

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

*In re Morning Song Bird Food Litigation*, Lead Case No. 3:12-cv-01592-JAH-AGS

**NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION**

**If you purchased certain Morning Song wild bird food products from November 1, 2005 to May 1, 2008, inclusive, you may be entitled to payment from a proposed class action settlement.**

*A federal court has authorized this Notice. This is not a solicitation from a lawyer.*

- There is a proposed Settlement of a nationwide class action litigation that is pending in the United States District Court for the Southern District of California, *In re Morning Song Bird Food Litigation*, Lead Case No. 3:12-cv-01592-JAH-AGS. The proposed Settlement is with The Scotts Miracle-Gro Company, The Scotts Company LLC, and Scotts' Chief Executive Officer (together, the "Defendants").
- Consumers who purchased certain Morning Song Bird Food products from November 1, 2005 to May 1, 2008, inclusive, and who have not yet received a full refund or other compensation for those purchases ("Settlement Class Members")<sup>1</sup> may receive a cash refund under the proposed Settlement (as described below). A list of the Morning Song Bird Food products is available at [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com).
- If you are a Settlement Class Member, your legal rights are affected even if you do not act. Read this Notice carefully:

<b>YOUR LEGAL RIGHTS AND OPTIONS UNDER THE PROPOSED SETTLEMENT</b>	
<b>SUBMIT A CLAIM</b>	The only way to receive a refund if you have not been identified through Retailer Records. Submit your Claim Form with either Proof of Purchase or Claim Form Affidavit to the Settlement Administrator postmarked no later than July 1, 2019.
<b>ASK TO BE EXCLUDED</b>	Get no benefits from the Settlement. If you ask to be excluded, you will keep any rights to sue Defendants separately about the same issues being settled now, but you will not receive any refund. Should you elect to exclude yourself from the Settlement Class, you should understand that Defendants and the other Released Defendants will have the right to assert any and all defenses they may have to any claims that you may seek to assert, including, without limitation, the defense that any such claims are untimely under applicable statutes of limitations or statutes of repose. You must send any written request to be excluded postmarked by May 13, 2019.
<b>OBJECT TO THE PROPOSED SETTLEMENT</b>	Write to the Court about your opposition to the proposed Settlement. If you want to object to the Settlement, you must do so in writing by May 13, 2019.
<b>GO TO THE FAIRNESS HEARING</b>	Ask to speak to the Court about the proposed Settlement at the Fairness Hearing, scheduled for June 3, 2019.
<b>DO NOTHING</b>	By doing nothing, you give up any rights to sue Defendants separately about the same issues being settled now, and unless you have been identified through Retailer Records as a Settlement Class Member, you will not receive any refund.

Your rights and options—**and the deadlines to exercise them**—are explained in this Notice.

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<sup>1</sup> Excluded from the Settlement Class are: (a) Defendants and their immediate families, the officers, directors and affiliates of Defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest; (b) distributors, retailers, and other resellers of Morning Song Bird Food; (c) judicial officers and their immediate family members and associated court staff assigned to this case; and (d) all those otherwise in the Settlement Class who timely and properly exclude themselves from the Settlement Class.

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## Basic Information

### **1. Why Did I Get This Notice?**

You received this Notice because you may have been identified as a potential Settlement Class Member, you are viewing this Notice at the Settlement website, or you requested to receive a copy of this Notice.

### **2. What Is This Lawsuit About?**

Plaintiffs allege in the lawsuits that the application of certain pesticides, Storcide II and Actellic 5E, to the Morning Song Bird Food products and the sale of those products violated certain federal or state laws. Plaintiffs sought refunds for their purchases, among other things.

Defendants deny all wrongdoing alleged in the litigation and deny that Plaintiffs have suffered any damages or that they are entitled to full refunds. However, taking into account the costs, burden, and uncertainty inherent in any litigation, Defendants have concluded that it is desirable and beneficial that the Action be fully and finally settled. By agreeing to the proposed Settlement described in this Notice, Defendants make no admission as to the truth of these allegations.

The Court has preliminarily approved this proposed Settlement and will hold a Fairness Hearing to decide whether to finally approve the proposed Settlement.

### **3. What Is A Class Action?**

In a class action, one or more persons called “class representatives” (in this case Laura Cyphert, Milt Cyphert, Ellen Larson, and David Kirby) sue on behalf of other people who have similar claims. Together, the people are called a “class” or “class members.” The individuals who sued are called the “plaintiffs.” The companies or individuals they sued are called the “defendants.” One court resolves the issues for the entire class, except for those people who choose to exclude themselves from the class.

### **4. How Do I Know If I Am A Part Of The Settlement Class?**

You are a member of the Settlement Class if, from November 1, 2005 to May 1, 2008, inclusive, you purchased and have not yet received a full refund for your Morning Song Bird Food purchases. A list of the Morning Song Bird Food products is available at [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com).

Unless you have separately received a document entitled Notice Regarding Retailer-Identified Refunds (the “Retailer-Identified Refund Notice”), you must complete and timely submit the Claim Form and the required accompanying documentation (as described below) to be eligible to receive any payments from the Settlement. If you have received a Retailer-Identified Refund Notice, please see that document for additional information.

As a Settlement Class Member, you will be bound by all proceedings, orders, and judgments entered in connection with the Settlement, including the release, covenant not to sue, and dismissal with prejudice described below.

### **Benefits Of The Proposed Settlement – What You May Get**

### **5. What Does The Proposed Settlement Provide?**

The proposed Settlement provides for the payment of a Settlement Amount of up to \$85,000,000 (“Settlement Amount”). The Settlement Amount, together with interest (“Settlement Fund”), will be used to pay notice and administration costs, Court-approved attorneys’ fees and expenses, Court-approved service awards for class representatives, and certain Settlement Fund taxes and tax expenses (the “Net Settlement Fund”). The Net Settlement Fund will be used to provide eligible Settlement Class Members with one or more of the refunds below. There is no monetary cap on Retailer-Identified Refunds or the Proof of Purchase Refunds. This means that if the total amount needed to pay Retailer-Identified Refunds and Proof of Purchase Refunds is more than the Net Settlement Fund, Scotts will deposit additional money into the Settlement Fund.

**Retailer-Identified Refunds:** Settlement Class Members who have been identified through records of certain specified retailers (Tractor Supply Company, Sam’s Club, PetSmart, Menard’s, and Orscheln Farm and Home) that contain certain information about purchases of Morning Song Bird Food from November 1, 2005 through May 1, 2008, inclusive, will automatically receive a full refund of their purchases. These Settlement Class Members will receive a Retailer-Identified Refund Notice via mail or email and will be provided the opportunity to update or correct their name and contact information, as well as to submit a Claim Form for additional purchases that are not reflected in the amount of the Retailer-Identified Refund.

**Proof of Purchase Refunds:** Settlement Class Members who have not been identified through the Retailer Records will receive a full refund of their qualifying purchases of Morning Song Bird Food if they timely submit a valid Claim Form with a sales receipt that shows the quantity of Morning Song Bird Food product purchased, retailer, dates of purchase, and amounts paid from November 1, 2005 through May 1, 2008, inclusive.

**Claim Form Refunds:** Settlement Class Members who have not been identified through the Retailer Records and who do not or cannot provide a sales receipt of their qualifying purchases of Morning Song Bird Food are eligible to receive up to \$100 per Household if they timely submit a valid Claim Form and sign the Claim Form Affidavit section. These funds will be distributed on a *pro rata* basis, meaning the total amount remaining in the Net Settlement Fund after deducting all Retailer-Identified Refunds and Proof of Purchase Refunds will be distributed based on the total amount of timely and valid Claim Form Refunds.

If, after making all the refund payments described above, any Court-approved award of attorneys' fees and expenses to Class Counsel, and any Court-approved service award to the class representatives, and any Settlement Fund taxes and tax expenses, more than \$22,500,000 (the "Maximum Residual Amount") remains in the Net Settlement Fund, the following additional and automatic refunds may be made:

**Supplemental Claim Form Refunds:** Settlement Class Members who timely submit a valid Claim Form and signed Claim Form Affidavit for more than \$100 of qualifying purchases of Morning Song Bird Food may receive up to an additional \$75 per Household. This refund amount, if applicable, will be distributed on a *pro rata* basis from the remaining balance, if any, in the Net Settlement Fund after the return of the Maximum Residual Amount, and will not exceed the total purchase amount validly claimed on the Claim Form.

**Second Supplemental Claim Form Refunds:** Settlement Class Members who timely submit a valid Claim Form and signed Claim Form Affidavit for more than \$175 of qualifying purchases of Morning Song Bird Food and cash their first Claim Form Refund check may receive an additional refund amount. This refund amount, if applicable, will be distributed on a *pro rata* basis from the remaining balance, if any, in the Net Settlement Fund after the return of the Maximum Residual Amount, and will not exceed the total purchase amount validly claimed on the Claim Form.

## **6. What Happens If Money Remains In The Net Settlement Fund?**

If the balance of the Net Settlement Fund – after payment of the Retailer-Identified Refunds, the Proofs of Purchase Refunds, the Claim Form Refunds, any Court-approved award of attorneys' fees and expenses to Class Counsel, and any Court-approved service award to the class representatives, and any Settlement Fund taxes and tax expenses – is \$22,500,000 or less, the balance will be returned to Scotts and no Supplemental Claim Form Refunds or Second Supplemental Claim Form Refunds will be made.

If money remains in the Net Settlement Fund after making Supplemental Claim Form Refunds and Second Supplemental Claim Form Refunds, the balance will be donated to the National Audubon Society, a bird-related charitable organization mutually agreed upon by Class Counsel and Scotts' Counsel, unless otherwise ordered by the Court.

### **How To Get A Payment - Submitting A Claim Form**

## **7. How Do I Submit A Claim Form And Get A Payment?**

Unless you received a Retailer-Identified Refund Notice in the mail or by email, you must submit a Claim Form to receive a payment. Claim Forms are available and may be submitted online at [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com). Be sure to complete the Claim Form in full, include sales receipts or the Claim Form Affidavit, if and as applicable, and submit or mail it postmarked by **July 1, 2019**.

If you received a Retailer-Identified Refund Notice, you do not need to submit a Claim Form for those purchases. Please see the Retailer-Identified Refund Notice for additional information and instructions.

## **8. I Received A Retailer-Identified Refund Notice, But It Is Missing Purchases. What Should I Do?**

If you believe the Retailer-Identified Refund Notice you received does not reflect *all* of your qualifying purchases of Morning Song Bird Food from November 1, 2005 to May 1, 2008, you may submit a Claim Form for additional purchases. Claim Forms are available and may be submitted online at [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com) by **July 1, 2019**.

## **9. I Think I Am Eligible For A Proof of Purchase Refund; What Should I Do?**

If you believe you are eligible for a Proof of Purchase Refund, you must submit a Claim Form and include your Proof of Purchase postmarked by **July 1, 2019**. Proof of Purchase is an original or copy of a sales receipt that shows the quantity of Morning Song Bird Food you purchased, the retailer your purchase was made from, the date of purchase, and the dollar amount of Morning Song Bird Food you purchased from November 1, 2005 to May 1, 2008, inclusive.

## **10. I Think I Am Eligible For A Claim Form Refund; What Should I Do?**

If you no longer have your sales receipt but you purchased Morning Song Bird Food products from November 1, 2005 to May 1, 2008, inclusive, you may seek a Claim Form Refund. You must submit a Claim Form and sign the Claim Form Affidavit section postmarked by **July 1, 2019**. Your Claim Form must be signed in two locations and include all required information (the quantity of Morning Song Bird Food purchased, the likely retailer it was purchased from, the approximate date or dates the purchases were made, and the dollar amount of Morning Song Bird Food purchased). By signing your Claim Form Affidavit, you will be swearing that the information you submit is true and accurate. You also will be authorizing the Settlement Administrator to contact you for more information, if needed, to help evaluate or process your claim.

## **11. What If I Already Received A Refund?**

If you already received a refund for your purchases of Morning Song Bird Food from November 1, 2005 to May 1, 2008, inclusive, that reimbursement amount will be deducted from the total amount that may be owed to you as part of the proposed Settlement. If that amount equals or exceeds the total amount you would be entitled to under this Settlement, you will not receive any Settlement refunds.

## **12. How Are Refunds Determined?**

An independent Settlement Administrator that is appointed by the Court will review all Claim Forms submitted to determine whether they are valid, timely, and payable. The Settlement Administrator, which is unrelated to any party in this lawsuit, also will calculate the amounts of the Retailer-Identified Refunds, using the records provided by certain retailers, as described above.

The Settlement Administrator may contact Settlement Class Members for further information to complete or validate their Claim Forms or to notify Settlement Class Members in writing if their Claim Form is rejected as deficient. Settlement Class Members will have thirty (30) days after the Claims Deadline of **July 1, 2019**, or the date of the deficiency notification sent by the Settlement Administrator, whichever is later, to try to cure any deficiencies in their Claim Forms or to dispute any rejection. The Settlement Administrator will evaluate any additional information or documentation submitted by the Settlement Class Member, consult with Class Counsel and Defendants' Counsel, and then decide whether the Claim Form should be accepted and/or if the payments of any Proof of Purchase Refund or Claim Form Refund should be adjusted. This decision will be final and binding.

## **13. When Would I Get My Payment?**

The Court will hold a hearing on **June 3, 2019**, to decide whether to approve the Settlement. If the Court approves the Settlement, there may be appeals. It is always uncertain when any appeals will be resolved. This process may take more than a year. Please be patient. Consult the Settlement website [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com) for the latest information and updates.

If and when the Settlement is approved and becomes final, Retailer-Identified and Proof of Purchase Refunds will be sent within 90 days of the effective date. Refunds will then be sent to Settlement Class Members entitled to receive Claim Form Refunds, followed by Supplemental Claim Form Refunds (if any) and Second Supplemental Claim Form Refunds (if any).

## **14. Tax Consequences Of The Settlement**

Filing a Claim Form under the proposed Settlement may have tax consequences for you (meaning you may be required to pay taxes on your refund amount), depending upon your individual circumstances. You should consult your personal tax advisor regarding the tax consequences of the Settlement and any tax reporting obligations with respect to any Settlement refunds you receive.

## 15. What Am I Giving Up In Exchange For The Settlement?

If you meet the definition of “Settlement Class Member,” you are part of the Settlement Class unless you ask to be excluded from the Settlement (see Question 16). As part of the Settlement Class, you will be bound by the Settlement and Court orders, whether or not you receive a refund or submit a Claim Form. When and if the Settlement is approved, the Court will enter a judgment that will dismiss the litigation with prejudice as to all claims against the Defendants. All Settlement Class Members who do not request to be excluded from the Settlement will be deemed to release Defendants and their current and former employees, affiliates, and insurers (among others, as reflected in the definition of “Released Defendants” in the Settlement Agreement) of any liability for any and all claims of every nature and description whatsoever, whether direct, derivative or brought in any other capacity, whether class or individual, ascertained or unascertained, suspected or unsuspected, asserted or unasserted, accrued or unaccrued, existing or claimed to exist, known and unknown, foreseen or unforeseen, fixed or contingent, liquidated or not liquidated, in law or equity that have been or could have been asserted against any of the Released Defendants, in any court, tribunal, or proceeding (including, but not limited to, any claims arising under federal, state, or common law and any statutory claims), by or on behalf of Releasing Plaintiffs and Settlement Class Members related to, arising from, or based upon, in whole or in part, the manufacture, sale, marketing, business operations, communications, transactions, or any other activity relating to Morning Song Bird Food or the manufacture or sale of wild bird food by any Scotts affiliate or the litigation or defense of this Action. This means that all Settlement Class Members who have not opted out of the proposed Settlement will be forever barred from initiating, asserting and/or prosecuting any such claim against the Released Defendants in any court or any forum. In addition, Settlement Class Members will waive any rights under California Civil Code section 1542 (and similar state laws), which provides:

*A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.*

Settlement Class Members and the parties may still seek the assistance of the Court to enforce the Settlement Agreement, and the Court will continue to oversee the lawsuit in order to interpret and enforce the Settlement Agreement.

More detail about the claims you will be releasing are described in Section XIII of the Settlement Agreement, which is available at [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com), or in the public court records on file in this lawsuit. You can also talk to the lawyers listed in Question 21 below for free or you can, of course, talk to your own lawyer at your own expense if you have questions about the released claims or what they mean.

### Excluding Yourself From The Settlement

## 16. What If I Do Not Want To Be Part Of The Settlement?

**To exclude yourself or “opt out” from the Settlement Class**, you must personally sign and submit a written request to opt out, stating “I wish to exclude myself from the Settlement Class in *In re Morning Song Bird Food Litigation*, Case No. 3:12-cv-01592-JAH-AGS,” to the Settlement Administrator postmarked on or before **May 13, 2019** to *In re Morning Song Bird Food Litigation*, c/o KCC Class Action Services, P.O. Box 404107, Louisville, KY 40233-4107. Your exclusion request must also include: (1) your printed name, address, and telephone number; (2) a statement that you are a Settlement Class Member; and (3) the Morning Song Bird Food you purchased, together with approximate dates, retailers, product type, and purchase price.

## 17. If I Exclude Myself, Can I Still Get A Refund From The Proposed Settlement?

No. If you exclude yourself, you are telling the Court that you do not want to be part of the Settlement Class in this proposed Settlement. You can get a refund only if you stay in the Settlement Class and either received a Retailer-Identified Refund Notice or timely submit a valid Claim Form, as described above.

## 18. If I Do Not Exclude Myself, Can I Sue The Released Defendants For The Claims Released by This Settlement?

No. Unless you exclude yourself from the proposed Settlement, you are giving up the right to sue the Released Defendants for the claims that this Settlement resolves. You must exclude yourself from the Settlement Class to start your own lawsuit or be part of any other lawsuit against any of the Released Defendants for the claims this Settlement resolves.

Should you elect to exclude yourself from the Settlement Class, you should understand that Defendants and the other Released Defendants will have the right to assert any and all defenses they may have to any claims

that you may seek to assert, including, without limitation, the defense that any such claims are untimely under applicable statutes of limitations or statutes of repose.

### **Objecting To The Proposed Settlement**

#### **19. How Do I Tell The Court I Do Not Like The Proposed Settlement?**

If you are a Settlement Class Member and have not submitted a request to exclude yourself from the Settlement Class, you can object to the proposed Settlement if you do not like any part of it. The Court will consider your views.

To object, you must file with the Court a written statement explaining why you believe the Settlement should not be approved by the Court as fair, reasonable, and adequate. Your written statement must also include: (1) your printed name, address, and telephone number; (2) the case name and number; (3) the Morning Song Bird Food product purchases that qualify you as a Settlement Class Member; (4) a detailed explanation of your objection, as well as the specific reasons for each objection; (5) any supporting materials you wish the Court to consider when reviewing your objection; and (6) a statement whether your objection applies only to yourself, a subset of the Settlement Class, or to the entire Settlement Class. Your objection must be mailed to the Clerk of the Court at 333 West Broadway, San Diego, CA 92101, is due by **May 13, 2019**, and served on the following counsel on or before that same date: Rachel L. Jensen, Robbins Geller Rudman & Dowd LLP, 655 West Broadway, Suite 1900, San Diego, CA 92101; Edward Patrick Swan, Jr., Jones Day, 4655 Executive Drive, Suite 1500, San Diego, CA 92121-3134; and Mark Holscher, Kirkland & Ellis LLP, 333 South Hope Street, Los Angeles, CA 90071.

You are permitted to file your objection yourself or through a lawyer hired at your own expense. Lawyers who file objections on behalf of Settlement Class Members must file an appearance with the Court by **May 13, 2019**.

#### **20. What Is The Difference Between Objecting To The Proposed Settlement And Asking To Be Excluded From It?**

Objecting is simply telling the Court that you do not like something about the Settlement. You can object only if you remain a Settlement Class Member (that is, do not exclude yourself). Excluding yourself is telling the Court that you do not want to be part of the Settlement. If you exclude yourself, you cannot object or receive any Refund because the Settlement no longer affects you.

### **The Lawyers Representing You**

#### **21. Who Are The Attorneys Appointed To Represent The Settlement Class?**

The Court has approved of the following law firms to represent the Settlement Class:

Robbins Geller Rudman & Dowd LLP	The Driscoll Firm, P.C.	Dowd & Dowd P.C.
655 West Broadway, Suite 1900	211 N. Broadway, Suite 4050	211 N. Broadway, Suite 4050
San Diego, CA 92101	St. Louis, MO 63102	St. Louis, MO 63102

You do not need to hire your own lawyer because Class Counsel is working on your behalf. If you want your own lawyer, you will have to pay that lawyer. For example, you can ask him or her to appear in Court for you if you want someone other than Class Counsel to speak for you.

#### **22. How Will The Lawyers Be Paid?**

Class Counsel will apply to the Court for an award of attorneys' fees of up to 25% of the Settlement Amount and expenses in an amount not to exceed \$450,000, plus interest thereon, and Service Awards in an amount not to exceed \$10,000 for each of the class representatives for their time and service to the Settlement Class. Any award of attorneys' fees and expenses and Service Awards must be approved by the Court. If approved, these awards will be paid from the Settlement Fund, and will be paid before Claim Form Refunds are distributed.

### **The Court's Fairness Hearing**

#### **23. When And Where Will The Court Decide On Whether To Grant Final Approval Of The Proposed Settlement?**

The Court will hold a Fairness Hearing at 2:30 p.m. on June 3, 2019, before the Honorable John A. Houston at the U.S. District Court for the Southern District of California, Courtroom 13B, 333 West Broadway, San Diego, CA 92101, to decide whether to grant or deny final approval of the proposed Settlement.

#### **24. Do I Have To Come To The Fairness Hearing?**

No. Class Counsel will answer any questions the Court may have about the proposed Settlement. However, you are welcome to come to the hearing at your own expense. If you submitted an objection, you do not have to appear in Court to talk about it. As long as you mailed your written objection on time, signed it, and provided all of the required information (see Question 19) the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

#### **25. May I Speak At The Fairness Hearing?**

If you wish to appear at the Fairness Hearing, you must file with the Court a written notice of your intent to appear at the Fairness Hearing by May 13, 2019, that complies with the Court's Preliminary Approval Order. Any Settlement Class Member who fails to comply with these requirements will forfeit their right to appear and be heard on his or her objection at the Fairness Hearing.

#### **26. What Happens If The Settlement Is Approved?**

When and if the Court approves the Settlement after the Fairness Hearing, it will enter a "Final Order and Judgment" which, among other things, will constitute a final and binding judgment regarding the Action and dismiss the lawsuit with prejudice, order the parties to carry out the terms of the Settlement, and put into effect the Releases described above.

#### **27. What Happens If The Court Does Not Approve The Settlement?**

If the Court does not approve the Settlement, you will not receive any Refunds described in this Notice and you will not be legally affected by the Settlement, all the parties in this lawsuit will be back to where they were before the Settlement Agreement, and no party may use or refer to the Settlement Agreement to the disadvantage of the other party.

#### **Getting More Information**

#### **28. How Do I Get More Information?**

Contact the Settlement Administrator. Go to [www.birdfoodsettlement.com](http://www.birdfoodsettlement.com), call 1-866-459-1390, or write to *In re Morning Song Bird Food Litigation*, c/o KCC Class Action Services, P.O. Box 404107, Louisville, KY 40233-4107.

**PLEASE DO NOT CONTACT THE JUDGE, THE COURT, THE DEFENDANTS, OR DEFENDANTS' COUNSEL REGARDING THIS NOTICE. THEY CANNOT ANSWER ANY QUESTIONS OR COMMENT ON THE SETTLEMENT OR LAWSUIT.**

Dated: March 1, 2019

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