

Testimony of Florencia Marotta-Wurgler

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before the

United States Senate

Committee on Commerce, Science, and Transportation

Hearing on

Aggressive Sales Tactics on the Internet and

Their Impact on American Consumers

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Chairman Rockefeller, Ranking Member Hutchison, Members of the Committee:

Thank you for the invitation to testify on the issue of aggressive sales tactics on the Internet and their impact on American consumers.

My name is Florencia Marotta-Wurgler and I am an associate professor at New York University School of Law. Much of my research focuses on contracting practices in consumer mass market transactions and especially online transactions. In other words, I study the fine print, and whether online consumers read the fine print.

Today's hearing examines an online business practice known as "post-transaction marketing" in which third-party companies offer discount subscription services for a fee while consumers complete the check-out process from selected vendors. Consumers are generally invited to accept these offers by entering their email address. Consumers' payment information is then automatically transferred to the third-party marketers from the known vendors. This practice has been the subject of numerous buyer complaints, critiques by consumer advocates, and class action litigation.

Here, in brief, is essentially how sellers and buyers view this practice. Marketers are likely to claim that a legitimate transaction took place because consumers explicitly communicated assent by actively entering their email address (or, in some recent cases, the four last digits of their credit card number). Because the fine print of the offer discloses the fees and other key terms, the marketers argue the assent is legitimate and not the result of an oversight or misunderstanding.

On the other hand, consumers may argue that they didn't meaningfully assent to the terms of the offer because based on years of experience in both online and real-world settings, a transaction that triggers financial obligations doesn't take place until the consumers provide and confirm payment details, including personal financial information, often a credit card. Consumers don't feel compelled to read the fine print informing them that have completed a transaction because, as everyone knows, financial obligations don't arise until a payment is explicitly given. Moreover, the consumers would argue, if the fine print was supposed to alert them of this change in practice, they didn't read it because it was presented in a deceptive manner and because consumers generally don't pay attention to fine print.

Whose interpretation is correct? The marketers' perspective that consumers are willingly subscribing to these services, or the consumers' perspective that they are effectively being tricked into a transaction?

In this statement I will start with some general observations about the nature of online transactions and then I will discuss some academic research that is relevant to answering this question. Generally, the well-settled norms in online commerce and research findings suggest to me that consumers may need further protections from these marketing

practices. I will conclude by recommending some measures that might help to address some troubling aspects of these transactions.

1. Post-Transaction Marketing Techniques Violate Consumer Expectations Online

Consumers who access the Internet can quickly access the sites of thousands of different vendors. The reason why consumers can comfortably browse and window shop without having to delve into the fine print governing each vendor's site is that, based on experience, they know that until they follow some well-established steps, they are not financially bound to the vendor. In almost all consumer transactions online, consumers select a product or service and complete a multi-step checkout process that requires entering a preferred payment method as well as shipping and billing addresses. When the transaction is completed, consumers are presented with a confirmation page with details of the completed transaction. This norm of online commerce is what allows consumers to safely explore the web, become informed about advertisement offers, and complete transactions online. The fact that this norm has been widely accepted and in a way standardized has helped drive the explosive and economically beneficial growth of online transactions.

So called "post-transaction marketing techniques" interfere with these established norms, creating consumer confusion in a way that would appear deceptive. Post-transaction marketing offers are generally presented to consumers while they are in the process of checking out from a selected merchant. Usually, the consumer selects a product in the site of the selected vendor and begins a check-out process to complete the transaction. However, instead of receiving a confirmation page from the selected vendor notifying the consumer that the transaction has been successful, the consumer receives a post-transaction marketing offer from a third party vendor. The offer is often deceptively entitled "Reward" or "Bonus" and at first glance appears to be some sort of gift, something to be happy about. The consumer can then accept the offer by entering his or her email address or by completing a survey. Once this step is completed, the selected merchant will automatically transfer the consumer's payment information to the third-party vendor and the consumer's credit card will be automatically billed \$12 a month, for example, until the consumer notices the charge and figures out how to cancel it. An amount of \$12 is small enough often to go unnoticed, but it is large enough to add to \$50 or \$100 within a few months.

This practice obviously raises concerns. The presentation of the offer by a third party interrupts the normal checkout process with a selected vendor. Consumers who reasonably expect to receive a confirmation page as a signal that a transaction is finalized may be deceived into thinking that the third-party offer is part of the selected vendor's checkout process. Wishing to complete the transaction with the selected vendor, consumers thus might end up subscribing to an unwanted service without even noticing.

Alternatively, even if consumers understand that the third-party offer is not part of the checkout-process, they nevertheless may be deceived into subscribing because they are

never prompted to enter their payment information. Given the aforementioned norms, consumers may thus reasonably expect that no financial obligation attaches. If anything, by providing their email address, consumers might expect at worst to receive some advertising that email account provided. Consumers associate purchases with payment details and email addresses with email messages.

So what I would like to highlight here is the violation of norms of online commerce. Now I will turn to some academic research that addresses the issue of whether fine print can substitute effectively for this deviation from norms and provide a legitimate basis for the transaction.

2. Disclosure of the Terms of the Post-Transaction Marketing Offers are Unlikely to Provide Adequate Notice Because Research Shows that Most Consumers Simply Do Not Read Fine Print Online

Post-transaction marketers argue that their offers adequately disclose to consumers the terms and fees associated with the transaction. Although this is the case, one of the reasons these disclosures are unlikely to correct consumers' likely mistaken beliefs is that the vast majority of consumers do not read the fine print online.

In a recent study, two co-authors and I examined the detailed online browsing behavior of 45,091 households with respect to 66 software vendors that made their products available online. We studied the extent to which consumers chose to become informed about the fine print governing the purchase and use of the products (in the context of software, these contracts are known as End User License Agreements).¹ Although we expected to find that relatively few consumers would bother reading the fine print, we were surprised to find that the number was so low.

What we found was that one or two of every thousand shoppers choose to access these contracts. We were also surprised by how consistent this attitude was. Consumers generally don't read contracts regardless of age and income level. And even though consumers are only slightly more likely to read contracts of products that command higher prices, the percentage of people who read contracts remains tiny. Moreover, those who did access the contract spent too little time on it to have actually read it. The median time spent on these contracts was 29 seconds. Given that the average contract in the sample 2,277 words long, making it impossible that the typical consumer reads more than a tiny fraction of it.

In a follow-up study, we found that the prominence of the disclosure did little to increase the probability that contracts would be read.² Consumers remained similarly apathetic when finding the contract is several "mouse-clicks" away as when the contract appears in

¹ "Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts," Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen (NYU Law and Economics Research Paper No. 09-40, 2009).

² "Does Disclosure Matter?" Florencia Marotta-Wurgler & Yannis Bakos (mimeo, 2009).

the familiar link next to a box mandating consumers to click on “I agree” to finish the transaction.³ We also found that consumers are unlikely to read the fine print even when sellers put the terms right in front of them and require explicit assent by checking a box immediately below the terms. We found that consumers spent a median of 72 seconds in single checkout pages that presented the contract to consumers (and required them to explicitly agree to it) but also required consumers to enter their name, address, and credit card information. A contract of this type is attached as Exhibit A of this testimony. Given all the tasks that consumers had to complete in these pages, I believe that it is highly unlikely that consumers spent more than a fraction of their time reading it. (To be clear, I do not view Exhibit A as an example of a deceptive presentation of fine print, rather it is fairly typical contract, and of course, another aspect to note is that the transaction is fully with the selected vendor as opposed to a transaction connected to a third party.)

The conclusion from this study is that there is an overwhelming tendency to ignore the fine print in online transactions, regardless of how clearly or prominently terms are disclosed. Although these studies only give us a general picture of consumer behavior online and they are drawn from a slightly different context, I believe that in combination with common sense and introspective observation, these studies strongly suggest that it is unlikely that consumers actively peruse the details of many online transactions. To summarize, I believe that it is unlikely that disclosure of the post-transaction marketing offers in fine print can effectively alert consumers of the transaction that they are undertaking.

3. Post-Transaction Marketers Structure and Display Fine Print in a Way that Discourages Consumers From Becoming Informed About Their Terms

I'll now turn to consider several features of post-transaction marketers' offers that based on common sense and academic research seem likely to further reduce the effectiveness of their disclosures.

3.1. The Method of Disclosure Exploits the Empirical Fact that Consumers are Less Likely to Read the Terms Offered by Known Vendors

Post-transaction marketers often present their offers in a format that is deceptively similar to that one used by the originally selected vendor. For example, if the vendor is a site that sells movie tickets the third-party vendor will include pictures of popcorn and reels. In many cases, the page with the third-party offer will have the brand name and logo of the known vendor, implying that the new offer comes from the known vendor. Consumers who are induced to believe that they are dealing with familiar vendors can be easily lulled into complacency.

Our study of consumer online behavior supports the validity of this concern. We found that as rarely as our sample consumers accessed contracts, they were even less likely to

³ Even less than 0.1% of consumers that were presented these contracts chose to access the contract.

read when the terms were offered by bigger, more reputable sellers.⁴ This makes sense. When consumers become familiar with firms or know their reputation, they will feel a lessened need to read the fine print. Post-transaction marketing offers exploit that trust.

3.2. Many Offers Are Deceptively Framed as Rewards or Rebates

Post-transaction marketers often identify their offers as rewards or bonuses that the consumers in fact should be grateful to receive. Offers may feature a prominently displayed coupon with a title such as “\$10 off your next purchase—Good for your next Fandango Purchase” or “\$10 CASH BACK ON YOUR PURCHASE TODAY!” Fandango is a very popular vendor of movie tickets, among other products. (See for example, Exhibits B and C.) It is natural to imagine that the new offer is part of the original transaction.

The offers also splash relatively larger-font terms around the page such as “Congratulations,” “MEMBER REWARDS,” and “Thank You...Please Complete Your Survey and Claim Your Reward.” These phrases are likely to distract attention from the disclosures that explain the new charges associated with the new offer. Given the general emphasis on the reward component and consumers’ aforementioned expectations that financial liability is incurred only after entering a payment method, it seems unlikely that barely noticeable disclosures will correct consumers’ misperceptions.

Existing research supports this view. Studies have shown that consumers focus only on a few, salient aspects of a product or service when deciding on a purchase.⁵ By highlighting the “reward” component of the offer and framing it as something that the consumer should be pleased to receive, marketers make the “good news” as salient as possible.

3.3. Key terms are Designed and Positioned in Way That Makes it Likely that They Will be Overlooked

Just as good news is emphasized, the bad news is suspiciously hidden. The terms related to the fees and automatic transfers of payment information appear in small print, in the left or bottom of the page, and appear under unrelated and boldly displayed happy titles such as “Congratulations,” “Great News,” “Thank You,” and “Register for Reservation Rewards and get our Money-Saving Discounts up to 50%...plus your \$10 cash back incentive at your next Fandango Purchase.” Moreover, the relevant disclosures appear at the end of dense paragraphs that for the most part again recite the bonus or reward aspect of the offer. Even consumers who glance at the fine print might think there are few strings attached. Indeed, research has shown that the manner in which sellers display

⁴ See Bakos et al, *supra* note 1.

⁵ See Russell Korobkin, “Bounded Rationality, Standard Form Contracts, and Unconscionability,” U. Chi. L. Rev. 1203, 1243-44 (2003), for an overview of these studies.

information affects the attention consumers pay to it and, consequently, the likelihood of it being a salient component in purchase decisions.⁶

To offer some perspective, the vast majority of contracts in our study that were for the most part ignored by consumers in the sample were clearly labeled as contracts or disclaimers, and included titles in bold or capital letters explaining the provisions that would follow. For example, paragraphs explaining liability disclaimers would be titled “DISCLAIMERS,” or “IMPORTANT: PLEASE READ THIS CONTRACT.” If contracts with clear and prominent titles were not able to successfully catch consumers’ attention, the terms of post-transaction marketers are even less likely to do so. Indeed, they seem designed to attract as little attention as possible.

Even if some consumers have become savvy enough to detect these deceptive practices and stay away from them, it is well worth the effort to help as many consumers as possible fully understand the contract that they are being offered.

4. Recommendations

I have a few suggestions to help remedy the problems created by post-transaction marketing techniques.

First, automatic transfers of payment information from known vendors to post-transaction marketers should not be allowed. Instead, consumers should be asked to enter their credit card information at each transaction. This will preserve the well-established norm that financial liability in these contexts arise only after the consumers takes certain well-established steps. The benefit of clarity outweighs any cost of inconvenience.

Second, post-transaction marketers should be required to identify themselves prominently and differentiate themselves from the originally selected vendors. To avoid confusion, they should not present themselves before the transaction with the selected vendor is completed. This will put consumers on notice that they are dealing with a different entity.

Third, post-transaction marketers should improve the quality of their disclosures by framing their offers in a manner that is not deceptive and by clearly and prominently explaining the fees and services. These disclosures should also include regular email updates reminding them of the subscription and any ongoing charges. They should be written in short, clear, and plain language with no distracting features.

Fourth, post-transaction marketers should implement a clear process by which enrolled consumers can easily cancel or seek a refund. This alternative should be prominently present in every periodic email communication with consumers.

⁶ See, e.g., J. Edward Russo, “The Value of Unit Price Information,” 14 J. Marketing Rsrch. 193, 194 (1977). Don N. Kleinmuntz & David A. Schkade, “Information Displays and Decision Processes,” 4 Psy. Sci. 221-27 (1993).

To summarize, because post-transaction marketers present themselves to consumers in an unexpected fashion at an unexpected juncture of the transaction, they violate the norms of online commerce and should be held to a higher standard of disclosure and transparency.

Thank you very much for hearing my views. I hope they are helpful in your consideration of these practices.

Exhibit A.



United States - English



TESTED 14-NOV

Small and Medium Business Store

Help # 1-888-VIRUSNO

1. 1Billing & Shipping
2. 2Review & Confirm
3. 3Print Receipt

Billing Address

First Name *

Last Name *

Email Address *

Confirm Email Address
*

Phone Number *

Address Line 1 *

Address Line 2

City *

State *

Postal code *

Country * United States

Licensing Party

Company Name

Same as Billing Address Contact

Please provide a valid company name or choose to have the billing address contact as the legal licensee of your McAfee products and solutions.

Shipping Address

Same as Billing

Address

New Address

Payment Information

Credit Card Type *



Credit Card Number * (no spaces or dashes)

Expiration Date *

Card Security Code *

More Info

Stay Secure. Enroll in McAfee's [Auto Renewal Program](#).

We do not share your information with anyone without your consent.

I agree with the McAfee license agreement.

I disagree with the McAfee license agreement.

Continue

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Exhibit B.



a Preferred Partner of
 FANDANGO

Congratulations...

Here's your Special Offer for Fandango customers!

Register for Reservation Rewards and get your Money-Saving Discounts up to 50%... plus your \$10.00 Cash Back Incentive on your next Fandango purchase!

Great News....

Sign up to claim your benefits!

Click YES below to get your \$10.00 Cash Back Incentive on your next Fandango purchase if you sign up for all the money-savings benefits of Reservation Rewards, the premier online discount service! Enjoy all this **FREE** for the next 30 days and only \$12 per month thereafter billed to the credit card or deducted from the debit card you used at Fandango today.

Buy anything you like at Fandango--get a \$10.00 Cash Back Incentive from Reservation Rewards.



30 Days Free
 Then Only \$12
 Month Thereafter

Member Care GUARANTEE

- Email reminder before first monthly charge
- Cancel anytime hassle-free, online or by phone

Offer and Billing Details:

Sign up for Reservation Rewards FREE for the next 30 days, with our compliments, and enjoy ongoing savings for only \$12 a month thereafter. Get your \$10.00 Cash Back Incentive on your next Fandango purchase, Money-Saving Discounts plus all the valuable benefits of Reservation Rewards. If you are 100% satisfied during your trial, do nothing. **All your Reservation Rewards discounts and protection will automatically continue**



Get a \$10.00 Cash Back Incentive on your next Fandango purchase if you sign up for all the money-saving benefits of Reservation Rewards, the premier online discount service! Enjoy incredible savings when you shop, eat at great restaurants and have fun at exciting attractions.

SHOPPING DISCOUNTS UP TO 50% at over 15,000 stores and service providers like portrait studios, sports stores, eyewear stores plus dry cleaners, service stations, pet shops and much more.

ATTRACTION DISCOUNTS UP TO 50% at over 8,000 fun locations like theme parks, zoos, aquariums, sporting events, concerts, golf ranges and much more. Save locally and nationwide.

DINING DISCOUNTS FOR BUY-1-GET-1-FREE deals at over 30,000 popular family restaurants and fast food chains, pizzerias, diners, plus many local restaurants too!

\$10.00 CASH BACK INCENTIVE ON YOUR NEXT FANDANGO PURCHASE! As a member of Reservation Rewards you get your \$10.00 Cash Back Incentive good for your next Fandango purchase. Just make a purchase anytime in the next 3 months, send Reservation Rewards your receipt and Cash Back Incentive Coupon and we'll send you the Cash! It's that easy and no minimum purchase is required! So, go ahead and save money shopping for your favorite things at Fandango... get anything you want... it's up to you! [Click here for full details on your \\$10.00 Cash Back Incentive](#)

So claim all your Reservation Rewards benefits... plus get your \$10.00 Cash Back Incentive! You'll get your \$10.00 Cash Back Incentive and instructions on the next page so you can access the site and start saving today! Plus we'll send your Membership Kit email to you at your email address. Try all the benefits for the next 30 days FREE and see how much you save! There's no obligation to continue. If you are completely satisfied, do nothing and you'll enjoy ongoing savings for only \$12 a month and of course you have our Guarantee as described in the Offer and Billing Details! There's no limit to the amount of money you can save!

Plus you get even more than discounts... you also get valuable Travel Protection with Trip Delay Protection, Hotel Over-Booking Protection, 24-Hour Road & Tow Protection and more!

[Click here for more benefit information.](#)

Enter your email address and click YES below to sign up for Reservation Rewards

By entering my email address as my electronic signature and clicking YES, I have read and agree to the Offer and Billing Details and authorize Fandango to securely transfer my name, zip code and credit or debit card information to Reservation Rewards for billing.

for just \$12 a month billed by Reservation Rewards to the credit card or deducted from the debit card you used at Fandango today. For your convenience Reservation Rewards will use the contact and credit or debit card information you provided to Fandango today for billing and benefit processing. In the event your monthly membership fee were to ever change, you would be notified before you are billed. Reservation Rewards benefits may be enhanced or modified at any time without prior notice. And, you have our Guarantee! **If at anytime you are not completely satisfied during your trial or thereafter, simply call Reservation Rewards toll free at 1-800-732-7031 to let us know you wish to cancel your monthly membership benefits and owe nothing further.** All your benefits and access will be canceled. All the money you save is yours to keep!

Consent to receive electronic disclosures. Please read carefully and save or print a copy for your records. Reservation Rewards will communicate your benefit and other membership information to you, including payment authorization made by clicking Yes, by electronic communications, including email and electronic postings on our site. Your Membership Kit email will also include a copy of the Offer and Billing Details for your convenience. In order to view this membership and benefit information in electronic form, you need to have access to a computer with Internet browser version IE 6.0 or Safari 1.24 or higher. In order to receive Reservation Rewards you must agree to receive these communications electronically and by clicking Yes you consent to do so. You may withdraw this consent by canceling the service. Of course if you would also like a printed copy of any membership information you can email us at customerservice@reservationrewards.com to request it and we will be happy to send it at no charge. You can update your email address on the Reservation Rewards profile page.

[Privacy Policy](#)

[Terms of Service](#)

[State Disclosures](#)

Enter your email address here:

Verify email:



I want my Reservation Rewards discounts and \$10.00 Cash Back Incentive plus get my confirmation page!

No thanks, not right now



Offer only available to residents of the U.S., Puerto Rico and the U.S. Virgin Islands and is not available to current Reservation Rewards members. Terms of Service apply. Reservation Rewards is owned and operated by Webloyalty.com, Inc., 101 Merritt 7, Norwalk, CT 06851. All trademarks and or copyrights are the property of their respective owners. Merchants participating in this program vary by location. Reservation Rewards benefits cannot be accessed via WebTV. ©2009, Webloyalty.com, Inc. 111139-0107

Exhibit C.

RESTAURANT.COM**EAT. DRINK. SAVE MONEY.****Shopping Essentials+SM**

A special thank you with your purchase from

RESTAURANT.COM
EAT. DRINK. SAVE MONEY.**Thank You...****Please complete your survey and claim your reward –****\$10.00 CASH BACK ON YOUR PURCHASE TODAY!**

Thank you for your order from Restaurant.com today! Complete your 2009 Consumer Survey and registration to claim your \$10.00 Cash Back Award on your purchase today. ([Click here for \\$10.00 Cash Back details](#)) Plus, get all the money-saving benefits of *Shopping Essentials+SM*, our premier shopper savings program!

MEMBER REWARDS

20% Savings on gift cards* purchased through *Shopping Essentials+SM* for leading department stores such as Kmart, Kohl's®, Macy's® and many others - **for a savings of up to \$1,650 per year.** [Benefit Details](#)



20% Savings on gift cards* purchased through *Shopping Essentials+SM* for popular entertainment and recreation stores, including Sports Authority® and more - **for a savings of up to \$1,300 per year.** [Benefit Details](#)



20% Savings on gift cards* purchased through *Shopping Essentials+SM* for top-name fashion and home retailers, such as Bath & Body Works®** and many more - **for a savings of up to \$1,400 per year.** [Benefit Details](#)



Save 20% to 60% off eyewear – frames, lenses, contact lenses and accessories – at over 13,000 participating providers nationwide.

Plus so much more!
[Benefit Details](#)

Offer Details:

Simply click "Yes" to activate your trial membership and take advantage of the great savings that *Shopping Essentials+SM* has to offer plus claim your \$10.00 Cash Back on your purchase today. The membership fee of \$19.95 per month will be charged/debited by *Shopping Essentials+SM* to the credit/debit card you used today with Restaurant.com, after the 30-day FREE trial and then automatically charged/debited each month at the then-current monthly membership fee so long as you remain a member. Of course, you can call toll-free at 1-888-999-0564 and speak to a *Shopping Essentials+SM* member representative within the first 30 days to cancel – you will have paid nothing and owe nothing. Please note that by agreeing to these Offer Details, you are authorizing Restaurant.com to securely transfer your name, address and credit/debit card information to *Shopping Essentials+SM*, a service provider of Restaurant.com. No matter what, the FREE \$10.00 Cash Back on your purchase today is yours to claim! Remember, you can call to cancel at any time and you will no longer be charged/debited. If you used a debit card today, then beginning on or about 30 days from now, your monthly membership fee for *Shopping Essentials+SM* will be automatically debited each month on or about that same date at the then-current membership fee from the checking account associated with the debit card you provided today.

**\$10.00 CASH
BACK!**
On Your
Purchase Today!

2009 Consumer Survey

Please complete your Survey below. Click on the answers you want and complete your information to claim your \$10.00 Cash Back on your purchase today just for trying *Shopping Essentials+SM* FREE for 30 days.

Do you give gift cards away as presents?

☒ Yes ☐ No ☐ Sometimes

Do you shop at nationally-known stores?

☒ Yes ☐ No ☐ Sometimes

Did you use a credit card or debit card for your purchase today?

☒ Credit Card ☐ Debit Card

Please enter the email address you used to order from Restaurant.com:

By typing your email address below, it will constitute your electronic signature and is your written authorization to charge/debit your account according to the Offer Details.

Email

Confirm Email

By clicking "Yes" I have read and agree to the Offer Details displayed to the left and authorize Restaurant.com to securely transfer my name, address and credit/debit card information to *Shopping Essentials+SM*, a service provider of Restaurant.com.

Yes

(Click ONCE and wait.)

This will automatically sign me up and then take me to my Restaurant.com certificate(s).

[No Thanks](#)

Continue directly to my
Restaurant.com certificate(s).

Special Offer for **RESTAURANT.COM** Customers! EAT. DRINK. SAVE MONEY.

*Participating vendors are neither sponsors, co-sponsors or affiliates of *Shopping Essentials+*. Gift card/certificate savings are an exclusive offer of *Shopping Essentials+* and are valid only on gift cards/certificates purchased through *Shopping Essentials+*. Please see back of gift card/certificate for terms and conditions of use. All vendor trademarks and copyrights remain the property of the individual vendor. *Shopping Essentials+* uses vendor names, logos and any other vendor material by permission of each vendor. Please visit the *Shopping Essentials+* website or call Member Savings for complete terms and conditions related to participating vendors.

**Bath & Body Works is not a sponsor of this promotion. Savings offer is valid on gift card purchases made through *Shopping Essentials+* only and does not consist of in-store or online discounts. The Bath & Body Works® name and logo are registered trademarks of Bathco, Inc.

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