

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

PLAINTIFF(S)

v.
MANTRA FILMS, INC., and, JOSEPH R.
FRANCIS,

DEFENDANT(S).

CASE NUMBER

CV03-9184 RSWL (MANX)

SUMMONS

TO: THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with this court and serve upon plaintiff's attorney
MARK L. JOSEPHS, whose address is:

PETER D. KEISLER, ASSIST ATTY GENERAL
EUGENE M. THIROF, DIRECTOR
MARK L. JOSEPHS
1331 PENNSYLVANIA, N.W., SUITE 950 NORTH
WASHINGTON, D.C. 20004

an answer to the complaint amended complaint counterclaim cross-claim
which is herewith served upon you within 20 days after service of this Summons upon you, exclusive
of the day of service. If you fail to do so, judgement by default will be taken against you for the relief
demanded in the complaint.

Clerk, U.S. District Court

DEC 16 2003

Dated: _____

By: R. L. EYER
Deputy Clerk

(Seal of the Court)

FILED

2003 DEC 16 PM 3:31

CHECK IN DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

BY _____

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17 IN THE UNITED STATES DISTRICT COURT
 18 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 19 WESTERN DIVISION

21 _____)
 22 UNITED STATES OF AMERICA,)
 23 Plaintiff,)
 24 v.)
 25 MANTRA FILMS, INC., and,)
 26 JOSEPH R. FRANCIS,)
 27 Defendants.)
 28 _____)

CV03-9184 RSWL

(MANX)

No. CV
 COMPLAINT FOR CIVIL PENALTIES,
 PERMANENT INJUNCTION, AND
 OTHER RELIEF

1 Plaintiff, the United States of America, acting upon
2 notification and authorization to the Attorney General by the
3 Federal Trade Commission ("FTC" or "Commission"), for its
4 complaint, alleges that:

5 1. Plaintiff brings this action under Sections 5(a),
6 13(b), and 16(a) of the Federal Trade Commission Act ("FTC Act"),
7 15 U.S.C. §§ 45(a), 53(b), and 56(a); Section 917(c) of the
8 Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693o(c); and
9 Section (a) of the Unordered Merchandise Statute, 39 U.S.C.
10 § 3009(a), to secure a permanent injunction, consumer redress,
11 disgorgement, and other equitable relief from Defendants for
12 engaging in acts or practices violating Section 5(a) of the FTC
13 Act, 15 U.S.C. § 45(a); Section 907(a) of the EFTA, 15 U.S.C.
14 § 1693e(a); Section 205.10(b) of Regulation E, 12 C.F.R.
15 § 205.10(b), and Section 205.10(b) of the Federal Reserve Board's
16 Official Staff Commentary to Regulation E, 12 C.F.R. § 205.10(b),
17 Supp. I; and Section (a) of the Unordered Merchandise Statute, 39
18 U.S.C. § 3009(a); and to recover monetary civil penalties
19 pursuant to Section 5(m)(1)(B) of the FTC Act, 15 U.S.C.
20 § 45(m)(1)(B), from Defendants for engaging in acts or practices
21 previously determined by the Commission to be unfair and
22 deceptive and unlawful under Section 5(a) of the FTC Act, 15
23 U.S.C. § 45(a).

24 JURISDICTION AND VENUE

25 2. This Court has jurisdiction over this matter pursuant
26 to 15 U.S.C. §§ 45(a), 45(m)(1)(B), 53(b), and 56(a), and 28
27 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

28

1 3. Venue in this district is proper under 28 U.S.C. §§
2 1391(b) and (c), and 1395(a), and 15 U.S.C. § 53(b).

3 **DEFENDANTS**

4 4. Defendant Mantra Films, Inc., d/b/a MRA Video
5 ("Mantra"), is an Oklahoma corporation with its principal place
6 of business located within the Central District of California at
7 4751 Wilshire Boulevard, 3rd Floor, Los Angeles, California,
8 90010.

9 5. Defendant Joseph R. Francis ("Francis") is the sole
10 shareholder, officer and director of Defendant Mantra Films.
11 Individually or in concert with others, he directs, controls,
12 formulates and/or participates in the acts and practices set
13 forth herein. Francis transacts or has transacted business in
14 this district.

15 **COMMERCE**

16 6. At all times relevant to this Complaint, Defendants'
17 course of business, including the acts and practices alleged
18 herein, has been and is in or affecting commerce, as "commerce"
19 is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

20 **COURSE OF CONDUCT**

21 7. Since early 1999, and continuing thereafter, Defendants
22 Mantra and Francis (hereinafter collectively referred to as
23 Defendants) have produced, advertised, offered for sale, and sold
24 tapes and DVDs (hereinafter collectively referred to as videos)
25 under the name "Girls Gone Wild" and additional titles.

26 8. Defendants have marketed videos nationwide through
27 program length television commercials ("infomercials"), short
28

1 television commercials ("short-spots"), Internet advertising and
2 inbound telemarketing calls.

3 9. Defendants have disseminated or caused to be
4 disseminated 120-second and 60-second short spots. The short
5 spots each focus on one of the titles and provide censored images
6 of the video content. They are aired frequently on national
7 cable networks such as ESPN and the E! network. The 60-second
8 short spots have ranked in the top 20 of commercials on national
9 cable networks during numerous time periods, such as May 2001 to
10 June 2001, and October 2001 to November 2001.

11 10. Since December 2000, in connection with the sale of
12 videos, Defendants have operated continuity programs. Under
13 these programs, Defendants ship additional videos on a monthly
14 basis, for up to 12 months, and charge the cost of the additional
15 videos, \$24.98 each (\$19.99 plus \$4.99 shipping and handling) to
16 the credit card or other account number the consumer provided to
17 purchase the advertised video.

18 11. In conjunction with the spot advertising of a specific
19 video, while censored images from the videos are shown, the
20 announcer explains that "the price of the video is \$9.99. Use
21 your credit card, we'll also send you [a bonus title] absolutely
22 free." In the 60-second ad for one of the titles the announcer
23 states "[t]hen preview other all new Girls Gone Wild titles,
24 satisfaction guaranteed, cancel anytime." In the 120-second spot
25 for another title, the announcer states "[t]hen preview other
26 uncensored Girls Gone Wild titles, satisfaction guaranteed,
27 cancel anytime." In the 60 and 120-second spots for a third
28 video, the announcer says "[t]hen be the first to preview the

1 latest Girls Gone Wild videos, satisfaction guaranteed, cancel
2 anytime."

3 12. Near the end of the 120-second and 60-second short
4 spots, text flashes onto the screen for a few seconds, in small
5 white print, super-imposed over censored images of the video
6 content that states "(future titles \$19.99 + s+h)," and "(cancel
7 anytime)." The short spots conclude with a screen that provides
8 a toll-free number the consumer can call to order the title
9 advertised in the commercial.

10 13. Defendants also have disseminated or caused to be
11 disseminated 30-minute infomercials. As in the short spots, in
12 the 30-minute infomercials, text flashes for a few seconds, in
13 small white print, super-imposed over censored images of the
14 video content "(future titles \$19.99 + s+h)," and "(cancel
15 anytime)" A toll-free number is provided that the consumer can
16 call to order the advertised title.

17 14. When the consumer calls the toll-free numbers
18 advertised in the short spots and the infomercials, Defendants'
19 telemarketing scripts first direct the sales representatives to
20 ask the consumer to provide a shipping address and credit card or
21 other account number to receive and pay for the advertised video.

22 15. Next, the telemarketing scripts direct the sales
23 representatives to offer a series of additional products. First,
24 the representatives offer two additional titles for \$9.99 each.
25 If the consumer consents, s/he is asked to upgrade to rush
26 delivery for an additional charge. Next, the representatives
27 offer a collector's set of five videos for \$49.99. Finally, the
28 scripts direct the sales representatives to conclude calls by

1 stating that the consumer's order will arrive in 10 to 14
2 business days. The representatives then announce that once a
3 month the consumer will receive an "all new, never before seen
4 'Girls Gone Wild' video to preview for 10 days. You may cancel
5 at any time, your satisfaction is guaranteed, and keep only the
6 ones you want. Thank you for calling Girls Gone Wild."

7 16. If a consumer asks a question about the additional
8 video shipments, the telemarketing scripts direct the sales
9 representatives to tell the consumer that:

10 This is part of our special TV offer. There is no
11 ongoing commitment, and you don't have to buy anything
12 further. If you would like to cancel, feel free to
13 call after you receive your order. (emphasis added)

14 17. Defendants accept as payment credit cards, debit cards,
15 checks, and money orders.

16 18. Defendants do not tell consumers who order a video and
17 pay by credit card or debit card that they are being enrolled in
18 a continuity program and must call to cancel before the next
19 month's shipment - presumably within 30 days although the
20 deadline for cancellation is never disclosed - to avoid
21 additional shipments and charges. Defendants also do not tell
22 consumers the cost of the additional shipments, including whether
23 consumers must pay for shipping and handling - although the
24 initial video costs \$9.99 plus shipping and handling, videos sent
25 as part of a continuity program cost \$19.99 plus shipping and
26 handling and are charged to consumers' credit or debit cards on
27 or about the date of the shipment.

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1 19. The representatives do not ask for the consumer's
2 consent for enrollment in a continuity program or authorization
3 to charge the additional shipments to the debit or credit card
4 account the consumer provided to pay for the advertised video.

5 20. Defendants do not obtain written authorization from
6 consumers who order a video and pay by debit card for recurring
7 transfers from the consumers' accounts.

8 21. Mantra also advertises its videos on the company's
9 website, www.girlsgonewild.com. This website contains snapshots
10 from the videos and links to ordering pages. A consumer can
11 order the videos directly from the website by clicking on links
12 on the homepage that read "Order Now" or "Special TV Offer! 2 for
13 only \$9.99 (Limited-time offer)."

14 22. The "Special TV Offer" link takes the consumer to a
15 page containing a brief description of the videos offered for
16 \$9.99. That page has a link that reads "Order Now!" Below the
17 "Order Now!" link, at the bottom of the page, there is a box of
18 text that vaguely refers to a continuity program, through the
19 following statements:

20 Monthly Preview Program. 30-day money back guarantee if not
21 completely satisfied. Additional titles \$19.99 + \$4.99
22 shipping and handling. Cancel Anytime.

23 23. There is no explanation that the "Monthly Preview
24 Program" is a continuity program and that, by ordering the videos
25 pictured, the consumer will receive additional titles each month
26 that will be charged automatically to the consumer's credit or
27 debit card.

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1 24. Each "Order Now" link takes the consumer to a page that
2 lists video titles and other merchandise, such as t-shirts and
3 caps, that the consumer can order. The two "Special TV Offer"
4 videos are listed first, followed by numerous other titles and
5 products. The company address and a toll-free telephone number
6 to order videos are listed at the top of this page along with a
7 customer service telephone number.

8 25. When the consumer has chosen merchandise he wishes to
9 order by clicking on an "Add to Cart" button, the site takes the
10 consumer to a "shopping cart" page, from which the consumer must
11 click on a "Checkout" button that takes him to an order form
12 seeking billing and shipping information. At the top of this web
13 page to the right there are two check-boxes. One is entitled
14 "Same as Billing" and is pre-selected. The other check-box is
15 entitled "Agree to Terms" and is also pre-selected. No terms or
16 conditions of continuity program membership are disclosed on this
17 page.

18 26. The word "Terms" in this check-box's title is a link.
19 Clicking on the word "Terms" takes the consumer to a "Terms and
20 Conditions" pop-up page that cannot be maximized to fill the
21 screen. This page contains the terms and conditions "which apply
22 to the use by you of the Mantra Sites (as defined below) and any
23 other subscription product or service offered for sale by Mantra
24 Films, Inc.'s and/or its affiliates."

25 27. When the "Terms and Conditions" page appears on the
26 screen, there is a scroll bar along the right side. Only a very
27 limited number of terms can appear at one time in the pop-up page
28 and the consumer must scroll down to see the rest. The consumer

1 initially only sees the first two terms on the first screen, and
2 none of them disclose terms specifically related to a continuity
3 program. Term #1 is entitled "Definitions" and is one paragraph
4 long. Term #2 is entitled "General" and is also one paragraph
5 long. If the consumer continues to scroll down, additional terms
6 appear. Term #3 is entitled, "Use of Mantra Sites;" Term #4,
7 "Disclaimer of Warranty; Limitation of Liability;" Term #5,
8 "Indemnification;" Term #6, "Termination;" and Term #7,
9 "Trademarks." These sections do not disclose information
10 specifically related to a continuity program.

11 28. Approximately three-quarters down the pop-up page, Term
12 #8 appears, entitled "Products; Subscription." Sub-paragraph A
13 of this term states "certain products offered by Mantra consist
14 of a subscription. The following terms and conditions shall
15 apply in the event that you order any product that is part of a
16 subscription offered by Mantra on the Mantra Sites." This
17 provision, however, does not specify what items on the website
18 will "consist of a subscription." Further, the word
19 "subscription" is only used in the "Terms and Conditions" page.

20 29. Because the "Agree to Terms" check-box is preselected,
21 the website does not confirm in any way that the consumer has
22 read the terms and conditions. Moreover, it does not even
23 confirm that the consumer has seen the "Terms" link. In
24 addition, the website does not seek the consumer's authorization
25 to be enrolled in a continuity program in any other manner.

26 30. Defendants represent in the commercials, on the
27 website, and during the telemarketing calls that consumers can
28 cancel at any time. To avoid receiving a second shipment,

1 consumers need to cancel before that shipment is sent, presumably
2 within a month after the initial shipment. However, Defendants'
3 telemarketing scripts and shipments do not tell consumers how
4 they may cancel and defendants do not provide an effective means
5 to cancel. Defendants' telemarketing sales representatives
6 cannot even provide a customer service number to consumers to
7 contact the company.

8 31. The initial and subsequent shipments Defendants send to
9 consumers do not include any materials that explain the terms and
10 conditions of the continuity program or how to cancel. The
11 shipments do not contain any documents. The shipping label on
12 the outside of the shipment includes a return address, a P.O. Box
13 in Sylmark, CA, and states "Customer Service mrvideo.com." The
14 video jacket and the videotape label state "Visit our website at:
15 www.girlsgonewild.com" and the videotape label also includes a
16 P.O. Box address in Hollywood, CA. Consumers can locate a
17 customer service telephone number (to cancel further shipments)
18 only if they go to one of the company's websites.

19 32. The mrvideo.com website lists a customer service
20 telephone number, provides the P.O. Box address in Hollywood, CA,
21 and includes a link to the company's www.girlsgonewild.com
22 website. Written cancellation instructions appear on this
23 website. These instructions can be found by clicking on the
24 "Questions" link on the homepage and then on the "Video & DVD
25 Order FAQ" link. There, consumers are told that they can call or
26 write to the customer service department to cancel further
27 shipments. Defendants provide a customer service telephone
28 number and the P.O. Box address in Hollywood, CA. A telephone

1 call placed by Plaintiff to Defendants' customer service number
2 revealed, however, that videos must be returned to the address in
3 Sylmark, CA, not Hollywood, CA.

4 33. In numerous instances, consumers who called a customer
5 service phone number to cancel further shipments or request a
6 refund either could not reach an operator; the number was busy,
7 appearing to be disconnected; or consumers were left waiting on
8 hold for unreasonably long periods of time. Furthermore, some
9 consumers who were able to speak with a customer service
10 representative were denied a refund or cancellation of their
11 memberships. Other consumers who requested a refund were told it
12 was on the way and then never received the refund. Numerous
13 consumers who tried to contact the company by letter through
14 electronic or US mail did not receive replies. Consumers have
15 returned videos to the company, but have failed to receive
16 refunds.

17 34. On February 8, 2002, the Commission served on
18 Defendants a copy of the Unordered Merchandise Statute, the
19 Synopsis of Federal Trade Commission Decisions Concerning
20 Unordered Merchandise, and copies of such decisions, along with
21 Civil Investigative Demands for Documentary Materials and Written
22 Interrogatories (CIDs). The Commission determined in those
23 decisions that shipping unordered merchandise and sending
24 communications that seek to obtain payment for or return of
25 merchandise shipped without the expressed consent of the
26 recipient are unfair and deceptive acts or practices and are
27 unlawful. Defendants therefore had actual knowledge that such
28 acts or practices are unfair and deceptive and are unlawful.

1 Defendants continued to ship unordered merchandise to consumers
2 and continued to send communications that seek to obtain payment
3 for it after February 2002.

4 **THE FTC ACT**

5 35. Section (5) (a) (1) of the FTC Act, 15 U.S.C. § 45 (a) (1),
6 provides that "unfair or deceptive acts or practices in or
7 affecting commerce, are hereby declared unlawful."

8 **THE ELECTRONIC FUND TRANSFER ACT AND REGULATION E**

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

14 37. Section 205.10(b) of Regulation E, 12 C.F.R.
15 § 205.10(b), provides that "[p]reauthorized electronic fund
16 transfers from a consumer's account may be authorized only by a
17 writing signed or similarly authenticated by the consumer. The
18 person that obtains the authorization shall provide a copy to the
19 consumer."

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

23 The requirement that preauthorized EFTs be authorized
24 by the consumer "only by a writing" cannot be met by a
25 payee's signing a written authorization on the
26 consumer's behalf with only an oral authorization from
27
28

1 the consumer. A tape recording of a telephone
2 conversation with a consumer who agrees to
3 preauthorized debits also does not constitute written
4 authorization for purposes of this provision.

5 THE UNORDERED MERCHANDISE STATUTE

6 39. The Unordered Merchandise Statute, 39 U.S.C. § 3009
7 (1970), prohibits shipping unordered merchandise, unless such
8 merchandise is clearly and conspicuously marked as a free sample,
9 or is merchandise mailed by a charitable organization soliciting
10 contributions. The statute also prohibits billing and sending
11 dunning communications to recipients of unordered merchandise.

12 40. Pursuant to Section (a) of the Unordered Merchandise
13 Statute, 39 U.S.C. § 3009(a), violations of the Unordered
14 Merchandise Statute are an unfair method of competition and an
15 unfair trade practice in violation of Section 5(a)(1) of the FTC
16 Act, 15 U.S.C. § 45(a)(1).

17 PRIOR COMMISSION DETERMINATIONS CONCERNING

18 UNFAIR AND DECEPTIVE ACTS OR PRACTICES IN COMMERCE

19 41. In a proceeding under Section 5(b) of the FTC Act, 15
20 U.S.C. § 45(b), concerning Sunshine Art Studios, Inc., FTC Docket
21 No. 8825, 81 F.T.C. 836 (1972), aff'd, 481 F.2d 1171 (1st Cir.
22 1973), the Commission on November 30, 1972, determined that, in
23 connection with the advertising, offering for sale, sale or
24 distribution of any product in commerce, as "commerce" is defined
25 in the FTC Act, certain acts or practices are unfair and
26 deceptive and unlawful under Section 5(a)(1) of the FTC Act, 15
27 U.S.C. § 45(a)(1), and in that proceeding on that date with
28 respect to such acts or practices the Commission issued an

1 Opinion and Final Order to cease and desist ("the Commission's
2 Opinion and Final Order").

3 42. In Sunshine Art Studios, Inc. the Commission determined
4 that:

- 5 i. It is an unfair and deceptive act or practice to send
6 any merchandise by any means without the expressed
7 request or consent of the recipient unless such
8 merchandise has attached to it a clear and conspicuous
9 statement that the recipient may treat the merchandise
10 as a gift and has the right to retain, use, discard, or
11 dispose of it in any manner that the recipient sees fit
12 without any obligation whatsoever to the sender;
- 13 ii. It is an unfair and deceptive act or practice to send
14 any communication that in any manner seeks to obtain
15 payment for or return of merchandise shipped without
16 the expressed consent of the recipient.

17 43. On February 8, 2002, the Commission served on
18 Defendants a copy of the Unordered Merchandise Statute, the
19 Synopsis of Federal Trade Commission Decisions Concerning
20 Unordered Merchandise, and copies of such decisions, along with
21 CIDs. A copy of the Synopsis is attached as Exhibit A.

22 44. The Synopsis informed the Defendants of the
23 Commission's proceeding described in paragraphs 41 and 42; and
24 included a copy of the Administrative Law Judge's Initial
25 Decision and the Commission's Opinion and Final Order in Docket
26 No. 8825.

27 45. In response to the February 2002 CIDs, the Defendants
28 stated that the "Company's sole shareholder, director and officer

1 has read and is familiar with the Statute and decision
2 accompanying this CID, as are the supervising employees of the
3 Company."

4 **FTC ACT VIOLATIONS**

5 **COUNT I**

6 46. In numerous instances since December 2000, in
7 connection with the sale, offering for sale, or distribution of
8 videos, Defendants have represented, expressly or by implication,
9 that consumers may order a single video for \$9.99 and will
10 receive an additional title free as a bonus.

11 47. Defendants have failed to disclose or to disclose
12 adequately to consumers: (a) that the purchase of a video
13 results in enrollment in a continuity program; and (b) the
14 material terms and conditions of that program, including:

- 15 i. that consumers who order a video are enrolled in a
16 continuity program and must call to cancel before the
17 next monthly shipment to avoid additional shipments and
18 charges;
- 19 ii. the cost of the additional shipments, including whether
20 consumers must pay for shipping and handling;
- 21 iii. how consumers may cancel to avoid further shipments and
22 charges.

23 48. As a result of the representation set forth in
24 paragraph 46, Defendants' failure to disclose or to disclose
25 adequately the material information set forth in paragraph 47 is
26 a deceptive act or practice in violation of Section 5(a) of the
27 FTC Act, 15 U.S.C. § 45(a).

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COUNT II

49. In numerous instances since December 2000, in connection with the sale, offering for sale, or distribution of videos, Defendants have caused charges to be submitted for payment for subsequent video shipments without the express informed consent of the consumer.

50. Defendants' practices of causing charges to be submitted for payment for subsequent video shipments 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 competition.

51. Therefore Defendants' practices as alleged in paragraph 49, are unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

52. In numerous instances since December 2000, in connection with the sale, offering for sale, or distribution of videos, Defendants have represented, expressly or by implication, that consumers who purchase a video can cancel their continuity program membership at anytime.

53. In truth and in fact, consumers who purchase a video cannot cancel their continuity program membership at anytime.

54. Therefore, the representation set forth in paragraph 52 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

1 ELECTRONIC FUND TRANSFER ACT AND REGULATION E VIOLATIONS

2 COUNT IV

3 55. In numerous instances since December 2000, in
4 connection with the sale, offering for sale, or distribution of
5 videos, Defendants have debited consumers' accounts on a
6 recurring basis without obtaining consumers' written
7 authorization for preauthorized electronic fund transfers from
8 the accounts, thereby violating Section 907(a) of the EFTA, 15
9 U.S.C. § 1693e(a), Section 205.10(b) of Regulation E, 12 C.F.R. §
10 205.10(b), and Section 205.10(b) of the Federal Reserve Board's
11 Official Staff Commentary to Regulation E, 12 C.F.R. § 205.10(b),
12 Supp. I.

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

16 57. By engaging in violations of the EFTA and Regulation E
17 as alleged in paragraph 55 above, Defendants have engaged in
18 violations of the FTC Act.

19 UNORDERED MERCHANDISE STATUTE VIOLATION

20 COUNT V

21 58. In numerous instances since December 2000, in
22 connection with the sale, offering for sale, or distribution of
23 videos, Defendants, who are not a charitable organization
24 soliciting contributions, have mailed packages of videos to
25 consumers without the prior express request or consent of the
26 recipients, or without identifying the packages as free samples,
27 thereby violating Section (a) of the Unordered Merchandise
28 Statute, 39 U.S.C. § 3009(a).

1 VIOLATION OF PREVIOUS COMMISSION DETERMINATIONS
2 CONCERNING UNFAIR AND DECEPTIVE ACTS OR PRACTICES IN COMMERCE

3 COUNT VI

4 59. In numerous instances since on or about February 8,
5 2002, in the course of conduct of their business, Defendants have
6 as described above:

7 i. Mailed or caused to be mailed packages of videos to
8 consumers without the prior expressed request or
9 consent of the recipients, or without attaching to the
10 videos a clear and conspicuous statement that the
11 recipients may treat the videos as a gift and have the
12 right to retain, use, discard, or dispose of them in
13 any manner the recipients see fit without any
14 obligation to the Defendants; and

15 ii. Sent communications that seek to obtain payment for or
16 return of merchandise shipped without the expressed
17 consent of the recipients.

18 60. Defendants have engaged in the acts and practices
19 described in paragraph 59 above with actual knowledge that such
20 practices have been determined by the Commission to be unfair and
21 deceptive and are unlawful under Section 5(a)(1) of the FTC Act,
22 15 U.S.C. § 45(a)(1), as set forth in Section 5(m)(1)(B) of the
23 FTC Act, 15 U.S.C. § 45(m)(1)(B). Defendants, therefore, have
24 violated Section 5(m)(1)(B) of the FTC Act.

25 CONSUMER INJURY

26 61. Numerous consumers throughout the United States have
27 suffered and continue to suffer substantial monetary loss as a
28 result of Defendants' unlawful acts or practices. In addition,

1 Defendants have been unjustly enriched as a result of their
2 unlawful practices. Absent injunctive relief by this Court,
3 Defendants are likely to continue to injure consumers, reap
4 unjust enrichment, and harm the public interest.

5 **THIS COURT'S POWER TO GRANT RELIEF**

6 62. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
7 empowers this Court to grant injunctive and other ancillary
8 relief, including rescission of contracts and restitution, other
9 forms of redress, and the disgorgement of ill-gotten gains to
10 prevent and remedy violations of any provision of law enforced by
11 the Commission.

12 63. Section 5(m)(1)(B) of the FTC Act, 15 U.S.C.
13 § 45(m)(1)(B), Section 4 of the Federal Civil Penalties Inflation
14 Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the
15 Debt Collection Improvement Act of 1996, Pub.L. 104-134, and
16 Federal Trade Commission Rule 1.98(e), 16 C.F.R. § 1.98(e), 61
17 Fed. Reg. 54548 (Oct. 21, 1996), authorize the Court to award
18 monetary civil penalties of not more than \$11,000 for each
19 violation of previous Commission determinations concerning unfair
20 and deceptive acts or practices in commerce, as described in
21 paragraphs 41-45 and 59-60.

22 64. Each shipment of unordered merchandise made by
23 Defendants since February 8, 2002, constitutes a separate
24 violation for which Plaintiff seeks monetary civil penalties.

25 **PRAYER FOR INJUNCTIVE AND MONETARY RELIEF**

26 WHEREFORE, Plaintiff pursuant to Section 5(m)(1)(B) and
27 Section 13(b) of the FTC Act, 15 U.S.C. §§ 45(m)(1)(B) and 53(b),
28 and the Court's own equitable powers, requests that this Court:

1 1. Permanently enjoin Defendants from violating Section
 2 5(a) of the FTC Act, the EFTA, Regulation E, the Federal Reserve
 3 Board's Official Staff Commentary to Regulation E, and the
 4 Unordered Merchandise Statute;

5 2. Award Plaintiff such preliminary injunctive and
 6 ancillary relief as may be
 7 necessary to avert the likelihood of consumer injury during the
 8 pendency of this action and to preserve the possibility of
 9 effective, final relief;

10 3. Award such equitable relief as the Court finds necessary
 11 to redress injury to consumers resulting from Defendants'
 12 violations of Section 5(a) of the FTC Act, the EFTA, Regulation
 13 E, the Federal Reserve Board's Official Staff Commentary to
 14 Regulation E, and the Unordered Merchandise Statute, including,
 15 but not limited to, rescission of contracts and restitution,
 16 other forms of redress, and the disgorgement of ill-gotten gains;

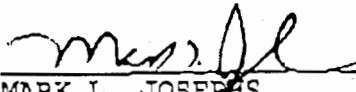
17 4. Award Plaintiff monetary civil penalties from Defendants
 18 for each violation of Commission determinations concerning unfair
 19 and deceptive acts or practices in commerce, as described in
 20 paragraphs 41-45 and 59-60 of this Complaint; and

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

4
5 Dated: December 16, 2003

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SYNOPSIS OF FEDERAL TRADE COMMISSION
DECISIONS CONCERNING UNORDERED MERCHANDISE

Exhibit A

The Federal Trade Commission has determined that the following acts or practices of sending and/or attempting to collect payment for unordered merchandise are unfair and deceptive and are unlawful under Section 5(a)(1) [15 U.S.C. §45(a)(1)] of the Federal Trade Commission Act [15 U.S.C. §§41-58]:

It is an unfair and deceptive act or practice to:

- (1) send any merchandise by any means without the prior expressed request or consent of the recipient unless such merchandise has attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift and has the right to retain, use, discard, or dispose of it in any manner that the recipient sees fit without any obligation whatsoever to the sender; 1/
- (2) send any communication that in any manner seeks to obtain payment for or return of merchandise shipped without the prior expressed request or consent of the recipient. 2/

From the foregoing, it should be clear that it is unlawful to send any bill or dunning communication for unordered merchandise (i.e., merchandise sent without the prior expressed request or consent of the recipient). Under

1/ In the Matter of Sunshine Art Studios, Inc., et al., Docket 8825, Initial Decision December 20, 1971, 81 F.T.C. 836, 853, 857-59, 865-71, 880. Affirmed by the Commission at 882-84, 886-88, November 30, 1972. Affirmed by the United States Court of Appeals, First Circuit, July 23, 1973, Sunshine Art Studios, Inc., et al. v. F.T.C., 481 F.2d 1171, 1173-74. Golden Fifty Pharmaceutical Co., et al., Docket 8792, 77 F.T.C. 277, 280-81, 289-90 (1970). See also Section 3009 of the Postal Reorganization Act (39 U.S.C. §3009, copy attached).

2/ Ibid.

EXHIBIT A

Section 3009 of the Postal Reorganization Act, it is also unlawful even to send unordered merchandise unless it consists of: (1) free samples clearly and conspicuously marked as such, or (2) merchandise sent by a charitable organization soliciting contributions. In either case, the merchandise must have attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift and may retain, use, discard, or dispose of it in any manner he or she sees fit without any obligation whatsoever to the sender. 3/

Section 3009 of the Postal Reorganization Act and the Synopsis of the Commission's determinations cited above are stated in terms which are intended to cover the many and various methods and means which have been or might be employed to send or bill for unordered merchandise. To offer additional guidance, the following are brief synopses of merely some of the more specific acts and practices which the Commission has determined to be unlawful in connection with the sending and billing for unordered merchandise. The list is not complete or all-inclusive but merely suggestive of some related practices that also have been determined to be unlawful.

It is an unfair and deceptive act or practice to:

- (3) pad or "kite" [e.g., increase, expand, inflate, or raise without prior expressed customer approval] orders or prices. 4/

3/ See Postal Reorganization Act, 39 U.S.C. §3009. Also, the Commission has issued two enforcement policy statements to advise the legal and business communities that it considers Section 3009 to be a proper interpretation of Section 5 of the Federal Trade Commission Act insofar as the sending or billing for unordered merchandise are concerned -- whether it is sent by U.S. mail or by nonmail shipment. See 35 Federal Register 14328 (Sept. 11, 1970) and 43 Federal Register 4113 (Jan. 31, 1978).

4/ In the Matter of Star Office Supply Company, et al., Docket 8749, Initial Decision April 11, 1969, 77 F.T.C. 383, 402-03. Affirmed by the Commission April 16, 1970, at 443-44, 446, 447, 455.

- (4) send merchandise which differs with respect to brand name, type, quantity, size, or quality from that represented in inducing orders or from that ordered by the purchaser; 5/
- (5) fail or refuse to accept bona fide cancellations or thwart and prevent cancellations of all or part of orders by customers who assert bona fide reasons therefor; 6/
- (6) represent, directly or indirectly, that a recipient of merchandise sent on "approval" (a) has a contract or agreement with the sender, or (b) must either pay for or return the merchandise:
 - (i) unless the recipient has expressly requested or consented to receive such merchandise on approval, or
 - (ii) if the recipient has specifically requested the sender not to ship the merchandise; 7/

5/ Ibid. See also ibid at 419.

6/ Ibid. See also In the Matter of Sunshine Art Studios, Inc., et al., note 1 supra, 81 F.T.C. 836, 837, 857, 880, 882-84, 887, 888; In the Matter of Golden Fifty Pharmaceutical Co., et al., note 1 supra at 280-81, 289-90.

7/ In the Matter of Sunshine Art Studios, Inc., et al., note 1 supra, 81 F.T.C. 836, 837, 851-53, 856-59, 865-71, 880, 882-84.

EXHIBIT A

- (7) represent, directly or indirectly, that persons accepting a free offer will be under no obligation when, in fact, those accepting the free offer are (or are later informed that they are) obligated to (a) notify the sender to cancel further shipments, or (b) purchase or return additional shipments of merchandise; 8/
- (8) represent, contrary to fact, that the shipper of unordered merchandise has a bona fide order for it. 9/

8/ In the Matter of Golden Fifty Pharmaceutical Co., et al., note 1 supra at 288-90. For additional guidance regarding use of the word "FREE" see the Commission's Guide Concerning Use of the Word "FREE" and Similar Representations at Title 16 of Code of Federal Regulations, Part 251.

9/ In the Matter of May Goldberg, Trading As Norman Company, et al., Docket 3812, Commission Decision, March 29, 1945, 40 F.T.C. 296, 300-01.

Title 39 United States Code Section 3009**§3009. Mailing of unordered merchandise**

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45 (a) (1) of title 15 [of the United States Code].

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 749. (Postal Reorganization Act.)

EXHIBIT A

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