

1 WILLIAM E. KOVACIC  
General Counsel  
2 GREGORY A. ASHE  
ROBIN R. SPECTOR  
3 LAURA SCHNEIDER  
Federal Trade Commission  
4 600 Pennsylvania Ave., N.W., NJ-2122  
Washington, D.C. 20580  
5 (202) 326-3719 (voice)  
(202) 326-2558 (facsimile)  
6

7 GREG ADDINGTON  
Assistant United States Attorney  
8 100 W. Liberty Street, Suite 600  
Reno, NV 89501  
9 (775) 784-5438

10 Attorneys for Plaintiff

11 UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

12  
13 FEDERAL TRADE COMMISSION,

14 Plaintiff

15 v.

16 INTEGRATED CAPITAL INC., et al.,

17 Defendants.

Case No. CV-N-03-0412-DWH (RAM)

18 MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER  
19 HOLDING DEFENDANT INTEGRATED CAPITAL INC. AND ALAN WILSON IN  
20 CIVIL CONTEMPT AND FOR ORDER MODIFYING STIPULATED FINAL ORDER  
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1 **I. Introduction**

2 Plaintiff Federal Trade Commission (“FTC”) respectfully submits this Memorandum in  
3 support of its motion for (1) an order holding defendant Integrated Capital Inc., doing business as  
4 National Student Financial Aid (“NSFA”), and its principal, Alan Wilson, in civil contempt of  
5 court for violating the Stipulated Final Consent Order (“Final Order”) entered in this case, and  
6 (2) an order modifying the Final Order. The FTC brought this case in 2003 to halt NSFA’s  
7 deceptive practices in the course of marketing (via seminars conducted in area hotels) its high-  
8 priced college financial aid services. The parties entered into a settlement, which was entered in  
9 August 2003. The Final Order allowed NSFA to continue in business by enjoining the deceptive  
10 practices charged in the Complaint and requiring certain disclosures to cure common  
11 misconceptions.

12 Since entry of the Final Order, however, NSFA has routinely ignored significant  
13 requirements of the Final Order. In an effort to persuade consumers seeking college financial aid  
14 to pay at least \$1,000 they can ill-afford to spend, NSFA’s sales personnel continue to  
15 misrepresent the efficacy of NSFA’s services and the amount of effort required by consumers to  
16 implement those services. NSFA also fails to make any of the required affirmative disclosures in  
17 its sales presentations. As demonstrated by consumer complaints, undercover tapes of NSFA  
18 sales presentations, and scripts provided by NSFA, NSFA is flouting the Final Order entered  
19 against it (and to which it agreed to be bound). Thus, the evidence is clear and convincing that  
20 NSFA and its president should be held in civil contempt of court.

21 In addition to holding them in contempt, the Court should modify the Final Order to  
22 permanently ban NSFA and Wilson from marketing or selling academic goods and services. The  
23 negotiated Final Order represented an efficient compromise — allowing NSFA to remain in  
24 business while protecting consumers from unscrupulous sales practices. As the evidence  
25 demonstrates, NSFA and Wilson have demonstrated an inability to uphold their end of the deal.  
26 They fail to make required disclosures and continue to make core misrepresentations as to  
27 NSFA’s services. Thus, the circumstances warrant the requested modification of the Final Order.

1 **II. Statement of Facts**

2 **A. Procedural History**

3 On August 1, 2003, the FTC filed a complaint against NSFA and its then president Sheila  
4 Cuccia. (Ex. 9, Att. A at 107-115.) The complaint charged NSFA and Cuccia with violating  
5 Section 5 of the FTC Act, 15 U.S.C. § 45, in the course of marketing their college financial aid  
6 services. (Ex. 9, Att. A ¶ 1 at 107.) Specifically, the complaint alleged that Defendants  
7 misrepresented that (1) students were selected based upon their qualifications to participate in  
8 NSFA's college financial aid and admissions program, (2) consumers who purchased NSFA's  
9 services were likely to receive substantially more financial aid than consumers could obtain  
10 without NSFA's services, and (3) consumers who purchased NSFA's services would get a refund  
11 if they did not obtain certain specified amounts of financial aid. (Id., Att. A ¶¶ 23-31 at 112-14.)

12 Together with the complaint, the FTC and Defendants submitted a Stipulated Final  
13 Consent Order resolving all matters in dispute arising from the complaint. The Court entered the  
14 Final Order on August 7, 2003. (Id., Att. B at 116-32.)

15 Section I of the Final Order prohibits NSFA and its officers, agents, servants, employees,  
16 and all persons or entities in active concert or participation with them who receive actual notice  
17 of this Order by personal service or otherwise from making certain prohibited misrepresentations.  
18 (Id., Att. B at 119-20.) These misrepresentations include: (1) falsely representing that  
19 consumers who purchase any college planning good or service are likely to receive substantially  
20 more financial aid than consumers could otherwise obtain without the aid of such good or  
21 service, (Id., Att. B § I.B at 119); (2) falsely representing that consumers who purchase any  
22 academic good or service have received, or are likely to receive, a specified amount of financial  
23 aid or an increase in financial aid eligibility as a result of such good or service, (Id., Att. B § I.F  
24 at 120); and (3) falsely representing the extent to which consumers will be required to incur any  
25 expense or partake in any activities in order to implement or use any such good or service,  
26 including, but not limited to, completing a questionnaire and being required to request in writing  
27 any particular good or service. (Id., Att. B § I.J at 120.)

1 Section II of the Final Order requires NSFA and its officers, agents, servants, employees,  
2 and all persons or entities in active concert or participation with them who receive actual notice  
3 of this Order by personal service or otherwise to make certain affirmative disclosures in all of  
4 NSFA's oral sales presentations. (Id., Att. B at 120-22.) Specifically, Section II.A. of the Final  
5 Order requires NSFA to disclose, clearly and conspicuously, "[i]n the course of making any oral  
6 sales presentations," that (1) purchasing NSFA's services does not guarantee that a consumer  
7 will get financial aid or get more financial aid than the consumer could have otherwise obtained  
8 without purchasing NSFA's services, (2) purchasing NSFA's services does not guarantee that a  
9 consumer's child will get accepted by any college or university, (3) NSFA provides no services  
10 until it receives a completed questionnaire, that certain services must be specifically requested,  
11 and that failure to utilize any services does not entitle consumers to a refund, (4) consumers may  
12 not realize the full benefit of NSFA's services if their children are within 6 months of graduating  
13 high school, have not made reasonable efforts to complete the necessary paperwork for  
14 admissions and financial aid, or are only considering attending community college, and (5)  
15 consumers who are not U.S. citizens may not be eligible for federal or state financial aid, and  
16 thus may not realize the full benefit of NSFA's services.<sup>1</sup> (Id., Att. B § II.A at 120-21.)

17 NSFA acknowledges receiving actual notice of the Final Order on August 21, 2003. (Id.,  
18 Att. N at 502-03.) Alan Wilson acknowledged receiving actual notice of the Final Order on  
19 August 25, 2003. (Id., Att. C at 199.) On October 15, 2003, Alan Wilson replaced Sheila Cuccia  
20 as president of NSFA. (Id., Att. H at 349 (responding to FTC inquiry at Id., Att. G at 345).)

21 Section IX of the Final Order required NSFA to submit a compliance report 180 days  
22 after entry of the Final Order in which it detailed its efforts to comply with the Final Order. (Id.,  
23 Att. B at 128-29.) On February 6, 2004, NSFA submitted a timely compliance report that  
24 included the current version of its solicitation letter and scripts for its various sales presentations.  
25 (Id., Att. E.) The FTC advised NSFA's counsel, by letter dated March 11, 2004, of several  
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27 <sup>1</sup> The Final Order also entered a judgment of \$115,000 against NSFA (Id., Att. B § III.A  
28 at 122), which it paid.

1 deficiencies in its compliance. (Id., Att. F.) In response, NSFA submitted a supplemental report  
2 on March 30, 2004. (Id., Att. H.) As discussed below, this report did not cure the deficiencies.

3 **B. Defendants' Marketing Practices**

4 NSFA purchases lists of high school students who have taken the college entrance  
5 examinations and sends solicitation letters to students who appear to be college bound. (Ex. 9,  
6 Att. D at 138 (responding to FTC inquiry at Id., Att. C).) The letter invites the students and their  
7 parents or legal guardians to attend a free financial aid presentation. (Ex. 9, Att. E at 203-04, Att.  
8 H at 350-51; Ex. 2 ¶ 2 at 4, Att. A at 10-11, Att. H at 25-26; Ex. 3 ¶ 2 at 27, Att. A at 32-33; Ex.  
9 4 ¶ 2 at 36; Ex. 5 ¶ 2 at 41.) Students and their parents or legal guardians who attend the  
10 seminar receive a one-hour group sales presentation for NSFA's services. (Ex. 1 ¶ 3 at 1; Ex. 2  
11 ¶ 3 at 4-5; Ex. 3 ¶ 4 at 27-28; Ex. 4 ¶ 3 at 36-37; Ex. 5 ¶ 3 at 41-42; Ex. 6 ¶ 7 at 48; Ex. 7 ¶ 10 at  
12 55; Ex. 8 ¶ 3 at 79, Att. A; Ex. 9 ¶ 4 at 102-03, Att. J.) The presentation concludes with a  
13 personal interview. (Ex. 1 ¶ 4 at 1-2; Ex. 2 ¶ 4 at 5-6; Ex. 3 ¶ 5 at 28-29; Ex. 4 ¶ 4 at 37; Ex. 5  
14 ¶ 4 at 42; Ex. 6 ¶ 13 at 50; Ex. 7 ¶ 13 at 56-67; Ex. 8 ¶ 3 at 79, Att. B; Ex. 9 ¶ 4 at 102-03, Att.  
15 K.) The presentations typically take place at local hotels. (Ex. 1 ¶ 2 at 1; Ex. 2 ¶ 2 at 4; Ex. 3 ¶ 2  
16 at 27; Ex. 4 ¶ 2 at 36; Ex. 5 ¶ 2 at 41; Ex. 6 ¶ 3 at 46; Ex. 7 ¶ 3 at 53; Ex. 8 ¶ 3 at 79 Ex. 9 ¶ 4 at  
17 102-03.) During the presentation, NSFA's representatives explain the various services NSFA  
18 can provide. (Ex. 9, Att. E at 230-31, Att. H at 370-71, Att. J at 420-28; Ex. 8, Att. A at 82Y-  
19 82DD; Ex. 5 ¶ 3 at 41-42; Ex. 6 ¶¶ 8-10 at 48-50; Ex. 7 ¶¶ 8-9 at 55.)

20 The interview following the group presentation is essentially a sales closing for NSFA's  
21 services. (See Ex. 9, Att. E at 206 (discussing how using "Table Talk" script will help sales  
22 force close over 50% of their prospects), Att. H at 376 (same).) Consumers learn for the first  
23 time that to receive NSFA's services, consumers must execute a contract and pay a fee, which  
24 ranges in cost from \$1,095 to \$1,600 depending upon whether consumers pay up-front or over  
25 time. (Ex. 9, Att. E at 212-13, Att. H at 384-86, Att. K at 469; Ex. 1 ¶ 4 at 1-2; Ex. 2 ¶ 5 at 6;  
26 Ex. 3 ¶ 6 at 29; Ex. 4 ¶ 4 at 37; Ex. 5 ¶ 4 at 42; Ex. 7 ¶¶ 13-14 at 56-57.) The representatives  
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1 emphasize the urgency of signing up that day, claiming they may not be in area again for months.  
2 (Ex. 2 ¶ 5 at 6; Ex. 3 ¶¶ 6, 7 at 29; Ex. 7 ¶ 14 at 57.)

3 **C. Defendants Have Engaged In Widespread Violations Of The Final Order**

4 **1. NSFA Continues To Misrepresent That Consumers Are Likely To**  
5 **Receive More Financial Aid Through Its Services In Violation Of**  
6 **Sections I.B And I.F Of The Final Order**

7 Section I.B of the Final Order prohibits NSFA from falsely representing that consumers  
8 who purchase any college planning good or service are likely to receive substantially more  
9 financial aid than consumers could otherwise obtain without the aid of such good or service.  
10 Section I.F of the Final Order prohibits NSFA from falsely representing that consumers who  
11 purchase any academic good or service have received, or are likely to receive, a specified amount  
12 of financial aid or an increase in financial aid eligibility as a result of such good or service.  
13 Nevertheless, NSFA continues to make such misrepresentations.

14 NSFA's solicitation letter is replete with statements suggesting its services will increase  
15 consumer's financial aid eligibility. The letter references the school district in which the student  
16 resides on the envelope in the upper left corner, near the return address, and then states that as a  
17 "[School District] area student you may benefit from NSFA's services," (Ex. 9, Att. E at 203,  
18 Att. H at 350; Ex. 2 ¶ 2 at 4, ¶ 13 at 9, Att. A at 10-12, Att. H at 24-26; Ex. 3 ¶ 3 at 27, Att. A at  
19 32), giving some consumers the impression that NSFA is affiliated with or endorsed by their  
20 local school board. (Ex. 2 ¶ 2 at 4; Ex. 3 ¶ 3 at 27; Ex. 9 ¶ 15 at 105-06.) The letter opens with  
21 the statement that NSFA is committed to **"maximizing your eligibility to receive financial**  
22 **assistance, in an effort to lessen or even eliminate your family's expenses for your child's**  
23 **college education."** (Ex. 9, Att. E at 203 (emphasis in original), Att. H at 350 (emphasis in  
24 original), Ex. 2, Att. A at 10, Att. H at 25; Ex. 3, Att. A at 32.) Several paragraphs later, the  
25 letter again states that NSFA assists consumers "to increase your chances for obtaining financial  
26 aid." (Ex. 9, Att. E at 203, Att. H at 350; Ex. 2, Att. A at 10, Att. H at 25; Ex. 3, Att. A at 32.)  
27 The letter then states that "Many of our clients have had their financial aid eligibility increased  
28

1 and/or their families' contribution for college expenses decreased by using our program.”<sup>2</sup> (Ex. 9,  
2 Att. E at 204, Att. H at 351; Ex. 2, Att. A at 11, Att. H at 26; Ex. 3, Att. A at 33.) Indeed, the  
3 lure of increased financial aid is the reason most consumers go to NSFA’s seminars in the first  
4 place. (Ex. 2 ¶ 2 at 4; Ex. 3 ¶ 2 at 27; Ex. 4 ¶ 2 at 36; Ex. 5 ¶ 2 at 41.)

5 NSFA’s scripts contain detailed descriptions of the level of aid NSFA has obtained for its  
6 clients, which imply that consumers are likely to receive similar results. The script for the one-  
7 on-one interview states “Now let me show you what we have done economically for one of our  
8 clients” and goes on to explain that NSFA reduced the student’s Estimated Family Contribution  
9 (“EFC”) from \$6825 to \$338. (Ex. 9, Att. E at 210, Att. H at 381, Att. K at 455-56.) The script  
10 further explains that NSFA made it possible for this student to attend Northwestern University  
11 for only \$338 per year. (Ex. 9, Att. E at 211, Att. H at 382, Att. K at 455-57.) The script states  
12 that the regular tuition for this school is \$32,162. (Ex. 9, Att. E at 211, Att. H at 382, Att. K at  
13 455-56.)

14 In the group presentation script, there is a detailed discussion of financial aid and  
15 expected family contribution. (Ex. 9, Att. E at 228, 231-33, Att. H at 368, 371-73.) NSFA’s  
16 representatives discuss the importance of a college education and emphasize the complexity of  
17 the college financial aid and admissions process. (Ex. 9, Att. E at 217-18, 220, 228, Att. H at  
18 355-56, 359, 368, Att. J at 395-97, 400, 416-19; Ex. 8, Att. A at 82C, 82E-82G, 82K, 82S-82V,  
19 82FF; Ex. 2 ¶ 4 at 5-6; Ex. 3 ¶ 5 at 28-29; Ex. 4 ¶ 3 at 36-37; Ex. 5 ¶ 3 at 41-42; Ex. 6 ¶ 8 at 48-  
20 49; Ex. 7 ¶ 8 at 55.) NSFA’s inform the seminar attendees that NSFA can help consumers with  
21 all aspects of the aid and admissions process. (Ex. 9, Att. E at 230-31, Att. H at 370-71, Att. J at  
22 420-26; Ex. 8, Att. A at 82K-82L, 82T-82X, 82Y-82DD; Ex. 2 ¶ 3 at 4-5; Ex. 3 ¶¶ 5, 6 at 28-29;  
23 Ex. 4 ¶ 3 at 36-37; Ex. 5 ¶ 3 at 41-42; Ex. 6 ¶ 8 at 48-49; Ex. 7 ¶ 8 at 55.) They explain that  
24 NSFA will provide various personalized services, such as a personalized career profile, an  
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26 <sup>2</sup> A disclaimer stating “individual financial aid results will vary” appears in small print at  
27 the bottom of the letter. (Ex. 9, Att. E at 204; Ex. 2, Att. A at 11; Ex. 3, Att. A at 33; see also Ex.  
28 9, Att. H at 351 (disclaimer, still in small print, placed in parentheses next to statement); Ex. 2,  
Att. H at 26 (same).)

1 analysis of the consumers' financial situations, assistance in completing the Free Application for  
2 Federal Student Aid ("FAFSA") and practice SAT tests. (Ex. 9, Att. E at 230-31, Att. H at 370-  
3 71, Att. J at 420-28; Ex. 8, Att. A at 82Y-82DD; Ex. 5 ¶ 3 at 41-42.) NSFA explains that what  
4 they do for students is to get the financial aid as high as possible and the expected family  
5 contribution as low as possible so that each student can go to college for as close to \$0 as  
6 possible. (Ex. 9, Att. E at 233, Att. H at 373; Ex. 8, Att. A at 82V-82W.) NSFA's suggest that  
7 these services will enable consumers to obtain more financial aid than they could get on their  
8 own. (Ex. 9, Att. E at 233, Att. H at 373, Att. J at 427-28 ("we will strategize to maximize your  
9 aid eligibility"), 432-37, 440-41 ("Parents, take the burden off your shoulders and put it on the  
10 professionals"); Ex. 8, Att. A at 82T-82X, 82BB ("We can analyze your whole entire financial  
11 position so that we can develop what we call financial strategies or methods or a plan of how to  
12 fill that FAFSA out to maximize your eligibility for financial aid and minimize your out-of-  
13 pocket expense"), 82DD ("We have clients all over the country that paid zero out of pocket to go  
14 to college, nothing to go to college"); Ex. 4 ¶ 3 at 36-37; Ex. 5 ¶ 3 at 41-42; Ex. 7 ¶¶ 8 at 55  
15 (NSFA representative stated there was millions of dollars available for students and that NSFA  
16 was successful in getting money for students), ¶ 9 at 55 (NSFA representative stated that  
17 attendees could get all the money they needed if they used NSFA's services).)

18 Similar representations were made at the presentations attended by the FTC. For  
19 example, at the California presentation, the representative stated that NSFA has clients all over  
20 the country that paid zero out-of-pocket to go to college. (Ex. 8, Att. A at 82DD.) At the  
21 Gaithersburg, Maryland presentation, the representative read a letter purportedly from a  
22 consumer thanking NSFA for getting her daughter's tuition reduced from \$22,000 to \$871 per  
23 year in out-of-pocket expense. (Ex. 9, Att. J at 432-36. See also Ex. 3 ¶ 4 at 27-28 (NSFA  
24 representative read testimonial about single mother who received \$2000 in financial aid using  
25 NSFA's services).) At the Baltimore, Maryland presentation, the NSFA representative read a  
26 testimonial letter of a single mother who received all of the financial assistance necessary to send  
27 her child to an Ivy League school using NSFA's services. (Ex. 7 ¶ 10 at 55-56.) At the New  
28

1 Jersey presentation, NSFA's representative described how by using NSFA's services he was able  
2 to send his daughter to Notre Dame for only \$10,000 per year and that another of NSFA's clients  
3 went to Northwestern for only \$385 per year. (Ex. 6 ¶ 9 at 49.)

4 NSFA's purported ability to maximize consumers' financial aid is reinforced during the  
5 personal interview. NSFA's representatives reiterate the services NSFA provides and assure  
6 consumers that NSFA will maximize the amount of financial aid they can obtain. (Ex. 9, Att. E  
7 at 210-212 ("we will analyze your current financial situation and provide strategies to maximize  
8 your aid eligibility, with the intention of lowering your [Expected Family Contribution] and  
9 increasing your financial aid"), Att. H at 381-84, Att. K at 450-51, 453, 455-57, 462, 465-67  
10 ("We're going to make sure that if a child doesn't go to school, it won't be because of tuition and  
11 the family"); Ex. 2 ¶ 4 at 5-6; Ex. 3 ¶ 5 at 28-29; Ex. 4 ¶ 4 at 37; Ex. 5 ¶ 4 at 42; Ex. 7 ¶ 13 at 56-  
12 67.) For example, during the Gaithersburg, Maryland interview, NSFA's representative  
13 explained how one of their clients completed the FAFSA and had an expected family  
14 contribution of \$6,825 but "we redid it and got it down to 338." (Ex. 9, Att. K at 455.) The  
15 representative continued that "we were able to get her into Northwestern" and "she was able to  
16 go to school for less than \$500." (Ex. 9, Att. K at 457.) This point is reiterated several times  
17 throughout the interview. (Ex. 9, Att. K at 466, 467.) At the Baltimore, Maryland interview, the  
18 NSFA representative assured the FTC investigator (posing as a parent) that NSFA would get her  
19 all of the money she needed to send her child to college. (Ex. 7 ¶ 13 at 56-57.)

20 Consumers report similar experiences. For example, several consumers were told that  
21 NSFA would get them 100% financing for college. (Ex. 1 ¶ 4 at 1-2 (NSFA guaranteed  
22 consumer would receive 100% financing); Ex. 3 ¶ 6 at 29 (NSFA representative promised  
23 consumer would receive 100% financing); Ex. 4 ¶ 4 at 37 (NSFA promised consumer would get  
24 100% financing). See also Ex. 2 ¶ 4 at 5-6 (consumer told that he would not get as much  
25 financial aid if did not use NSFA's services), ¶ 5 at 6 (NSFA guaranteed that consumer would  
26 get financing for majority of college costs); Ex. 5 ¶ 4 at 42 (consumer told during general  
27 presentation that if he followed NSFA's program he would be guaranteed more financial aid), ¶ 5  
28

1 at 42-43 (consumer told during individual interview that he could get more financial aid by using  
2 NSFA's services than he could obtain on his own); Ex. 9 ¶ 15 at 105-06.) It is highly unlikely  
3 that any company offering financial aid consulting services will be able to obtain such results for  
4 the majority of its clients. Yet NSFA's presentations leave consumers with the impression that  
5 NSFA will get them substantial amounts of financial aid, which is why they purchased NSFA's  
6 services with money that would have been better spent on actual college expenses. (Ex. 1 ¶ 4 at  
7 1-2; Ex. 2 ¶¶ 3,6 at 4-7; Ex. 3 ¶¶ 4, 6, 7 at 27-29; Ex. 4 ¶¶ 5, 6 at 37-38; Ex. 5 ¶¶ 3, 6 at 41-43;  
8 Ex. 9, Att. J at 407 ("Students, I'm here to tell you, if you show us the brains, yeah, we'll show  
9 you the money"), 428 ("we will strategize to maximize your aid eligibility...we're going to  
10 provide you with the maximum aid"), 436 (reading testimonial letter than concludes "my  
11 daughter's dreams of going to Bridgewater College were now going to come true. It would not  
12 have happened if it had not been for National Student Financial Aid"); Ex. 8, Att. A at 82DD ("If  
13 they can get financial aid, you can get it"). See also Ex. 6 ¶ 12 at 50; Ex. 7 ¶ 12 at 56; Ex. 9 ¶ 14  
14 at 105.)

15 **2. NSFA Fails To Make Required Disclosures During Sales**  
16 **Presentations In Violation Of Section II.A Of The Final Order**

17 Section II.A. of the Final Order clearly and unambiguously requires that NSFA disclose  
18 five specific statements in the course of making any oral sales presentation. These disclosures do  
19 not appear in the scripts NSFA submitted in its compliance report. (Ex. 9, Att. F at 342-44.) In  
20 fact, NSFA admits in its compliance report that the disclosures were made only in writing (in the  
21 fine print of its service contract) and not orally.<sup>3</sup> (Ex. 9, Att. E at 201.)

22 The FTC informed NSFA counsel orally on March 10, 2004, and in writing on March 11,  
23 2004, of these violations. (Ex. 9, Att. F.) The FTC subsequently attended a seminar on March  
24 27, 2004 in Gaithersburg, Maryland. (Ex. 9 ¶ 4 at 102-03.) NSFA failed to heed the FTC's

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25 <sup>3</sup> The agreement contains some, but not all, of the required disclosures. For instance, the  
26 agreement does not contain the first disclosure regarding guarantee of aid or the last disclosure  
27 regarding US citizenship. (Ex. 9, Att. E at 205, Att. F at 343.) In addition, although it is helpful  
28 for consumers to have the disclosures in writing in the contract, the Final Order expressly  
requires that the disclosures be made "in the course of making any oral sales presentation." (Ex.  
9, Att. B § II.A at 121.)

1 warnings — the required disclosures still were not made during the oral sales presentation. (Ex.  
2 9 ¶ 12 at 104.) Consumers, likewise, report that none of the required disclosures were made at  
3 their seminars. (Ex. 2 ¶¶ 6, 7 at 6-7 (seminar held in October 2003); Ex. 3 ¶¶ 8, 9 at 30 (seminar  
4 held in November 2003); Ex. 4 ¶ 6 at 37-38 (seminar held in February 2004); Ex. 5 ¶ 6 at 43  
5 (seminar held August 2003).)

6 In response to the FTC's March 11<sup>th</sup> letter, NSFA submitted a supplemental compliance  
7 report on March 30, 2004 that included a revised script.<sup>4</sup> (Ex. 9, Att. H.) The script was  
8 identical to the previously submitted script except that the phrase "Disclosure # XX See  
9 attached" was typewritten onto the margin in a few places with the disclosure itself on an  
10 attached piece of paper. (Ex. 9, Att. H at 352-53, 358-59, 366-67 373-75, 379-80, 382-83, 384-  
11 85.) Notwithstanding this purported "revised" script, the disclosures are still not being made.  
12 The FTC attended seminars on April 17, 2004 in Santa Clara, California, (Ex. 8 ¶ 3 at 79), on  
13 June 26, 2004 in Baltimore, Maryland, (Ex. 7 ¶ 3 at 53), and on July 10, 2004 in Highstown,  
14 New Jersey. (Ex. 6 ¶ 3 at 46.) NSFA representatives did not make the required disclosures at  
15 any of these seminars.<sup>5</sup> (Ex. 6 ¶¶ 11, 17 at 50, 51; Ex. 7 ¶¶ 11, 15 at 56-57; Ex. 8 ¶ 10 at 81-82.)

16 **3. NSFA Continues To Misrepresent The Amount Of Effort Required**  
17 **By Consumers To Implement NSFA's Services In Violation Of Section**  
18 **I.J Of The Final Order**

19 Section I.J of the Final Order prohibits NSFA from falsely representing the extent to  
20 which consumers will be required to incur any expense or partake in any activities in order to  
21 implement or use any such good or service. Yet, NSFA continues to misrepresent the amount of  
22 effort required by consumers to implement its services.

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23 <sup>4</sup> Notably, in the cover letter to the supplemental compliance report, NSFA's counsel  
24 concedes that "NSFA has agreed to modify" its scripts to "include the five affirmative  
25 disclosures at issue." (Ex. 9, Att. H at 348.)

26 <sup>5</sup> At best, one representative grudgingly conceded, during the personal interview portion  
27 of the seminar in New Jersey, that "the Federal Trade Commission tells me to tell you that" after  
28 the FTC investigator's husband asked whether they could get the same financial aid on their own.  
(Ex. 6 ¶ 16 at 51.) The disclosure, however, was not made to all of seminar attendees. (*Id.* ¶¶ 12,  
17 at 50,51.) Further, but for the investigator's prompting, it is unlikely that the disclosure would  
have been made. (*Id.* ¶ 17 at 51.)

1 NSFA' solicitation letter contains repeated representations that NSFA's seminar and  
2 financial aid packet are free while at the same time describing NSFA's comprehensive services  
3 and the benefits of those services. The letter invites the students and their parents or legal  
4 guardians to attend a free financial aid presentation. (Ex. 9, Att. E at 203-04, Att. H at 350-51;  
5 Ex. 2 ¶ 2 at 4, Att. A at 10-11, Att. H at 25-26; Ex. 3 ¶ 2 at 27, Att. A at 32-33; Ex. 4 ¶ 2 at 36;  
6 Ex. 5 ¶ 2 at 41.) The letter explains that, following the presentation, the students and parents will  
7 be invited to a one-on-one interview with an NSFA counselor. (Ex. 9, Att. E at 203-04, Att. H at  
8 350-51; Ex. 2 ¶ 2 at 4, Att. A at 10-11, Att. H at 25-26; Ex. 3 ¶ 2 at 27, Att. A at 32-33.) The  
9 letter states that there is "NO COST" to attend the presentation and interview and states  
10 numerous times that consumers who attend will receive a "FREE Financial Aid Information  
11 Packet." (Ex. 9, Att. E at 203-04, Att. H at 350-51; Ex. 2, Att. A at 10-11, Att. H at 25-26; Ex. 3,  
12 Att. A at 32-33.) The letter also discusses the "College Assistance Program," the services NSFA  
13 provides through that program, and the potential benefits consumers may achieve. (Ex. 9, Att. E  
14 at 203-04, Att. H at 350-51; Ex. 2, Att. A at 10-11, Att. H at 25-26; Ex. 3, Att. A at 32-33.) At  
15 no point in the letter, however, does NSFA disclose that, in order to obtain the described  
16 services, consumers must sign a contract and pay a substantial fee. (Ex. 9, Att. E at 203-04, Att.  
17 H at 350-51; Ex. 2, Att. A at 10-11, Att. H at 25-26; Ex. 3, Att. A at 32-33.) It is not clear from  
18 the letter that the benefits will not be realized simply by attending the seminar and reviewing the  
19 free packet. It is also not clear that the services described in the letter are only provided to  
20 consumers who sign a contract and pay a fee.<sup>6</sup> The first time consumers learn about the contract  
21 and fees is during the one-on-one interview after the group presentation. (Ex. 5 ¶ 5 at 42-43.)

22 During the sales presentations, NSFA repeatedly describes what it will do for the  
23 consumer. (See generally Ex. 9, Att. E at 206-33, Att. H at 352-86, Att. J at 440 ("Parents, take  
24 the burden off your shoulders and put it on the professionals").) Other than informing consumers  
25

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26 <sup>6</sup> At most, the letter contains the statement "Following the group presentation individual  
27 interviews will be conducted and additional services will be made available to those families  
28 needing more personalized services." (Ex. 9, Att. E at 204, Att. H at 351; Ex. 2, Att. A at 11,  
Att. H at 26.) This statement, however, does not indicate that a fee exceeding \$1,000 will be  
charged for those "additional services."

1 that they will need to complete a financial questionnaire and making general exhortations that the  
2 students need to achieve or maintain high grades and SAT scores, (Ex. 9, Att. E at 209-10, Att. H  
3 at 379-81, Att. K at 451), NSFA does not discuss the effort required of consumers. While the  
4 service contract contains language that failure to utilize a service does not entitle a consumer to a  
5 refund and that certain services need to be specifically requested, (Ex. 9, Att. E at 205), this fact  
6 is not discussed by NSFA representatives. (Ex. 2 ¶ 7 at 7; Ex. 3 ¶ 9 at 30.) As a result,  
7 consumers are left with the impression that other than filling out some initial questionnaires,  
8 NSFA does all the work.

#### 9           4.       **Consumer Injury Caused By NSFA's Contumacious Behavior**

10           NSFA reports that it entered contracts with 5,947 consumers between August 6, 2003 and  
11 March 21, 2004. (Ex. 9, Att. H at 349.) NSFA reports receiving \$1,938,277 in net cash receipts  
12 from these contracts through March 26, 2004. (*Id.*) The total number of injured consumers and  
13 the amount of their loss, however, is likely to be much higher as NSFA's contumacious behavior  
14 continues unabated.

### 15       **III.    Legal Argument**

16           District courts have the inherent power to enforce their orders. Shillitani v. United States,  
17 384 U.S. 364, 370 (1966). As a party to the original action, the FTC may, as part of the same  
18 action, invoke the court's power by initiating a proceeding for civil contempt. Gompers v. Bucks  
19 Stove & Range Co., 221 U.S. 418, 444-45 (1911). To establish a defendant's liability for civil  
20 contempt, the plaintiff must show by clear and convincing evidence that the defendant has  
21 violated a specific and definite order of the court. FTC v. Affordable Media, LLC, 179 F.3d  
22 1228, 1239 (9th Cir. 1999). "The burden then shifts to the contemnors to demonstrate why they  
23 were unable to comply." *Id.* A defendant's good faith or intent in attempting to comply with an  
24 order is irrelevant. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); Stone v. City  
25 and County of San Francisco, 968 F.2d 850, 856-57 (9th Cir. 1992). "A party cannot disobey a  
26 court order and later argue that there were 'exceptional circumstances' for doing so." *In re*  
27 Crystal Palace Gambling Hall, Inc., 817 F.2d 1361, 1365 (9th Cir. 1987).



1           **A.     NSFA Should Be Held In Civil Contempt For Violating The Final Order**

2           The evidence is clear and convincing that NSFA is failing to make the disclosures  
3 required by Section II.A. of the Final Order during its sales presentations. As discussed above,  
4 the very scripts NSFA submitted to the FTC as part of its compliance report lack the required  
5 disclosures. Even had the submitted scripts contained the required disclosures, they are not being  
6 made, in practice, during the oral sales presentations. During 2004, the FTC has attended four  
7 sales presentations (in Gaithersburg and Baltimore, Maryland, California, and New Jersey). In  
8 none of these presentations did NSFA make the required disclosures. Moreover, as discussed  
9 above, the sales presentations attended by the FTC all took place after FTC counsel had warned  
10 NSFA counsel that the scripts NSFA submitted with its compliance report lacked the required  
11 disclosures. Clearly, NSFA was on notice that its conduct violated the Final Order yet it took no  
12 steps to correct this behavior.

13           The evidence is equally clear and convincing that NSFA has misrepresented its efficacy,  
14 in violation of Sections I.B and I.F of the Final Order, and the amount of effort required by  
15 consumers to implement NSFA's services, in violation of Section I.J. of the Final Order. As  
16 discussed above, scripts submitted by NSFA, transcripts of sales presentations taped by the FTC,  
17 and consumer experiences all demonstrate a calculated effort by NSFA to mislead consumers  
18 into thinking that purchasing NSFA's services will result in increased financial aid.

19           **B.     Alan Wilson Should Be Held In Civil Contempt For Violating The Final  
20           Order**

21           Federal Rule of Civil Procedure 65(d) explains that injunctions are binding on the parties  
22 to the action, as well as "those persons in active concert or participation with them who receive  
23 actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The Ninth  
24 Circuit has also held that an injunction is binding on a nonparty who has actual notice and either  
25 (1) is the alter ego of, or has an identity of interest with, a party, or (2) aids and abets a party's  
26 violation of the order. See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1323-24 (9th Cir.  
27 1998); FTC v. Gill, 183 F. Supp. 2d 1171, 1184 (C.D. Cal. 2001).

1 As discussed above, Alan Wilson received actual notice of the Final Order at almost the  
2 same time as NSFA. He became NSFA's president in October 2003 and, as such, was  
3 responsible for its operations and for ensuring that NSFA complied with the Final Order. He has  
4 failed to revise NSFA's business practices to come into compliance with the Final Order, and, in  
5 so doing, has allowed NSFA to continue to violate the Final Order. His conduct, therefore,  
6 constitutes civil contempt of the Final Order.

7 **C. The Court Should Enter The Proposed Contempt Order Containing**  
8 **Compensatory Sanctions**

9 In a civil contempt proceeding, the court may impose a fine to compensate for losses  
10 caused by the violations and may employ sanctions to coerce the defendant into compliance with  
11 the court's order. United States v. United Mine Workers of America, 330 U.S. 258, 304-05  
12 (1947). "Thus, there are two forms of civil contempt: compensatory and coercive." Falstaff  
13 Brewing Corporation v. Miller Brewing Co., 702 F.2d. 770, 778 (9th Cir. 1983). "[R]emedial or  
14 compensatory actions [for contempt] are essentially backward looking, seeking to compensate  
15 the complainant through the payment of money for damages caused by past acts of  
16 disobedience." Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336, 1344 (3d  
17 Cir. 1976). Thus, in a contempt action for violations of an order in a Section 13(b) fraud case,  
18 the district court has the equitable authority to order payment of consumer redress for injury  
19 caused by the violations. McGregor v. Chierico, 206 F.3d 1378, 1387 (11th Cir. 2000).

20 The FTC's proposed order would rescind all contracts with consumers who have entered  
21 contracts with or paid money to NSFA after NSFA was served with the Final Order, and require  
22 NSFA to refund all money received from such consumers. As in Section 13(b) actions, evidence  
23 of widespread credible misrepresentations creates a presumption that all customers of the  
24 defendants relied on the misrepresentations. McGregor v. Chierico, 206 F.3d at 1388 (citing  
25 FTC v. Figgie Int'l Inc., 994 F.2d 595, 605 (9<sup>th</sup> Cir. 1993)). Absent evidence that any particular  
26 consumer was not injured by the contumacious conduct, the amount of total consumer injury may  
27 be equated with the defendant's revenues. Id.  
28

1 Further, consumer redress should be awarded against NSFA and Wilson jointly and  
2 severally since each of them is responsible for the consistent pattern and practice of repeatedly  
3 violating the clear directives of the Final Order. See National Labor Relations Board v.  
4 International Union of North America, AFL-CIO, 882 F.2d 949, 955 (5<sup>th</sup> Cir. 1989) (holding that,  
5 where parties join together to evade an order, they are jointly and severally liable for resulting  
6 damages); American Airlines, Inc. v. Allied Pilots Association, 53 F. Supp. 2d 909, 924 (N.D.  
7 Texas 1999) (same).

8 Here, the FTC seeks to have the Court order the payment of money to remedy NSFA's  
9 past non-compliance. According to NSFA's compliance report, it took in at least \$1,938,277  
10 during its period of non-compliance.<sup>7</sup> An order requiring NSFA to return that money to  
11 consumers is, therefore, an entirely appropriate remedy for NSFA and Wilson's contempt.

12 **D. The FTC's Motion Should Be Decided On Declarations If Defendants Fail To**  
13 **Raise A Genuine Issue Of Material Fact**

14 Civil contempt proceedings generally require a trial under Rule 43(a) of the Federal Rules  
15 of Civil Procedure. Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d  
16 1268, 1277 (9th Cir. 1976). Under Rule 43(a), testimony of witnesses is to be taken in open  
17 court, rather than presented by affidavit. However, just as any civil case may be decided on the  
18 basis of written testimony in a motion for summary judgment, "[a] trial court may in a contempt  
19 proceeding narrow the issues by requiring that affidavits on file be controverted by counter-  
20 affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits."  
21 Hoffman, 536 F.2d at 1277.

22 The FTC respectfully requests that the Court decide the issue of whether NSFA and  
23 Wilson are in contempt based upon declarations and oral argument. Should the contemnors  
24 present declarations raising a genuine dispute of material fact as to whether NSFA or Wilson is  
25 liable for contempt on any of the counts alleged in FTC's application, the Court could then  
26

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27 <sup>7</sup> The actual amount is likely to be higher. As discussed in Section II.C.4 above, this  
28 amount represents consumer injury through March 26, 2004, although, as discussed in Section  
II.C above, the defendants' contumacious behavior has continued unabated.

1 schedule a trial to take testimony relevant to the genuine issues raised by Defendants'  
2 declarations.

3 **IV. NSFA's And Wilson's Demonstrated Inability To Comply With The Final Order**  
4 **Justify Modifying The Final Order To Ban Them From Selling College Financial**  
5 **Aid Goods Or Services**

6 A district court has the power to modify the terms of its injunctions in the event that  
7 changed circumstances require it. United States v. Oregon, 769 F.2d 1410, 1416 (9<sup>th</sup> Cir. 1985).  
8 See System Federation v. Wright, 364 U.S. 642, 647 (1961); Anderson v. Central Point School  
9 District No. 6, 746 F.2d 505, 507 (9th Cir. 1984) (per curiam). This power to modify in light of  
10 changed circumstances extends to the modification of consent decrees. United States v. Swift &  
11 Co., 286 U.S. 106, 114, 76 L. Ed. 999, 52 S. Ct. 460 (1932); Safe Flight Instrument Corp. v.  
12 United Control Corp., 576 F.2d 1340, 1343 (9<sup>th</sup> Cir. 1978).

13 As discussed above, NSFA and Wilson have demonstrated an inability to comply with the  
14 Final Order. Despite being warned by FTC counsel that their conduct was violating the Final  
15 Order, they continued to conduct sales presentations without the required disclosures and with  
16 prohibited misrepresentations. Moreover, any promises of future compliance should be looked at  
17 with skepticism. For example, as discussed above, in its March 30<sup>th</sup> letter, NSFA included a  
18 revised sales script purporting to include the required disclosures. Yet sales presentations made  
19 after that date continue to lack those very disclosures. This demonstrated inability justifies a  
20 modification of the Final Order banning NSFA and Wilson from marketing academic goods and  
21 services in the future. See, e.g., Chierico, 206 F.3d at 1386 n.9 (holding that a ban was an  
22 appropriate order modification, justified by the defendant's continued fraudulent practices).

23 In addition to a ban, the proposed order modification includes a provision enjoining  
24 certain misrepresentations regarding the marketing of any other good or service. Such fencing-in  
25 relief is appropriate against those found to be violating the law. See FTC v. Colgate-Palmolive  
26 Co., 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal  
27 practices in the precise form in which it is found to have existed in the past. Having been caught  
28 violating the [FTC] Act, respondents must expect some reasonable fencing in."); Litton

1 Industries, Inc. v. FTC, 676 F.2d 364, 370 (9th Cir. 1982) (reasonable fencing-in provisions serve  
2 to “close all roads to the prohibited goal, so that [the FTC’s] order may not be by-passed with  
3 impunity”). The proposed order modification also contains record keeping provisions,  
4 compliance monitoring provisions, compliance reporting provisions and an order distribution  
5 requirement. These provisions are proper to ensure compliance with the order. See, e.g., FTC v.  
6 Think Achievement Corp., 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000) (record keeping and  
7 monitoring are appropriate to ensure compliance), aff’d 312 F.3d 259 (7<sup>th</sup> Cir. 2002); FTC v.  
8 Five-Star Auto Club, Inc., 97 F. Supp. 2d 502, 533 (S.D. N.Y. 2000)(court has authority to order  
9 record keeping and monitoring provisions); FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263,  
10 1276 (S.D. Fla. 1999) (record keeping and monitoring provisions are appropriate to permit the  
11 FTC to police the defendants’ compliance with the order); FTC v. US Sales Corp., 785 F. Supp.  
12 737, 753-54 (N.D. Ill. 1992) (monitoring provisions necessary to ensure adequate compliance);  
13 FTC v. Sharp, 782 F. Supp. 1445, 1456-57 (D. Nev. 1991) (judgment included monitoring provisions).

14 In sum, NSFA and Wilson have demonstrated that they are incapable of complying with  
15 the Final Order and that their promises of future compliance deserve little weight. Accordingly,  
16 these changed circumstances warrant modification of the Final Order to ban permanently NSFA  
17 and Wilson from marketing or selling college financial aid goods and services.

1 **V. Conclusion**

2 Accordingly, for the reasons set forth herein, the FTC respectfully requests this Court (1)  
3 to hold NSFA and its president, Alan Wilson, in civil contempt of court for violating Sections  
4 I.B., I.F, I.J., and II.A of the Final Order and (2) to modify the Final Order to ban permanently  
5 NSFA and Wilson from marketing academic goods and services.

6 Dated: July 21, 2004

7 Respectfully submitted,

8 **WILLIAM E. KOVACIC**  
9 General Counsel

10 

11 **GREGORY A. ASHE**  
12 **ROBIN R. SPECTOR**  
13 **LAURA SCHNEIDER**  
14 Federal Trade Commission  
15 600 Pennsylvania Ave., N.W., Room NJ-2122  
16 Washington, D.C. 20580  
17 202-326-3719 (telephone)  
18 202-326-2558 (facsimile)

19 **GREG ADDINGTON**  
20 Assistant United States Attorney  
21 100 W. Liberty Street, Suite 600  
22 Reno, NV 89501  
23 (775) 784-5438

24 Attorneys for Plaintiff  
25  
26  
27  
28