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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

FEDERAL TRADE COMMISSION,) Case No.: 17cv0575 AJB (JMA)
)
Plaintiff,) ORDER GRANTING JOINT
) MOTION FOR PERMANENT
v.) INJUNCTION AND OTHER
) EQUITABLE RELIEF AS TO
AAFE PRODUCTS CORPORATION, <i>et al.</i>)	ROBERT KOCH
)
Defendants.) (Doc. No. 26-2)
)

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), filed its Complaint for Permanent Injunction and Other Equitable Relief (“Complaint”) in this matter, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and Section 5 of the Restore Online Shoppers’ Confidence Act (“ROSCA”), 15 U.S.C. § 8404. The Commission and Defendant Koch stipulate to the entry of this Stipulated Order for Permanent Injunction and Other Equitable Relief as to Robert Koch (“Order”) to resolve all matters in dispute in this action between them, regardless of any other judgment that the Commission may obtain in this action.

1 3. **“Clear(ly) and conspicuous(ly)”** means that a required disclosure is
2 difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary
3 consumers, including in all of the following ways:

4 a. In any communication that is solely visual or solely audible, the
5 disclosure must be made through the same means through which the
6 communication is presented. In any communication made through both
7 visual and audible means, such as a television advertisement, the disclosure
8 must be presented simultaneously in both the visual and audible portions of
9 the communication even if the representation requiring the disclosure is
10 made in only one means;

11 b. A visual disclosure, by its size, contrast, location, the length of
12 time it appears, and other characteristics, must stand out from any
13 accompanying text or other visual elements so that it is easily noticed, read,
14 and understood;

15 c. An audible disclosure, including by telephone or streaming
16 video, must be delivered in a volume, speed, and cadence sufficient for
17 ordinary consumers to easily hear and understand it;

18 d. In any communication using an interactive electronic medium,
19 such as the Internet or software, the disclosure must be unavoidable;

20 e. The disclosure must use diction and syntax understandable to
21 ordinary consumers and must appear in each language in which the
22 representation that requires the disclosure appears;

23 f. The disclosure must comply with these requirements in each
24 medium through which it is received, including all electronic devices and
25 face-to-face communications;

26 g. The disclosure must not be contradicted or mitigated by, or
27 inconsistent with, anything else in the communication; and
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1 in misrepresenting, expressly or by implication:

2 A. Any cost to the consumer to purchase, receive, use, or return the
3 initial good or service;

4 B. That the consumer will not be Charged for any good or service;

5 C. That a good or service is offered on a “free,” “trial,” “sample,”
6 “bonus,” “gift,” “no obligation,” “discounted” basis, or words of similar import,
7 denoting or implying the absence of an obligation on the part of the recipient of the
8 offer to affirmatively act in order to avoid Charges, including where a Charge will
9 be assessed pursuant to the offer unless the consumer takes affirmative steps to
10 prevent or stop such a Charge;

11 D. That the consumer can obtain a good or service for a processing,
12 service, shipping, handling, or administrative fee with no further obligation;

13 E. The purpose(s) for which the consumer’s Billing Information will be
14 used;

15 F. The date by which the consumer will incur any obligation or be
16 Charged unless the consumer takes an affirmative action on the Negative Option
17 Feature;

18 G. That a transaction has been authorized by the consumer; and

19 H. Any other fact material to the consumer concerning any good or
20 service, such as any material aspect of the nature or terms of a refund, cancellation,
21 exchange, or repurchase policy for the good or service.

22
23 Compliance with this Section is separate from, and in addition to, the
24 disclosures required by Sections II and III, *infra*.

25 **II. REQUIRED DISCLOSURES RELATING TO NEGATIVE OPTION**
26 **FEATURES**

27
28 **IT IS FURTHER ORDERED** that Defendant Koch, Defendant Koch’s

1 agents, employees, attorneys, and all other persons in active concert or
2 participation with any of them, who receive actual notice of this Order, whether
3 acting directly or indirectly, in connection with promoting or offering for sale any
4 good or service with a Negative Option Feature, are permanently restrained and
5 enjoined from:

6 A. Representing, directly or indirectly, expressly or by implication, that
7 any good or service that includes a Negative Option Feature is being offered on a
8 free, trial, no obligation, reduced, or discounted basis, without disclosing Clearly
9 and Conspicuously, and in Close Proximity to, any such representation:

10 1. The extent to which the consumer must take affirmative
11 action(s) to avoid any Charges: (a) for the offered good or service, (b) of an
12 increased amount after the trial or promotional period ends, and (c) on a
13 recurring basis;

14 2. The total cost (or range of costs) the consumer will be Charged
15 and, if applicable, the frequency of such Charges unless the consumer timely
16 takes steps to prevent or stop such Charges; and

17 3. The deadline(s) (by date or frequency) by which the consumer
18 must affirmatively act in order to stop all recurring Charges.

19 B. Obtaining Billing Information from a consumer for any transaction
20 involving a good or service that includes a Negative Option Feature, without first
21 disclosing Clearly and Conspicuously, and in Close Proximity to where a
22 consumer provides Billing Information:

23 1. The extent to which the consumer must take affirmative
24 action(s) to avoid any Charges: (a) for the offered good or service, (b) of an
25 increased amount after the trial or promotional period ends, and (c) on a
26 recurring basis;
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1 2. The total cost (or range of costs) the consumer will be Charged,
2 the date the initial Charge will be submitted for payment, and, if applicable,
3 the frequency of such Charges unless the consumer timely takes affirmative
4 steps to prevent or stop such Charges;

5 3. The deadline(s) (by date or frequency) by which the consumer
6 must affirmatively act in order to stop all recurring Charges;

7 4. The name of the seller or provider of the good or service and, if
8 the name of the seller or provider will not appear on billing statements, the
9 billing descriptor that will appear on such statements;

10 5. A description of the good or service;

11 6. Any Charge or cost for which the consumer is responsible in
12 connection with the cancellation of an order or the return of a good; and

13 7. The simple cancellation mechanism to stop any recurring
14 Charges, as required by Section IV.

15 C. Failing to send the consumer:

16 1. Immediately after the consumer's submission of an online
17 order, written confirmation of the transaction by email. The email must
18 Clearly and Conspicuously disclose all the information required by
19 Subsection II.B, and contain a subject line reading "Order Confirmation"
20 along with the name of the product or service, and no additional information;
21 or

22 2. Within two (2) days after receipt of a consumer's order by mail
23 or telephone, a written confirmation of the transaction, either by email or
24 first class mail. The email or letter must Clearly and Conspicuously disclose
25 all the information required by Subsection II.B. The subject line of the
26 email must Clearly and Conspicuously state "Order Confirmation" along
27 with the name of the product or service, and nothing else. The outside of the
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1 envelope must Clearly and Conspicuously state “Order Confirmation” along
2 with the name of the product or service, and no additional information other
3 than the consumer’s address, the Defendant Koch’s return address, and
4 postage.

5 **III. OBTAINING EXPRESS INFORMED CONSENT**

6 **IT IS FURTHER ORDERED** that Defendant Koch, Defendant Koch’s
7 agents, employees, attorneys, and all other persons in active concert or
8 participation with any of them, who receive actual notice of this Order, whether
9 acting directly or indirectly, in connection with promoting or offering for sale any
10 good or service with a Negative Option Feature, are permanently restrained and
11 enjoined from using Billing Information to obtain payment from a consumer,
12 unless Defendant Koch first obtains the express informed consent of the consumer
13 to do so. To obtain express informed consent, Defendant Koch must:

14 A. For all written offers (including over the Internet or other web-based
15 applications or services), obtain consent through a check box, signature, or other
16 substantially similar method, which the consumer must affirmatively select or sign
17 to accept the Negative Option Feature, and no other portion of the offer.

18 Defendant Koch shall disclose Clearly and Conspicuously and in Close Proximity
19 to such check box, signature, or substantially similar method of affirmative
20 consent, only the following, with no additional information:

21 1. The extent to which the consumer must take affirmative
22 action(s) to avoid any Charges: (a) for the offered good or service, (b) of an
23 increased amount after the trial or promotional period ends, and (c) on a
24 recurring basis;
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1 2. The total cost (or range of costs) the consumer will be Charged
2 and, if applicable, the frequency of such Charges unless the consumer timely
3 takes affirmative steps to prevent or stop such Charges; and

4 3. The deadline(s) (by date or frequency) by which the consumer
5 must affirmatively act in order to stop all recurring Charges.

6 B. For all oral offers, prior to obtaining any Billing Information from the
7 consumer:

8 1. Clearly and Conspicuously disclose the information contained
9 in Subsection II.B; and

10 2. Obtain affirmative unambiguous express oral confirmation that
11 the consumer: (a) consents to being Charged for any good or service,
12 including providing, at a minimum, the last four (4) digits of the consumer's
13 account number to be Charged, (b) understands that the transaction includes
14 a Negative Option Feature, and (c) understands the specific affirmative steps
15 the consumer must take to prevent or stop further Charges.

16 For transactions conducted through Telemarketing, Defendant Koch shall
17 maintain for three (3) years from the date of each transaction an unedited voice
18 recording of the entire transaction, including the prescribed statements set out in
19 Subsection III.B. Each recording must be retrievable by date and by the
20 consumer's name, telephone number, or Billing Information, and must be provided
21 upon request to the consumer, the consumer's bank, or any law enforcement entity.

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23 **IV. SIMPLE MECHANISM TO CANCEL NEGATIVE OPTION FEATURE**

24 **IT IS FURTHER ORDERED** that Defendant Koch, Defendant Koch's
25 agents, employees, attorneys, and all other persons in active concert or
26 participation with any of them, who receive actual notice of this Order, whether
27 acting directly or indirectly, in connection with promoting or offering for sale any
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1 good or service with a Negative Option Feature, are permanently restrained and
2 enjoined from failing to provide a simple mechanism for a consumer to: (1) avoid
3 being Charged, or Charged an increased amount, for the good or service; and (2)
4 immediately stop any recurring Charges. Such mechanism must not be difficult,
5 costly, confusing, or time consuming, and it must be at least as simple as the
6 mechanism the consumer used to initiate the Charge(s). In addition:

7 A. For consumers who entered into the agreement to purchase a good or
8 service including a Negative Option Feature over the Internet or through other
9 web-based applications or services, Defendant Koch must provide a mechanism,
10 accessible over the Internet or through such other web-based application or service
11 that consumers can easily use to cancel the product or service and immediately
12 stop all further Charges.

13 B. For consumers who entered into the agreement to purchase a good or
14 service including a Negative Option Feature through an oral offer and acceptance,
15 Defendant Koch must maintain a telephone number and a postal address that
16 consumers can easily use to cancel the product or service and immediately stop all
17 further Charges. Defendant Koch must assure that all calls to this telephone
18 number shall be answered during normal business hours and that mail to the postal
19 address is retrieved regularly.

20
21 **V. PROHIBITION AGAINST BILLING CONSUMERS CURRENTLY**
22 **ENROLLED IN SUBSCRIPTION PLANS**

23 **IT IS FURTHER ORDERED** that Defendant Koch, Defendant Koch's
24 agents, employees, attorneys, and all other persons in active concert or
25 participation with any of them, who receive actual notice of this Order, whether
26 acting directly or indirectly, with respect to any current customer of any good or
27 service with a Negative Option Feature whom Defendant Koch seeks to continue
28 to charge after the entry of this Order, are hereby permanently restrained and

1 enjoined from charging any existing customer who was first charged prior to
2 March 1, 2016, unless, prior to any future charge, Defendant Koch:

3 A. Sends the customer written notice, either by email or first class mail,
4 in a form approved by FTC counsel, that includes the Clear and Conspicuous
5 disclosure of all the information required by Section II; and

6 B. Obtains the customer's express informed written consent in a manner
7 consistent with Section III.

8 VI. MONETARY JUDGMENT

9 **IT IS FURTHER ORDERED** that:

10 A. Judgment in the amount of SIX HUNDRED THIRTY TWO
11 THOUSAND THREE HUNDRED FOUR DOLLARS (\$632,304) is entered in
12 favor of the Commission against Defendant Koch, as equitable monetary relief.

13 B. Defendant Koch is ordered to pay to the Commission the Judgment
14 set forth above in Section VI.A as follows:

15 1. Within seven (7) days of entry of this Order, Defendant Koch
16 shall wire by electronic fund transfer the sum of ONE HUNDRED FIFTY
17 THOUSAND DOLLARS (\$150,000) which, as Defendant Koch stipulates,
18 his undersigned counsel holds in escrow for no purpose other than payment
19 to the FTC. Defendant Koch shall wire these funds to the FTC in
20 accordance with instructions previously provided by a representative of the
21 Commission;

22 2. Within one hundred and eighty (180) days of entry of this
23 Order, Defendant Koch shall wire by electronic fund transfer the sum of
24 ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000) to the FTC
25 in accordance with instructions previously provided by a representative of
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1 the Commission;

2 3. Within two hundred and seventy (270) days of entry of this
3 Order, Defendant Koch shall wire by electronic fund transfer the sum of
4 ONE HUNDRED FIFTY THOUSAND DOLLARS (\$150,000) to the FTC
5 in accordance with instructions previously provided by a representative of
6 the Commission;

7 4. Within three hundred and sixty (360) days of entry of this
8 Order, Defendant Koch shall wire by electronic fund transfer the sum of
9 ONE HUNDRED EIGHTY TWO THOUSAND THREE HUNDRED
10 FOUR DOLLARS (\$182,304) to the FTC in accordance with instructions
11 previously provided by a representative of the Commission; and

12 5. Notwithstanding the foregoing, Defendant Koch shall have the
13 right to prepay at any time, and without penalty, the remaining balance, or
14 any part thereof, due the Commission under this Order. Any such
15 prepayment made prior to an installment due date shall be credited as if
16 made on the next installment due date, and Defendant Koch shall be relieved
17 of making any further payments on the installment due date for any
18 prepayments to the extent of such prepayment. Nothing herein shall be
19 construed to relieve Defendant Koch of his obligation to make timely
20 payment for any installments as they become due which have not otherwise
21 fully been paid in advance.

22
23 C. To secure the payment obligations under Section VI.B of this order,
24 Defendant Koch grants the Commission a security interest in certain property and
25 proceeds thereof (“Collateral”), as set forth in the Mortgage and Security
26 Agreement (“Mortgage,” attached as Attachment A), which is incorporated by
27 reference as if fully set forth verbatim and which grants a security interest in the
28 following Collateral: Defendant Koch and his spouse, Angela Koch, hereby grant

1 to the Commission, pursuant to the attached Mortgage, a lien on and security
2 interest in real property located at 6440 Aberdeen Lane, Medina, Ohio, 44256.
3 Defendant Koch shall submit to the clerk's office for recording all security
4 documents used to perfect the Commission's lien on the property within fourteen
5 (14) days after entry of this Order, and shall deliver to the Commission copies of
6 such officially recorded documents within seven (7) days after receipt of such
7 documents.

8 D. In the event that Defendant Koch fails to make a required payment
9 when due under Section VI.B of the Order, or the Commission is not allowed to
10 retain any such payment, or if Defendant Koch fails to comply with the terms of
11 the Mortgage and such failure is not timely cured:

12 1. The entire judgment amount, less any amount previously paid,
13 shall immediately become due and payable by Defendant Koch. Interest
14 computed at the rate prescribed under 28 U.S.C. § 1961, as amended, shall
15 immediately begin to accrue on the unpaid balance. Time is of the essence
16 for the payments specified in this Section; and

17 2. Defendant Koch consents to the appointment of a receiver by
18 the Court for purpose of taking possession and control of and liquidating the
19 Collateral, with the rights and powers, and privileges of an equity receiver.
20 The costs and expenses of the receivership, including reasonable
21 compensation for the receiver and personnel retained by the receiver, shall
22 be paid solely from the proceeds of the Collateral.
23

24 E. The Commission's agreement to this Order is expressly based on the
25 material representations that Defendant Koch and Angela Koch have the right and
26 authority to enter into the Mortgage, and that such Collateral is not encumbered by
27 any lien, assignment, security interest, or other interest not otherwise disclosed in
28 the Mortgage.

1 1. The Commission's agreement to this Order is expressly based
2 on the material representations by Defendant Koch that the value of his
3 equity in the Collateral is at least \$723,456.

4 2. If, upon motion of the Commission, a Court determines that
5 Defendant Koch made a material misrepresentation or omitted material
6 information concerning ownership or authority to pledge the Collateral, any
7 encumbrance of the Collateral, or the value of the Collateral, the entire
8 Judgment amount (\$632,304), less any amounts previously paid by
9 Defendant Koch, shall immediately become due and payable by Defendant
10 Koch. Interest computed at the rate prescribed under 28 U.S.C. § 1961, as
11 amended, shall immediately begin to accrue on the unpaid balance.

12 *Provided* that proceedings instituted under this provision would be in
13 addition to, and not in lieu of, any other civil or criminal remedies, as may
14 be provided by law, including but not limited to, contempt proceedings or
15 any other proceedings that the Commission may initiate to enforce this
16 Order.

17 **VII. ADDITIONAL MONETARY PROVISIONS**

18 **IT IS FURTHER ORDERED** that:

19 A. Defendant Koch relinquishes dominion and all legal and equitable
20 right, title, and interest in all assets transferred pursuant to this Order and may not
21 seek the return of any assets.

22 B. The facts alleged in the Complaint will be taken as true, without
23 further proof, in any subsequent civil litigation by or on behalf of the Commission,
24 including in a proceeding to enforce its rights to any payment or monetary
25 judgment pursuant to this Order, such as a nondischargeability complaint in any
26 bankruptcy case.
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1 C. The facts alleged in the Complaint establish all elements necessary to
2 sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the
3 Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral
4 estoppel effect for such purposes.

5 D. Defendant Koch acknowledges that his Taxpayer Identification
6 Numbers (Social Security Numbers or Employer Identification Numbers), which
7 Defendant Koch previously submitted to the Commission, may be used for
8 collecting and reporting on any delinquent amount arising out of this Order, in
9 accordance with 31 U.S.C. § 7701.

10 E. All money paid to the Commission pursuant to this Order may be
11 deposited into a fund administered by the Commission or its designee to be used
12 for equitable relief, including consumer redress and any attendant expenses for the
13 administration of any redress fund. If a representative of the Commission decides
14 that direct redress to consumers is wholly or partially impracticable or money
15 remains after redress is completed, the Commission may apply any remaining
16 money for such other equitable relief (including consumer information remedies)
17 as it determines to be reasonably related to Defendant Koch's practices alleged in
18 the Complaint. Any money not used for such equitable relief is to be deposited to
19 the U.S. Treasury as disgorgement. Defendant Koch has no right to challenge any
20 actions the Commission or its representatives may take pursuant to this Subsection.
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22 **VIII. CUSTOMER INFORMATION**

23 **IT IS FURTHER ORDERED** that Defendant Koch, Defendant Koch's
24 agents, employees, attorneys, and all other persons in active concert or
25 participation with any of them, who receive actual notice of this Order, are
26 permanently restrained and enjoined from directly or indirectly:

27 A. Failing to provide sufficient customer information to enable the
28 Commission to efficiently administer consumer redress. If a representative of the

1 Commission requests in writing any information related to redress, Defendant
2 Koch must provide it, in the form prescribed by the Commission, within thirty (30)
3 days; and

4 B. Disclosing, using, or benefitting from customer information, including
5 the name, address, telephone number, email address, Social Security number, other
6 identifying information, or any data that enables access to a customer's account
7 (including a credit card, bank account, or other financial account), that Defendant
8 Koch obtained prior to entry of this Order in connection with the advertising,
9 marketing, promoting, offering for sale, or selling of any good or service using a
10 Negative Option Feature. *Provided, however,* that Defendant Koch may use
11 customer information for any current customer if Defendant Koch complies with
12 Subsection II.C of this Order.

13 **IX. COOPERATION**

14 **IT IS FURTHER ORDERED** that Defendant Koch must fully cooperate
15 with representatives of the Commission in this case and in any investigation related
16 to or associated with the transactions or the occurrences that are the subject of the
17 Complaint. Defendant Koch must provide truthful and complete information,
18 evidence, and testimony. Such Defendant must appear for interviews, discovery,
19 hearings, trials, and any other proceedings that a Commission representative may
20 reasonably request upon five (5) days written notice, or other reasonable notice, at
21 such places and times as a Commission representative may designate, without the
22 service of a subpoena.
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24 **X. ORDER ACKNOWLEDGMENTS**

25 **IT IS FURTHER ORDERED** that Defendant Koch obtain
26 acknowledgements of receipt of this Order:
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1 offered, the means of advertising, marketing, and sales, and the involvement
2 of any other Defendant; (d) describe in detail whether and how Defendant
3 Koch is in compliance with each Section of this Order; (e) provide a copy of
4 each Order Acknowledgment obtained pursuant to this Order, unless
5 previously submitted to the Commission; and (f) if a customer covered by
6 Section V is charged after the entry of this Order, provide a copy of the
7 notice sent to the customer pursuant to Subsection V.A and the customer's
8 written consent to the charge pursuant to Subsection V.B.

9 2. Additionally, Defendant Koch must: (a) identify all of his
10 telephone numbers and all physical, postal, email and Internet addresses,
11 including all residences; (b) identify all of his business activities, including
12 any business for which such Defendant performs services whether as an
13 employee or otherwise and any entity in which such Defendant has any
14 ownership interest; and (c) describe in detail such Defendant's involvement
15 in each such business, including title, role, responsibilities, participation,
16 authority, control, and any ownership.

17
18 B. For ten (10) years after entry of this Order, Defendant Koch must
19 submit a compliance notice, sworn under penalty of perjury, within fourteen (14)
20 days of any change in the following:

21 1. Defendant Koch must report any change in: (a) any designated
22 point of contact; or (b) the structure of any entity that Defendant has any
23 ownership interest in or controls directly or indirectly that may affect
24 compliance obligations arising under this Order, including: creation,
25 merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate
26 that engages in any acts or practices subject to this Order.
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1 affiliated with Defendant Koch who has agreed to such an interview. The person
2 interviewed may have counsel present.

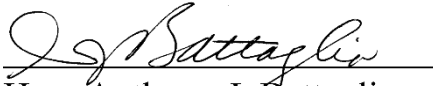
3 C. The Commission may use all other lawful means, including posing,
4 through its representatives, as consumers, suppliers, or other individuals or entities,
5 to Defendant Koch or any individual or entity affiliated with Defendant Koch,
6 without the necessity of identification or prior notice. Nothing in this Order limits
7 the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20
8 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

9 **XIV. RETENTION OF JURISDICTION**

10 **IT IS FURTHER ORDERED** that this Court retains jurisdiction of this
11 matter for purposes of construction, modification, and enforcement of this Order.

12 **IT IS SO ORDERED.**

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15 Dated: September 6, 2017

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17 Hon. Anthony J. Battaglia
18 United States District Judge
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