. Nor did respondent require that the YouTube influencers be instructed to place the sponsorship disclosure “above the fold” in the description box, or visible without consumers having to scroll down or click on a link, as it had for other information about *Shadow of Mordor*. (See, e.g., Exhibit A-1) Accordingly, the vast majority of YouTube influencers did not include any sponsorship disclosure in their videos and only placed their sponsorship disclosures “below the fold” in the description box below the video. Therefore, consumers have to click on a “Show More” button in the description box and potentially scroll down before they can see the sponsorship disclosure. (See, e.g., Exhibits A-1, A-2; Exhibits B-1, B-2) As a result, consumers who watched these YouTube videos were unlikely to learn that the videos were paid promotions.

10. Respondent, through Plaid Social, required the YouTube influencers to promote their videos on Twitter or Facebook. When the influencers posted these videos for consumers to view on Twitter or Facebook, however, consumers were even less likely to see the required sponsorship disclosures because such posts did not include the Show More button. (See, e.g., Exhibit C).

11. On at least two occasions, the YouTube influencers disclosed only that they had been given early access to the game, and did not adequately disclose that they had also been paid to post the video. (See, e.g., Exhibit D-1, D-2) For example, one influencer’s disclosure states: “This has been one of my favorite sponsored games, so thanks that I could play it for free!!” (See Exhibit D-1) This statement implies that the only compensation this YouTube influencer received was free access to the *Shadow of Mordor* video game. In fact, this YouTube influencer also received monetary compensation of thousands of dollars in return

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for his positive gameplay video and social media postings about *Shadow of Mordor*.

12. By contract, influencers' videos were subject to pre-approval by respondent and/or Plaid Social to ensure that they conformed with respondent's requirements. On at least one occasion, respondent reviewed and approved an influencer video with an inadequate sponsorship disclosure before it was made public. On this occasion, respondent did not require the influencer or Plaid Social to move the sponsorship disclosure.

13. Prior to and immediately after the public release of *Shadow of Mordor* on September 30, 2014, the YouTube influencers commissioned for the *Shadow of Mordor* YouTube Influencer Campaign posted approximately thirty gameplay videos on YouTube. These videos were viewed over 5.5 million times by consumers, and were publicly available for over a year.

Count I
False Claim of Independent Reviews

14. Through the means described in Paragraphs 4 through 13, respondent has represented, directly or indirectly, expressly or by implication, that gameplay videos of *Shadow of Mordor* produced and disseminated in connection with the YouTube Influencer Campaign reflect the independent opinions or experiences of impartial video game enthusiasts.

15. In truth and in fact, these gameplay videos of *Shadow of Mordor* do not reflect the independent opinions or experiences of impartial video game enthusiasts. The YouTube influencers were paid by respondent to create the videos as part of respondent's advertising campaign to promote sales of the game. Therefore, the representation set forth in Paragraph 14 was, and is, false and misleading.

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Count II**Deceptive Failure to Disclose Material Connection Between Endorsers and Seller**

16. Through the means described in Paragraphs 4 through 13, respondent has represented, directly or indirectly, expressly or by implication, that favorable gameplay videos for *Shadow of Mordor* reflect the opinions or experiences of individuals who had played *Shadow of Mordor*. In numerous instances, respondent has failed to disclose or disclose adequately that these individuals received compensation, including both a free game and monetary payment, to produce and disseminate the videos. This fact would be material to consumers in their decision to purchase *Shadow of Mordor*. The failure to disclose or disclose adequately this fact, in light of the representations made, was, and is, a deceptive practice.

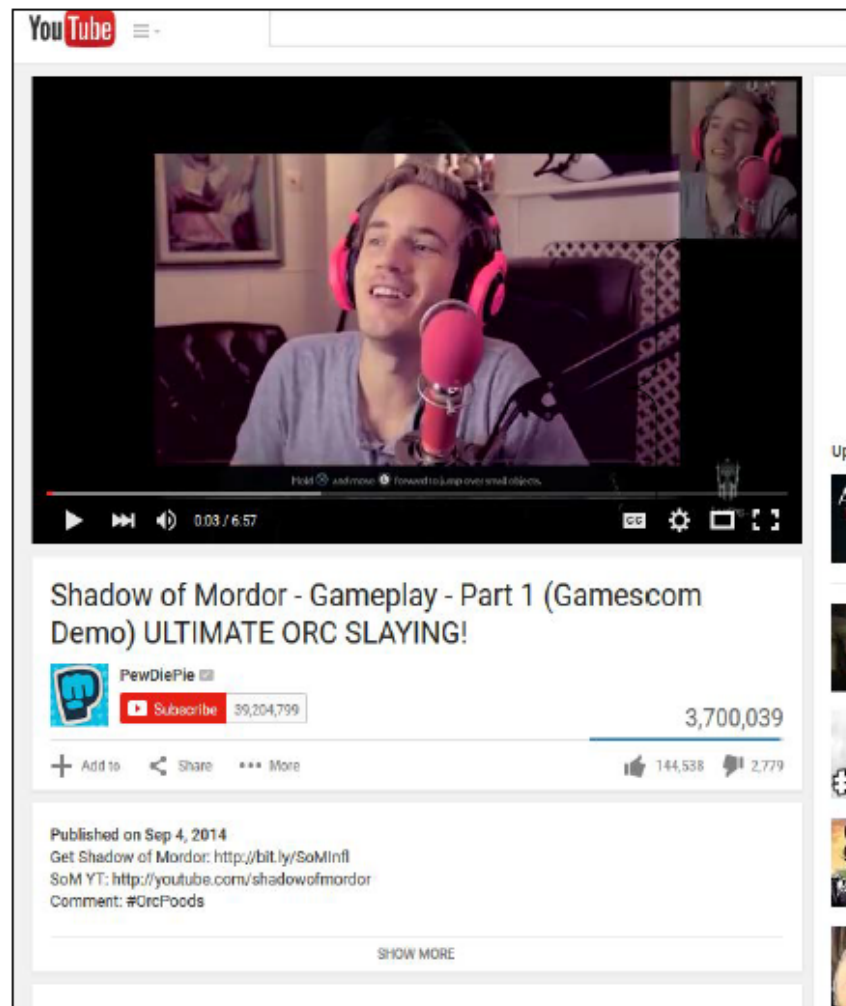
Violations of Section 5

17. The acts and practices of respondent 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 on this seventeenth day of November, 2016, has issued this Complaint against respondent.

By the Commission.

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Exhibit A

YouTube Description Box Before "Show More" Link Clicked,
Sponsorship Disclosure Not Visible

EXHIBIT A-1

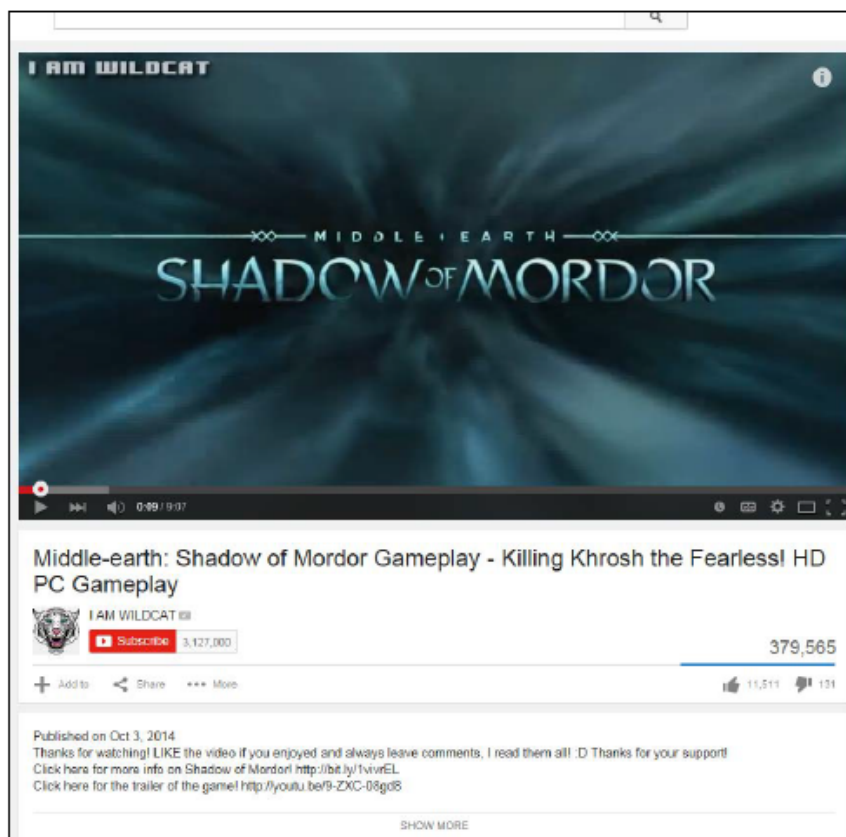
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YouTube Description Box After "Show More" Link Clicked,
Sponsorship Disclosure Visible

EXHIBIT A-2

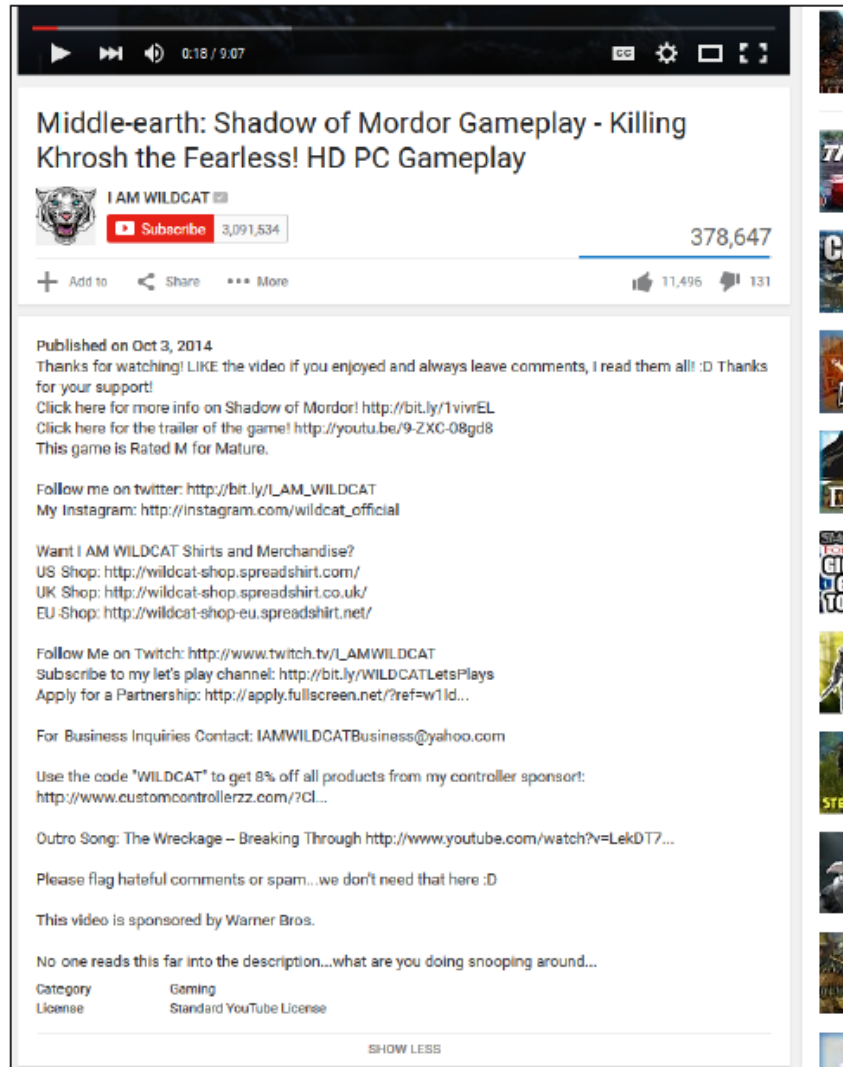
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Exhibit B

YouTube Description Box Before “Show More” Link Clicked,
Sponsorship Disclosure Not Visible

EXHIBIT B-1

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The screenshot shows a YouTube video player interface. The video title is "Middle-earth: Shadow of Mordor Gameplay - Killing Khrosh the Fearless! HD PC Gameplay". The channel is "I AM WILDCAT" with 3,091,534 subscribers and 378,647 views. The video has 11,496 likes and 131 dislikes. The description box is expanded, showing the following text:

Published on Oct 3, 2014
Thanks for watching! LIKE the video if you enjoyed and always leave comments, I read them all! :D Thanks for your support!
Click here for more info on Shadow of Mordor! <http://bit.ly/1vivrEL>
Click here for the trailer of the game! <http://youtu.be/9-ZXC-08gd8>
This game is Rated M for Mature.

Follow me on twitter: http://bit.ly/LAM_WILDCAT
My Instagram: http://instagram.com/wildcat_official

Want I AM WILDCAT Shirts and Merchandise?
US Shop: <http://wildcat-shop.spreadshirt.com/>
UK Shop: <http://wildcat-shop.spreadshirt.co.uk/>
EU Shop: <http://wildcat-shop-eu.spreadshirt.net/>

Follow Me on Twitch: <http://www.twitch.tv/LAMWILDCAT>
Subscribe to my let's play channel: <http://bit.ly/WILDCATletsPlays>
Apply for a Partnership: <http://apply.fullscreen.net/?ref=wildcat>

For Business Inquiries Contact: IAMWILDCATBusiness@yahoo.com

Use the code "WILDCAT" to get 8% off all products from my controller sponsor:
<http://www.customcontrollerzz.com/?CL...>

Outro Song: The Wreckage – Breaking Through <http://www.youtube.com/watch?v=LekDT7...>

Please flag hateful comments or spam...we don't need that here :D

This video is sponsored by Warner Bros.

No one reads this far into the description...what are you doing snooping around...

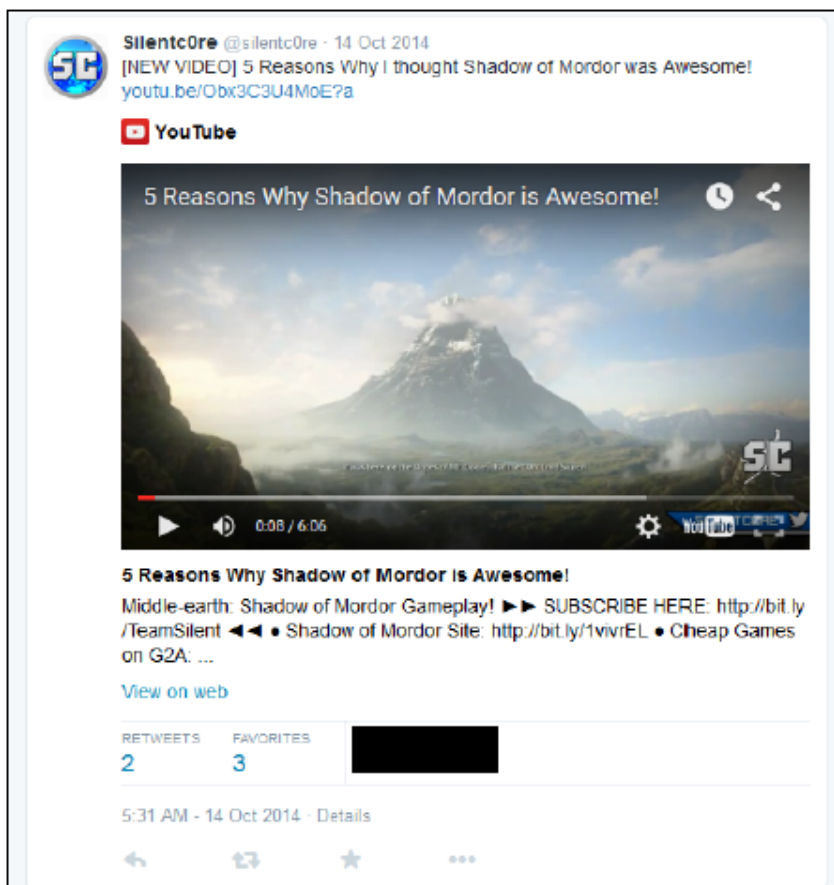
Category: Gaming
License: Standard YouTube License

SHOW LESS

YouTube Description Box After "Show More" Link Clicked,
Sponsorship Disclosure Visible

EXHIBIT B-2

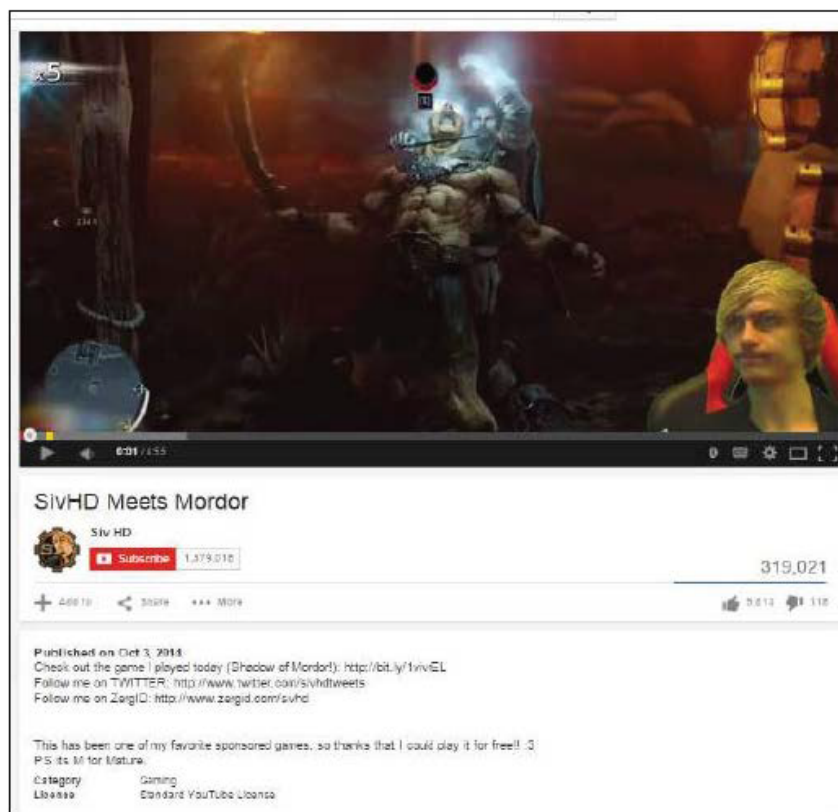
Complaint

Exhibit C

Twitter Post,
Limited Text from YouTube Description Box Visible

EXHIBIT C

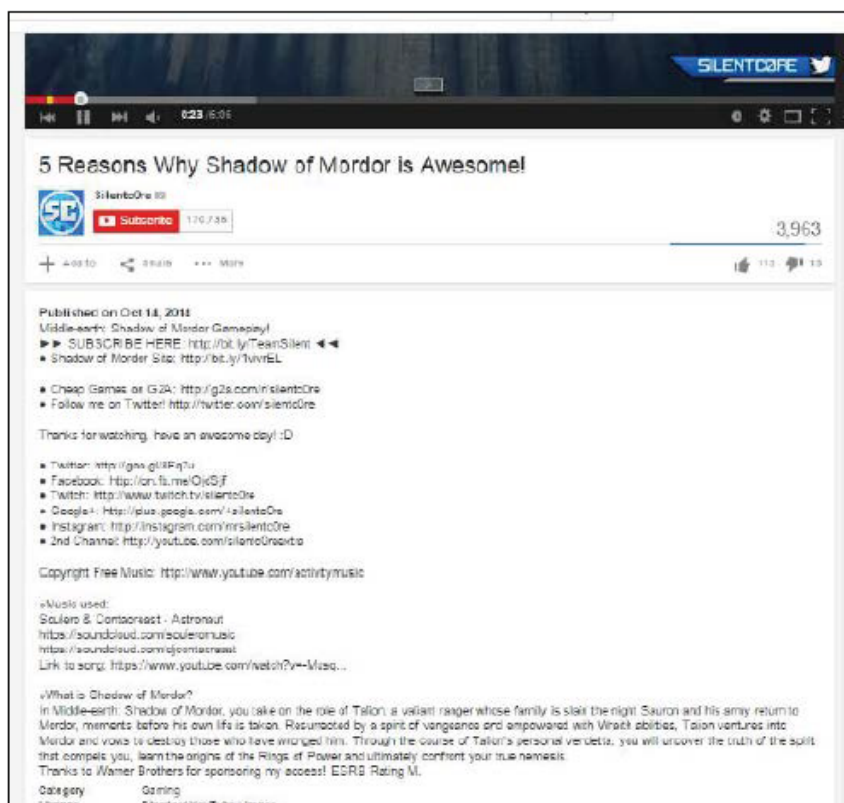
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Exhibit D

"This has been one of my favorite sponsored games, so thanks that I could play it for free!!"

EXHIBIT D-1

Complaint



“Thanks to Warner Brothers for sponsoring my access!”

EXHIBIT D-2

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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 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 Warner Bros. Home Entertainment Inc. is a Delaware corporation with its principal office or place of business at 4000 Warner Blvd., Burbank, California 91522.

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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” means Warner Bros. Home Entertainment Inc., its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Clearly and Conspicuously” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:
 1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume,

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speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the internet or software, the disclosure must be unavoidable.
 5. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including but not limited to all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.
- C. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Endorsement” means any advertising message (including but not limited to verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.

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- E. “Endorser” or “Influencer” means an individual or organization that provides an Endorsement.
- F. “Home Entertainment Product or Service” means any video game product or service for any platform, including but not limited to video game consoles, handheld or mobile devices, and personal computers.
- G. “Influencer Campaign” means any arrangement whereby, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, an Influencer creates, publishes, or otherwise disseminates an Endorsement for which the Influencer is to receive compensation from either Respondent or anyone else that Respondent engages to conduct such campaign.
- H. “Material Connection” means any relationship that materially affects the weight or credibility of any Endorsement and that would not be reasonably expected by consumers.

I.

IT IS ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Home Entertainment Product or Service, in or affecting commerce, shall not in any Influencer Campaign misrepresent, in any manner, expressly or by implication, that an Influencer is an independent user or ordinary consumer of the product or service.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Home Entertainment Product or Service, in or affecting commerce, by means of an Endorsement of such product or service, shall in any

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Influencer Campaign Clearly and Conspicuously disclose a Material Connection, if one exists, between the Influencer and Respondent.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any Home Entertainment Product or Service, in or affecting commerce, shall: (i) in any Influencer Campaign it conducts directly, take steps sufficient to ensure that its Influencer Campaigns comply with Parts I and II of this order; and (ii) require that any entity that Respondent engages to conduct an Influencer Campaign take steps sufficient to ensure that its Influencer Campaigns comply with Parts I and II of this order. Such steps shall include, at a minimum:

- A. Providing each Influencer with a statement of his or her responsibility to disclose Clearly and Conspicuously, in any online video, social media posting, or other communication for which the Influencer is to receive compensation, the Influencer's Material Connection to Respondent. Respondent or the entity conducting the campaign shall obtain from each Influencer a signed and dated acknowledgment that the Influencer has received the statement and expressly agrees to comply with it;
- B. Establishing, implementing, and thereafter maintaining a system to monitor and review the representations and disclosures of Influencers with Material Connections to Respondent to ensure compliance with Parts I and II of this order. The system shall include, at a minimum, monitoring and reviewing the Influencers' online videos, social media postings, or other digital advertisements or communications made as part of the Influencer Campaign;

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- C. Immediately terminating and ceasing payment to any Influencer with a Material Connection to Respondent who Respondent reasonably concludes:
1. Has misrepresented, in any manner, his or her independence and impartiality; or
 2. Has failed to disclose, Clearly and Conspicuously, and in close proximity to the representation, a Material Connection between such Influencer and Respondent.

Provided, however, that Respondent may provide an Influencer with notice of failure to disclose and an opportunity to cure the disclosure prior to terminating the Influencer if Respondent reasonably concludes that the failure to disclose was inadvertent. Respondent shall inform any Influencer to whom it has provided a notice of a failure to disclose a Material Connection that any subsequent failure to disclose will result in immediate termination;

- D. Directing the entity conducting the campaign to immediately terminate and cease payment to any Influencer with a Material Connection to Respondent who the entity conducting the campaign reasonably concludes:
1. Has misrepresented, in any manner, his or her independence and impartiality; or
 2. Has failed to disclose, Clearly and Conspicuously, and in close proximity to the representation, a Material Connection between such Influencer and Respondent.

Provided, however, that Respondent may allow the entity conducting the campaign to provide an Influencer with notice of failure to disclose and an opportunity to cure the disclosure prior to terminating the Influencer if the entity conducting the campaign

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reasonably concludes that the failure to disclose was inadvertent. The entity conducting the campaign shall inform any Influencer to whom it has provided a notice of a failure to disclose a Material Connection that any subsequent failure to disclose will result in immediate termination;

- E. Establishing, implementing, and thereafter maintaining a system for Respondent to monitor any entity that Respondent engages to conduct an Influencer Campaign for adherence to this Part of the order. If Respondent reasonably concludes that the entity engaged to conduct the Influencer Campaign has failed to comply with this Part of the order, Respondent shall immediately suspend payment to the entity, unless and until any noncompliance has been cured. Respondent shall disqualify the entity from conducting future Influencer Campaigns for Respondent upon a repeat incident unless Respondent reasonably concludes that the noncompliance was inadvertent; and
- F. Creating, and thereafter maintaining, reports showing the results of the monitoring required by subparts B and E of this Part of the order.

IV.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any Endorsement or other representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. Any documents that:
 - 1. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to documents obtained, created, or generated, or which relate to, the requirements, provisions, or terms of this order,

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and all reports submitted to the Commission pursuant to this order;

2. Contradict, qualify, or call into question Respondent's compliance with this order; or
3. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any Endorsement made by Respondent, and any responses to those complaints or inquiries; and

- B. All acknowledgments of receipt of this order obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that, for five (5) years, Respondent and its successors and assigns shall 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. 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.

VI.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to 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. *Provided, however,* that, with respect to any proposed

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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 re Warner Bros. Home Entertainment Inc.

VII.

IT IS FURTHER ORDERED that Respondent and its successors and assigns, within sixty (60) days after the date of service of this order, shall 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.

VIII.

This order will terminate on November 17, 2036, 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.

Analysis to Aid Public Comment

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 Warner Bros. Home Entertainment Inc. (“Warner Bros.” or “respondent”). The proposed consent order (“proposed 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 respondent’s use of social media influencers to advertise the video game, *Middle Earth: Shadow of Mordor* (“*Shadow of Mordor*”). According to the Commission’s complaint, Warner Bros., through its ad agency, Plaid Social Labs, LLC, hired individuals who had earned reputations as video game enthusiasts on YouTube (“YouTube influencers”) to post positive videos promoting *Shadow of Mordor* on YouTube. The Commission’s complaint alleges that these YouTube influencers were given free access to a pre-release version of *Shadow of Mordor* and cash payments often ranging from hundreds of

Analysis to Aid Public Comment

dollars to tens of thousands of dollars, if the videos they created about *Shadow of Mordor* met certain requirements defined by Warner Bros. Among other things, Warner Bros. required influencer videos to promote a positive sentiment about the game, and not to disclose any bugs or glitches that the game might have. Consequently, these videos were sponsored advertisements, and did not necessarily reflect the independent experiences of the individual YouTube influencers.

The complaint also alleges that while Warner Bros. instructed the YouTube influencers to provide a disclosure that their videos had been sponsored, it specified that the disclosure be written, and placed in the description box appearing below the YouTube videos. Warner Bros. did not require the YouTube influencers to place a sponsorship disclosure clearly and conspicuously in the video itself. Nor did Warner Bros. require that the YouTube influencers be instructed to place the sponsorship disclosure “above the fold” in the description box, or visible without consumers having to scroll down or click on a link, as it had for other promotional information about *Shadow of Mordor*. (See, e.g., Exhibit A-1) As a result, most YouTube influencers did not include any sponsorship disclosures in their videos, and only placed their sponsorship disclosures “below the fold” in the description box below the video. Therefore, consumers had to click on a “Show More” button in the description box and potentially scroll down before they could see the sponsorship disclosure. As a result, consumers who watched these YouTube videos were unlikely to learn that the videos were paid promotions for Warner Bros.

The Commission’s complaint further alleges that when YouTube influencers posted their *Shadow of Mordor* videos for viewing on Facebook or Twitter, consumers were even less likely to see these sponsorship disclosures because such posts did not include the “Show More” button. In addition, the complaint states that on at least two occasions, the influencers disclosed only that they had been given early access to the game, and did not adequately disclose that they had also been paid to post the video.

According to the complaint, in numerous instances, YouTube influencers did not disclose or adequately disclose that Warner

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Bros., through Plaid Social, offered compensation to the influencers in exchange for creating and uploading gameplay videos as part of a *Shadow of Mordor* advertising campaign. The Commission's complaint alleges that these videos were false and misleading because they did not reflect the independent opinions or experiences of impartial video game enthusiasts. The complaint further alleges that the videos were deceptive because they failed to disclose or disclose adequately that the influencers who posted the videos were compensated in connection with their endorsements.

The proposed order includes injunctive relief to address these alleged violations and requires Warner Bros. to follow certain monitoring and compliance procedures related to its use of influencer campaigns.

Part I of the proposed order prohibits Warner Bros., in connection with the advertising of any home entertainment product or service, from misrepresenting in any influencer campaign that an influencer or endorser of such product or service is an independent user or ordinary consumer of the product or service.

Part II of the proposed order requires Warner Bros., in connection with the advertising of any home entertainment product or service by means of an endorsement, in any influencer campaign, to disclose clearly and conspicuously a material connection, if one exists, between the influencer or endorser and Warner Bros.

Part III of the proposed order sets out certain monitoring and compliance obligations to ensure that Warner Bros., or any entity it engages to conduct an influencer campaign, comply with Parts I and II of the proposed order. These obligations include: Obtaining signed acknowledgements from such influencers that they will disclose their material connection to Warner Bros.; monitoring the influencers' representations and disclosures; maintaining records of monitoring efforts; and, under certain circumstances, terminating and ceasing payment to influencers who misrepresent their independence, or fail to properly disclose any material connection to Warner Bros. Part III specifically

Analysis to Aid Public Comment

provides that if Warner Bros. engages an entity to conduct an influencer campaign, Warner Bros. must take steps to ensure that the entity complies with this Part, and to monitor its compliance. If the entity fails to comply with this Part, Warner Bros. must cease payment to the entity until it cures any noncompliance. Furthermore, Warner Bros. is required to disqualify the entity from conducting future influencer campaigns upon a repeat incident, unless it reasonably concludes that the entity's failure to comply was inadvertent.

Part IV of the proposed order contains recordkeeping requirements for relevant documents.

Parts V through VII of the proposed order require the company to: Provide copies of the order to certain personnel having responsibilities with respect to the subject matter of the order; notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and file compliance reports with the Commission.

Part VIII of the proposed order 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 complaint or proposed order, or to modify the proposed order's terms in any way.

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IN THE MATTER OF

CALIFORNIA NATUREL, INC.COMPLAINT, OPINION OF THE COMMISSION AND ORDER IN
REGARD TO ALLEGED VIOLATIONS OF SECTIONS 5 AND 12 OF THE
FEDERAL TRADE COMMISSION ACT

Docket No. 9370; File No. 152 3267
Complaint, April 11, 2016 – Order, December 5, 2016

This case addresses California Naturel, Inc.'s marketing of its sunscreen product. The complaint alleges that California Naturel falsely advertises its Sunscreen SPF 30 product as an "all natural" sunscreen when in fact it contains the synthetic ingredient dimethicone, in violation of Sections 5 and 12 of the Federal Trade Commission Act. Complaint Counsel filed a Motion for Summary Decision. The Commission granted the Motion and issued an Order to cease and desist.

Participants

For the *Commission*: Robert M. Frisby, Gregory Madden, and John Andrew Singer.

For the *Respondent*: John Bernard Duler, President, *pro se*.

COMPLAINT

The Federal Trade Commission, having reason to believe that California Naturel, Inc., a corporation, 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 California Naturel is a Delaware corporation with its principal office or place of business at 480 Gate 5 Road – Suite 114, Sausalito, California 94965.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed products to consumers, including Sunscreen SPF 30. This sunscreen product is a "drug" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.