WILLIAM E. KOVACIC
General Counsel

GREGORY A. ASHE
RENATE KINSCHECK
LAURA SCHNEIDER
Federal Trade Commission
Division of Enforcement
600 Pennsylvania Ave., N.W., Room NJ-2122
Washington, D.C. 20580
(202) 326-3719 voice; (202) 326-2558 fax

THOMAS J. SYTA - Cal Bar # 116286
Local counsel
Federal Trade Commission
10877 Wilshire Blvd., Suite 700
Los Angeles, CA 90024
(310) 824-4324 voice
(310) 824-4380 fax

Attorneys for Plaintiff
Federal Trade Commission

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. PROMENADE COMMUNICATIONS LLC, a California corporation, PROMENADE MEMBERSHIP SERVICES, LLC, a corporation, PROMENADE COMMUNICATIONS LLC, a Florida corporation, ARCHETYPE COMMUNICATIONS CORPORATION, a corporation, PRIVCO, LLC, a corporation, INTERNATIONAL HEALTH GROUP, LLC, a corporation, TRAVELQUEST INTERNATIONAL LLC, a corporation, GLOBAL MEDIA HOLDINGS LTD, a corporation, and GRAIL HOLDINGS, a corporation, Defendants.	CV- COMPLAINT FOR INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("Commission"), by its undersigned attorneys, alleges:

1. Plaintiff FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et seq.*, and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r to secure a permanent injunction, rescission of contracts and restitution, disgorgement of ill-gotten gains, and other equitable relief against Defendants for engaging in unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), for engaging in deceptive or abusive telemarketing acts or practices in violation of the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, and for engaging in violations Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a); Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b); and Section 205.10(b) of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205.10(b), Supp. I.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

3. Venue in the Central District of California is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).

PLAINTIFF

4. Plaintiff, the Federal Trade Commission, is an independent agency of the United States Government created by the FTC Act, 15 U.S.C. §§ 41 *et seq*. The Commission is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive or abusive telemarketing acts or practices. In addition, the Commission enforces the EFTA, and violations of the EFTA are violations of the FTC Act, 15 U.S.C. § 1693o(c)). The Commission may

initiate federal district court proceedings, through its attorneys, to enjoin violations of the FTC Act, the Telemarketing Sales Rule and the EFTA and to secure such other equitable relief, including rescission of contracts and restitution, and disgorgement of ill-gotten gains, as may be appropriate in each case, 15 U.S.C. §§ 53(b), 57b and 6105(b).

DEFENDANTS

5. Promenade Communications LLC ("PCL") is a California corporation, with its principal place of business in Los Angeles, CA. PCL transacts or has transacted business in this district.

6. Promenade Membership Services, LLC ("PMS"), is a California corporation with its principal place of business in Los Angeles, CA. PMS transacts business in this district.

7. Archetype Communications Corporation is a Delaware corporation with its principal place of business in Los Angeles, CA. Archetype Communications Corporation transacts business in this district.

8. Promenade Communications, LLC ("PCL-Florida") is a Florida corporation with its principal place of business in Los Angeles, CA. PCL-Florida transacts business in this district.

9. Privco, LLC is a Delaware corporation with its principal place of business in Los Angeles, CA. Privco, LLC transacts business in this district.

10. International Health Group, LLC is a Delaware corporation with its principal place of business in Los Angeles, CA. International Health Group transacts business in this district.

11. Travelquest International, LLC is a Delaware corporation with its principal place of business in Los Angeles, CA. Travelquest International transacts business in this district.

12. Global Media Holdings, LTD is a Bermuda corporation with its principal place of business in Los Angeles, CA. Global Media Holdings transacts business in this district.

13. Grail Holdings is a Cayman Islands corporation with its principal place of business in Los Angeles, CA. Grail Holdings transacts business in this district.

14. Since at least 1999, Defendants (collectively "Promenade") have been engaged in a common enterprise nationwide to advertise, market, promote, offer to sell, sell and distribute membership services under various names, including Promenade, HealthSound and TravelDeals.

COMMERCE

15. At all times relevant to this complaint, Defendants' course of trade is in or affecting commerce within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' COURSE OF CONDUCT

16. Since at least 1999, Defendants have operated a common enterprise to promote, market, offer to sell and sell to consumers throughout the United States via telemarketing, memberships in buying services, discount health services, and other membership services under various names, including, but not limited to "Promenade Discount Buying and Travel Club," "HealthSound," "ShoppingDeals" and "TravelDeals." Prices for these memberships range from $96 to $249 per year, and consumers have often been signed-up for two Promenade memberships during the same call.

OUTBOUND TELEMARKETING CAMPAIGN

17. Defendants contract with third-party telemarketers to market their memberships via outbound calls (*i.e.*, calls initiated by Defendants' telemarketers). Defendants' third party telemarketers have typically introduced these calls by stating that they are calling to let the consumer know that he or she is "eligible to receive" a free gift, such as $1000 in grocery coupons. Some of Defendants' telemarketers, in many calls, have introduced themselves by stating that they are calling "with regard to your VISA card" and that the consumer is eligible for the free gift because she "has been named a preferred cardholder."

18. Defendants' telemarketers have then typically offered the consumer information regarding a membership service, or a "free trial" in Defendants' membership service,

emphasizing that it is "just for you to take a look at." Defendants' telemarketers have stated, often repeatedly, that charges will occur only *if* the consumer decides to continue with the membership after the trial period.

19. In numerous other instances, Defendants' telemarketers have stated that the consumer <u>will receive</u> the "free trial" and have not requested the consumer's authorization either to send the trial membership package or to charge the consumer's credit card or checking account for the membership at the end of the trial period.

20. In many instances, in their sales calls, Defendants' telemarketers have not disclosed, in a manner consumers are likely to notice and understand, (a) that at the time of the telemarketing call, Defendants or their telemarketers already have possession of, or access to, the consumer's credit number or debit card number (that is linked to a checking account) and related billing information; (b) that Promenade will automatically charge the consumer's credit card or bank account the membership fee at the conclusion of the trial period unless the consumer calls Promenade within the trial period to cancel the membership, and (c) that Promenade will also automatically charge the consumer's account for "renewal" of the membership in each subsequent year unless the consumer calls Promenade to cancel. In some instances, Defendants' telemarketers completely failed to disclose the above facts regarding the terms of the memberships.

21. In addition, in numerous calls, Defendants, through their telemarketers, have offered the consumer a membership that does not include a trial period and for which Promenade will immediately charge the consumer's credit card or bank account. Defendants, however, have not disclosed, in a manner consumers are likely to notice and understand, that they will charge the consumer's account immediately for this membership.

22. During these outbound calls, Defendants' telemarketers have not obtained from consumers the consumers' credit card or debit card numbers that Defendants plan to charge for their membership services. Instead, Defendants' telemarketers have obtained this account

information from third party marketers who obtained the information from the consumers as payment for goods or services offered by these marketers. In numerous instances, consumers have not authorized these third party marketers to transfer their billing information to any other marketer or to use the information for any purpose other than the original purchase.

23. In their sales calls, Defendants, through their telemarketers, have represented that consumers can "simply" call a toll-free number to cancel their membership. In some instances, Defendants have represented that consumers can obtain a "prompt" refund.

INBOUND TELEMARKETING CAMPAIGN

24. Defendants also have telemarketed their membership services through contracts with third-party companies that telemarket their own products via inbound telemarketing calls (*i.e.*, calls initiated by consumers to the telemarketers). Typically, these companies use television advertising to promote the companies' own goods or services, such as foods, dietary supplements, and gadgets and to solicit consumers to call the companies to order the advertised goods and services. The advertising that solicits inbound calls has provided information about the telemarketer's own goods or services, but generally has not disclosed that consumers calling to order the telemarketer's goods or services also would receive a sales pitch for another seller's goods or services.

25. Generally, when consumers have called these telemarketers to order the advertised goods or services, they have been asked to provide billing information, such as a credit card or debit card number, to pay for the telemarketer's goods or services.

26. After obtaining the account information to process the initial sales transaction, the telemarketers, on behalf of Defendants, then have attempted to "upsell" Defendants' memberships. "Upselling" is a telemarketing technique where a seller sells goods or services in an initial transaction, and then, during the same telephone call, solicits the purchase of additional goods or services.

27. During the upsell, the telemarketers often have introduced the upsell for the Defendants' membership as a "thank you" for the initial sales transaction. The telemarketers

then typically have stated that "we" would send the consumer a free, no obligation trial membership, sometimes referring to this membership as a "free gift."

28. The telemarketers then have made a statement about the fees for the membership and about cancellation, but have not disclosed clearly that Promenade will automatically charge the membership fee to the consumer's credit card or bank account at the conclusion of the trial period and periodically thereafter unless the consumer calls Promenade to cancel the membership.

29. At the conclusion of the upsell, the telemarketers frequently have not clearly solicited the consumer's consent to be charged, but have used wording such as "so look for your kit in the mail, ok?"

SIGNUPS, CHARGES, CANCELLATIONS AND REFUNDS

30. If consumers have agreed to accept a trial membership, and in numerous instances, even if consumers have not agreed, the telemarketers, who already have the billing information, have provided the consumers' names and credit or debit card numbers and related information to the Defendants so that Defendants can enroll these consumers for trial or permanent memberships and to process credit card or debit card/checking account charges to the accounts of consumers.

31. Shortly after receiving the consumer's name and billing information from their telemarketers, Defendants have mailed a membership package to the consumer announcing that the consumer has accepted a trial or permanent membership in one or more of Defendants' clubs and providing a toll-free number for questions, cancellations and refunds. Many consumers, however, have complained that they did not receive any such package. In many instances, consumers may have received a package, but not opened it because the package appeared to be unsolicited promotional or sales materials from a company with which the consumers are not familiar. Further, in some instances, the packages failed to disclose the amount of the charges or the annual renewal if the membership is not cancelled. Many consumers who did not open the

package first learned of Defendants' toll-free number when they received their credit card statement, where it was printed next to the charge for Defendants' membership.

32. Once Defendants have enrolled consumers in one or more of their clubs, Defendants have automatically charged consumers' credit card or debit card/checking accounts on a monthly or yearly basis without further authorization.

33. Defendants have not obtained written authorization from consumers who pay by debit card for such recurring automatic monthly or annual charges from the consumers' bank accounts.

34. Defendants have received a large number of complaints from consumers who have stated that they were signed up for memberships without their authorization or complained that they did not understand that they had to call and cancel the membership to avoid charges to their accounts. Despite this, Defendants have continued their practices without taking adequate and timely steps to ensure that their third party telemarketers have obtained authorization from consumers for such charges and disclosed the terms of the automatic charges. Further, numerous consumers have complained to Defendants that they did not know how Defendants got their billing information and that they had never authorized Defendants to obtain and use their billing information. Despite this, Defendants have continued to obtain consumers' credit and debit card numbers and to use this information to charge consumers without ensuring that proper authorization has been obtained.

35. In some instances, consumers have not received a sales pitch for the trial memberships, yet Defendants have placed charges for the memberships on their credit card or checking accounts.

36. During the course of Defendants' marketing and sale of membership services, through third party telemarketers, numerous consumers who have been signed up by Defendants have not agreed to accept trial or permanent memberships and do not recall receiving necessary information about automatic charges. Many of these consumers did not understand that

Defendants already had their account information, and that charges would automatically be placed on their credit card or checking accounts. Consumers were often particularly surprised and upset to find money withdrawn from their checking accounts, which resulted in bounced checks and overdraft fees.

37. In some instances, consumers have had to call repeatedly Defendants' toll-free number, or, having reached the number, have been put on hold for extended periods of time, before being able to reach an operator to cancel their memberships or to obtain refunds.

38. In some instances, consumers have been charged for a membership despite having called Defendants' toll-free number and communicated their desire to cancel within the free trial period. In some instances, consumers have had to make repeated requests for a refund before finally receiving one. Other consumers never received a refund, despite Defendants' repeated assurances that they would receive one.

THE FEDERAL TRADE COMMISSION ACT

39. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that "unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."

VIOLATIONS OF SECTION 5(a) OF THE FTC ACT

COUNT I

DECEPTIVE FAILURE TO DISCLOSE

40. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale or distribution of membership services, Defendants, through third-party telemarketers, have represented, expressly or by implication, that consumers who agree to their offer will receive information about a membership service or will receive a trial membership in such service without risk or obligation.

41. Defendants have failed to disclose or to disclose adequately to consumers:

a. in outbound calls: that, at the time of the telemarketing call, Defendants or their telemarketers already have possession of, or access to, the consumer's credit or debit card number and related billing information;

b. in inbound and outbound calls: that Promenade will automatically enroll a consumer who fails to contact Defendants within the trial period and cancel the trial membership and will charge an initial membership fee to the consumer's credit card or checking account;

c. in inbound and outbound calls: that Promenade will automatically charge a periodic membership fee to the consumer's credit card or bank account if the consumer fails to contact Defendants and cancel the membership.

These facts would be material to consumers in their decision to accept an offer of membership services.

42. In light of the representations set forth in paragraph 40, the failure of Defendants to disclose or to disclose adequately this material information is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

UNFAIR SUBMISSION OF CHARGES

43. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale or distribution of membership services, Defendants have caused a charge to be submitted for payment for such services without the express informed consent of the consumer.

44. Defendants' practice of causing charges to be submitted for payment for membership services without the consumer's express informed consent causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.

45. Therefore, Defendants' practice, as alleged in Paragraph 43, is unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

FALSE REPRESENTATION THAT CONSUMERS CAN EASILY CANCEL THEIR MEMBERSHIPS AND OBTAIN PROMPT REFUNDS

46. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale or distribution of membership services, Defendants, through their third-party telemarketers, have represented, expressly or by implication, that consumers who accept their offer can easily cancel their memberships and/or can promptly obtain refunds.

47. In truth and in fact, in numerous instances, consumers who have accepted Defendants' offer have not been able to easily cancel their memberships and/or have not been able to promptly obtain refunds.

48. Therefore, the representations set forth in paragraph 46 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

<u>THE TELEMARKETING SALES RULE</u>

49. In the Telemarketing Act, 15 U.S.C. §§ 6101 *et seq.*, Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices. On August 16, 1995, the Commission promulgated the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed. Reg. 43842 (Aug. 23, 1995). The TSR became effective on December 31, 1995, and was amended on January 29, 2003. The provisions discussed below have remained in full force and effect since December 31, 1995.

50. Defendants are "sellers" or "telemarketers" engaged in "telemarketing" as those terms are defined in the TSR. 16 C.F.R. §§ 310.2(z), (bb) and (cc).

51. The TSR prohibits sellers and telemarketers "[b]efore a customer pays for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner ... [a]ll

material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer." 16 C.F.R. § 310.3(a)(1)(ii).

52. The TSR requires telemarketers in outbound telephone calls to disclose promptly and in a clear and conspicuous manner to the person receiving the call, the following:

a. The identity of the seller;

b. That the purpose of the call is to sell goods and services; and

c. The nature of the goods or services.

16 C.F.R. §§ 310.4(d)(1), (2) and (3).

53. The TSR's Statement of Basis and Purpose explains that, in the case of "multiple purpose" outbound telephone calls, "where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the disclosures required by this section of the rule [§310.4(d)] must be made 'promptly,' during the first part of the call, before the non-sales portion of the call takes place." 60 Fed. Reg. at 43856.

54. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the TSR constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

COUNT IV

55. Since at least 1999, in numerous instances, in connection with the telemarketing of membership services, Defendants, through their third-party telemarketers, have failed to disclose, in a clear and conspicuous manner, before consumers pay for the memberships, all material restrictions, limitations or conditions to purchase, receive or use the goods or services that are the subject of the offers, including, but not limited to:

a. that, at the time of the telemarketing call, Defendants or their telemarketers already have possession of, or access to, the consumer's credit or debit card number and related billing information;

b. that Promenade will automatically enroll a consumer who fails to contact Defendants within the trial period and cancel the trial membership and will charge an initial membership fee to the consumer's credit card or checking account; and

c. that Promenade will automatically charge a periodic membership fee to the consumer's credit card or bank account if the consumer fails to contact Defendants and cancel the membership.

56. Therefore, Defendants' acts and practices as set forth in paragraph 55 violate Section 310.3(a)(1)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(ii).

COUNT V

57. Since at least 1999, in numerous instances, in connection with the telemarketing of membership services, Defendants, through their third-party telemarketers, in "outbound telephone calls," as that term is defined in the TSR, 16 C.F.R. § 310.2 (u), have failed to disclose promptly and in a clear and conspicuous manner to the person receiving the call:

a. The identity of the seller;

b. That the purpose of the call is to sell goods or services; and

c. The nature of the goods or services.

58. Therefore, Defendants' acts and practices as set forth in paragraph 57 violate Sections 310.4(d)(1), (2) and (3) of the TSR, 16 C.F.R. §§ 310.4(d)(1), (2), and (3).

<u>THE ELECTRONIC FUND TRANSFER ACT AND REGULATION E</u>

59. Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), provides that a "preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing, and a copy of such authorization shall be provided to the consumer when made."

60. Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), provides that "Preauthorized electronic fund transfers from a consumer's account may be authorized only by a

writing signed or similarly authenticated by the consumer. The person that obtains the authorization shall provide a copy to the consumer."

61. Section 205.10(b) of the Federal Reserve Board's Official Staff Commentary to Regulaton E, 12 C.F.R. § 205.10(b), Supp. I, provides that:

> The requirement that preauthorized EFTs be authorized by the consumer "only by a writing" cannot be met by a payee's signing a written authorization on the consumer's behalf with only an oral authorization from the consumer. A tape recording of a telephone conversation with a consumer who agrees to preauthorized debits also does not constitute written authorization for the purposes of this provision.

VIOLATIONS OF THE ELECTRONIC FUND TRANSFER ACT

COUNT VI

62. In numerous instances, Defendants have debited consumers' bank accounts on a recurring basis without obtaining consumers' written authorization for preauthorized electronic fund transfers from the accounts, thereby violating Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a); Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b); and Section 205.10(b) of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205.10(b), Supp. I.

63. Pursuant to the EFTA, 15 U.S.C. § 1693o(c), every violation of the EFTA and Regulation E constitutes a violation of the FTC Act.

64. By engaging in violations of the EFTA and Regulation E as alleged in paragraph 62 above, Defendants have engaged in violations of the FTC Act.

CONSUMER INJURY

65. Consumers throughout the United States have suffered, and continue to suffer, substantial monetary loss as a result of Defendants' unlawful acts and practices. In addition, Defendants have been unjustly enriched as a result of their unlawful acts and practices. Absent

injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public.

THIS COURT'S POWER TO GRANT RELIEF

66. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant a permanent injunction, rescission of contracts and restitution, disgorgement of ill-gotten gains, and other equitable relief to prevent and remedy any violations of any provision of law enforced by the Commission.

67. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers or other persons resulting from Defendants' violations of the Telemarketing Sales Rule, including the rescission or reformation of contracts, and the refund of money.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and pursuant to its own equitable powers:

1. Permanently enjoin and restrain Defendants from engaging or assisting others in engaging in violations of the FTC Act, the TSR, the EFTA, Regulation E, and the Federal Reserve Board's Official Staff Commentary to Regulation E.

2. Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from the Defendants' violations of Section 5(a) of the FTC Act, the TSR, the EFTA, Regulation E, and the Federal Reserve Board's Official Staff Commentary to Regulation E, including but not limited to, rescission of contracts and restitution, and the disgorgement of ill-gotten gains by the Defendants; and

3. Award the Plaintiff the costs of bringing this action and such other equitable relief as the Court may determine to be just and proper.

DATE:

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

____
GREGORY A. ASHE
RENATE KINSCHECK
LAURA SCHNEIDER
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room NJ-2122
Washington, D.C. 20580
202-326-3719 (telephone)
202-326-2558 (facsimile)
gashe@ftc.gov (e-mail)
Attorney for Plaintiff
Thomas J. Syta - Cal Bar # 116286
Local counsel

Federal Trade Commission