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10
11 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13
14 FEDERAL TRADE COMMISSION AND
STATE OF ILLINOIS,
15
16 Plaintiffs,
v.
17 MEMBERSHIP SERVICES, INC., a
Delaware corporation, and
18
19 JAMES M. SCHWINDT, individually
and as an officer of Membership
20 Services, Inc.,
21 Defendants.

01 CV 1868 JM (POR)

SETTLEMENT AND STIPULATED
FINAL ORDER AS TO DEFENDANT
JAMES M. SCHWINDT

22 Plaintiffs Federal Trade Commission ("Commission" or "FTC")
23 and the State of Illinois filed a Complaint for a permanent
24 injunction and other equitable relief pursuant to Sections 13(b)
25 and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
26 §§ 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse
27 Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 et seq.,
28 and the Illinois Consumer Fraud and Deceptive Business Practices

1 Act ("ICFA"), 815 ILCS 505. The Complaint charged Defendants with
2 violations of Section 5(a) of the FTC Act, as amended, 15 U.S.C.
3 § 45(a), and the Commission's Trade Regulation Rule entitled
4 Telemarketing Sales Rule (the "Rule"), 16 C.F.R. Part 310, as well
5 as Section 2 of the Illinois Consumer Fraud and Deceptive Business
6 Practices Act, 815 ILCS 505/2.

7 Plaintiffs--the Commission and the State of Illinois--and
8 Defendant James M. Schwindt have agreed to settle the charges
9 against Defendant Schwindt by stipulating to entry of a final order
10 with the terms and conditions set forth below, without adjudication
11 of any issue of fact or law and without Defendant Schwindt
12 admitting liability for any of the matters alleged in the
13 Complaint.

14 Plaintiffs and Defendant Schwindt having requested the Court
15 to enter this Settlement and Stipulated Final Order (hereinafter,
16 "Order"), the Court hereby finds and orders as follows:

17 **DEFINITIONS**

18 1. **"Consumer"** means an actual or potential purchaser,
19 customer, subscriber, or natural person.

20 2. **"Credit card loss protection"** means the advertisement,
21 promotion, offering for sale, or sale of any product or service
22 represented to register credit or debit accounts, including credit
23 card accounts, or protect, indemnify, or reimburse the holder of a
24 credit or debit account against unauthorized use or charges.

25 3. **"Credit-related good or service"** means any good or
26 service that is purported directly or indirectly to (1) provide to
27 consumers, arrange for consumers to receive, or assist consumers in
28 receiving grants, loans, financing, credit or debit cards, or other

1 extensions of credit; or (2) provide consumers, arrange for
2 consumers to receive, or assist consumers in receiving, debt
3 consolidation, debt relief, or other credit counseling.

4 4. The term "**Defendants**" refers to Defendants Membership
5 Services, Inc. and James Schwindt, and the agents, servants,
6 employees, and attorneys of either of them, and all persons or
7 entities directly or indirectly under the control of either of
8 them, and all other persons or entities in active concert or
9 participation with either of them who receive actual notice of this
10 Order by personal service or otherwise, and each such person.

11 5. The term "**document**" is synonymous in meaning and equal in
12 scope to the usage of the term in Federal Rule of Civil Procedure
13 34(a), and includes writings, drawings, graphs, charts,
14 photographs, audio and video recordings, computer records, and
15 other data compilations from which information can be obtained and
16 translated, if necessary, through detection devices into reasonably
17 usable form. A draft or non-identical copy is a separate document
18 within the meaning of the term.

19 6. "**Material**" means likely to affect a person's choice of,
20 or conduct regarding, goods or services.

21 7. "**Telemarketing**" means any business activity (whether or
22 not covered by the Telemarketing Sales Rule, 16 C.F.R. Part 310,
23 including, but not limited to, initiating or receiving telephone
24 calls, managing others who initiate or receive telephone calls,
25 operating an enterprise that initiates or receives telephone calls,
26 owning an enterprise that initiates or receives telephone calls, or
27 otherwise participating as an officer, director, employee or
28 independent contractor in an enterprise that initiates or receives

1 telephone calls) that involves attempts to induce consumers to
2 purchase any investment, item, good, service, partnership interest,
3 trust interest or other beneficial interest, or to enter a contest
4 for a prize, by means of telephone sales presentations, either
5 exclusively or in conjunction with the use of other forms of
6 marketing.

7 8. The terms "and" and "or" shall be construed conjunctively
8 or disjunctively as necessary, and to make the applicable phrase or
9 sentence inclusive rather than exclusive.

10
11 **FINDINGS**

12 1. This Court has jurisdiction of the subject matter of this
13 case and over Defendant Schwindt. Venue in the Southern District
14 of California is proper.

15 2. The Complaint states a claim upon which relief may be
16 granted under Sections 5(a), 13(b) and 19 of the FTC Act, 15 U.S.C.
17 §§ 45(a), 53(b) and 57b; Sections 310.3(a)(2)(iii), 310.3(a)(4),
18 and 310.4(a)(4) of the Commission's Telemarketing Sales Rule, 16
19 C.F.R. §§ 310.3(a)(2)(iii), 310.3(a)(4), and 310.4(a)(4); and
20 Section 2 of the Illinois Consumer Fraud and Deceptive Business
21 Practices Act, 815 ILCS 505/2.

22 3. Plaintiffs have the authority under Sections 13(b) and 19
23 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and Sections 7 and 10
24 of the Illinois Consumer Fraud and Deceptive Business Practices
25 Act, 815 ILCS 505/7 and 505/10, to seek the relief they have
26 requested.

1 4. The activities of Defendants as alleged in the Complaint
2 are in or affecting commerce, as defined in Section 4 of the FTC
3 Act, 15 U.S.C. § 44.

4 5. This Order is for settlement purposes only and does not
5 constitute and shall not be interpreted to constitute an admission
6 by Defendant Schwindt that (i) he has engaged in violations of any
7 law or regulations, including but not limited to the FTC Act or the
8 Telemarketing Sales Rule, or (ii) that the facts alleged in the
9 Complaint, other than the jurisdictional facts, are true.

10 6. Defendant Schwindt has waived all rights to seek judicial
11 review or otherwise challenge or contest the validity of this
12 Settlement and Order. Defendant Schwindt has also waived all
13 claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, as
14 amended by PL 104-121, 110 Stat. 847, 863-64 (1996), concerning
15 prosecution of this action to the date of this Order.

16 7. Entry of this Settlement and Order is in the public
17 interest.

18
19 **ORDER**

20 **I.**

21 **PROHIBITION ON SALE OF CREDIT CARD LOSS PROTECTION**
22 **AND CREDIT-RELATED GOODS OR SERVICES**

23 **IT IS THEREFORE ORDERED AND AGREED** that Defendant Schwindt,
24 and his agents, servants, employees, and attorneys, and those
25 persons or entities in active concert or participation with him who
26 receive actual notice of this Order by personal service or
27 otherwise, whether acting directly or through any corporation,
28 subsidiary, division, or other device, are hereby permanently

1 enjoined from engaging or participating in the advertising,
2 promoting, offering for sale, or sale of (1) **credit card loss**
3 **protection**, or (2) any **credit-related good or service**.

4 **II.**

5 **PROHIBITION ON MISREPRESENTATIONS AND UNAUTHORIZED CHARGES**

6 **IT IS FURTHER ORDERED AND AGREED** that Defendant Schwindt, and
7 his agents, servants, employees, and attorneys, and those persons
8 or entities in active concert or participation with him who receive
9 actual notice of this Order by personal service or otherwise,
10 whether acting directly or through any corporation, subsidiary,
11 division, or other device, in connection with the advertising,
12 offering for sale, or sale of any good or service, are hereby
13 permanently enjoined from the following:

14 A. falsely representing that any **consumer** will be charged
15 small monthly payments to purchase such good or service;

16 B. falsely representing that any **consumer** has given
17 authorization for his credit card account to be charged for such
18 good or service;

19 C. making any express or implied representation of **material**
20 fact that is false or misleading; or

21 D. causing any **consumer's** credit card account to be charged
22 for such good or service without having previously obtained the
23 **consumer's** authorization for such charge.

24 **III.**

25 **PROHIBITION ON VIOLATIONS OF THE TELEMARKETING SALES RULE**

26 **IT IS FURTHER ORDERED AND AGREED** that Defendant Schwindt, and
27 his agents, servants, employees, and attorneys, and those persons
28 or entities in active concert or participation with him who receive

1 actual notice of this Order by personal service or otherwise,
2 whether acting directly or through any corporation, subsidiary,
3 division, or other device, are hereby permanently restrained and
4 enjoined from the following:

5 A. Violating Section 310.3(a)(2)(iii) of the Telemarketing
6 Sales Rule, 16 C.F.R. § 310.3(a)(2)(iii), by making any **material**
7 misrepresentation of any material aspect of the performance,
8 efficacy, nature, or central characteristics of goods or services;

9 B. Violating Section 310.3(a)(4) of the Telemarketing Sales
10 Rule, 16 C.F.R. § 310.3(a)(4), by making a false or misleading
11 statement to induce any person to pay for goods or services,
12 including but not limited to either of the following statements:

13 (1) that **consumers** who have not agreed to be charged by Defendants
14 owe Defendants for goods or services; or 2) that **consumers** will be
15 charged small monthly payments to purchase products or services; or

16 C. Violating or assisting others in violating any other
17 provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310.

18 A copy of the Rule is appended to this Order as Attachment A
19 and is incorporated herein as if fully rewritten. In the event
20 that the Rule is amended by the Commission in a manner which would
21 create a new or different standard applicable to the defendant's
22 obligations under this Order, compliance with the Rule as so
23 amended shall not be deemed a violation of this Order.

24 IV.

25 PROHIBITION ON VIOLATIONS OF THE ILLINOIS CONSUMER FRAUD AND 26 DECEPTIVE BUSINESS PRACTICES

27 **IT IS FURTHER ORDERED AND AGREED** that Defendant Schwindt, and
28 his agents, servants, employees, and attorneys, and those persons

1 or entities in active concert or participation with him who receive
2 actual notice of this Order by personal service or otherwise,
3 whether acting directly or through any corporation, subsidiary,
4 division, or other device, in connection with the advertising,
5 offering for sale, or sale of any good or service, are hereby
6 permanently enjoined from violating Section 2 of the Illinois
7 Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2
8 by engaging in the following practices:

9 A. falsely representing any good or service other than those
10 goods or services prohibited for sale by defendants in Paragraph I
11 of this Order;

12 B. falsely representing to consumers, expressly or by
13 implication, that defendants are affiliated with, or are calling
14 from or on behalf of Mastercard, Visa, or the consumers' credit
15 card issuers;

16 C. falsely representing, expressly or by implication, that
17 consumers have given defendants their credit card accounts to be
18 billed for defendants' goods or services;

19 D. falsely representing, expressly or by implication, that
20 consumers will be billed in installment payments for defendants'
21 goods or services, instead of being billed for the full amount in a
22 lump sum;

23 E. billing or causing any consumer's credit card accounts to
24 be billed for defendants' goods or services, without first
25 obtaining the consumers' express authorization to bill their
26 accounts; or

27 F. billing or causing any consumer's credit card account to
28 be billed for defendants' goods or services, when the consumer has

1 agreed only to receive information about defendants' offer.

2 **V.**

3 **PROHIBITION ON SALE OF CUSTOMER LISTS**

4 **IT IS FURTHER ORDERED AND AGREED** that Defendant Schwindt, and
5 his agents, servants, employees, attorneys, and all persons or
6 entities directly or indirectly under his control, and all other
7 persons or entities in active concert or participation with him who
8 receive actual notice of this Order by personal service or
9 otherwise, and each such person, whether acting directly or through
10 any corporation, limited liability company, subsidiary, division or
11 other device, are hereby restrained and enjoined from using any
12 data obtained from Defendant Membership Services for the purpose of
13 selling, renting, leasing, transferring or otherwise disclosing the
14 name, address, telephone number, credit card number, bank account
15 number or other identifying information of any consumer or
16 purchaser identified in Defendants' customer database or files
17 pertaining to Defendants' Low Interest Credit Card Protect Program
18 ("LICCP")--i.e., the telemarketing program encompassing the two
19 types of products or services that are the subject of the Complaint
20 in this matter--to any third party; *provided, however,* that
21 Defendant Schwindt may disclose such identifying information to the
22 Receiver or a law enforcement agency, or as required by any law,
23 regulation or court order.

1 VI.

2 EQUITABLE MONETARY RELIEF

3 A. IT IS FURTHER ORDERED AND AGREED that Defendant Schwindt
4 is liable for equitable monetary relief in the amount of \$1,000,000
5 (ONE MILLION DOLLARS). *Provided, however,* that Defendant
6 Schwindt's liability shall be suspended if Defendant Schwindt
7 causes payments totaling \$30,000 to be made to the Commission
8 according to the following schedule: \$8,000 (EIGHT THOUSAND
9 DOLLARS) within thirty (30) calendar days of receipt by his
10 undersigned counsel of notice of entry of this Settlement and
11 Stipulated Final Order; an additional \$10,000 (TEN THOUSAND
12 DOLLARS) within four (4) months of receipt by his undersigned
13 counsel of notice of entry of this Settlement and Stipulated Final
14 Order; and the remaining \$12,000 (TWELVE THOUSAND DOLLARS) within
15 nine months of receipt by his undersigned counsel of notice of
16 entry of this Settlement and Stipulated Final Order. Time is of
17 the essence. In the event that any payment is not received on or
18 before the due date for that payment as set forth above, Defendant
19 Schwindt's liability shall not be suspended and the full amount of
20 \$1,000,000, less any amounts either Defendant has previously paid
21 to the Commission, shall become immediately due and payable.
22 *Provided further* that said suspension shall be subject to the
23 conditions set forth in Paragraph VII of this Order.

24 B. IT IS FURTHER ORDERED AND AGREED that all funds paid
25 pursuant to Paragraph VI.A, above, shall be deposited into a fund
26 administered by the Commission or its agent to be used for
27 equitable relief, including but not limited to consumer redress and
28 any attendant expenses for the administration of any redress fund.

1 In the event that direct redress to consumers is wholly or
2 partially impracticable or funds remain after redress is completed,
3 the Commission may apply any remaining funds for such other
4 equitable relief (including consumer information remedies) as it
5 determines to be reasonably related to Defendants' practices
6 alleged in the complaint. Any funds not used for such equitable
7 relief shall be deposited to the Treasury as disgorgement.
8 Defendant Schwindt shall have no right to challenge the
9 Commission's choice of remedies under this Paragraph.

10 **VII.**

11 **RIGHT TO REOPEN AND TERMINATE SUSPENSION**

12 **IT IS FURTHER ORDERED AND AGREED** that the Commission's
13 agreement to this Order is expressly premised upon the
14 truthfulness, accuracy and completeness of the sixteen-page
15 "Financial Statement of Individual Defendant" and the twelve-page
16 "Financial Statement of Corporate Defendant," each dated October,
17 20, 2001, and a supplemental "Financial Statement of Individual
18 Defendant" dated September 12, 2002, that Defendant Schwindt has
19 submitted to the Commission. Said financial statements contain
20 material information upon which the FTC has relied in negotiating
21 and agreeing to the terms of this Order. If, upon noticed motion
22 by the Commission to the Court, the Court finds that Defendant
23 Schwindt failed to disclose in his individual statement any
24 material asset with a value exceeding \$1,000 or in the corporate
25 statement any material asset with a value exceeding \$2,500, or
26 materially misrepresented the value of any asset, or made any other
27 material misrepresentation in or omission from either of the two
28 financial statements, any suspension of liability as provided in

1 Paragraph VI above shall be terminated, and the entire amount of
2 \$1,000,000, less any amounts either Defendant has previously paid
3 to the Commission, will be immediately due and payable. For
4 purposes of (a) this Paragraph, or (b) any subsequent proceedings
5 by the Commission or its assignees to enforce payment, including
6 but not limited to a non-dischargeability complaint filed in a
7 bankruptcy proceeding, and for no other purposes, Defendant
8 Schwindt stipulates with the Commission to all of the allegations
9 in the Commission's Complaint.

10 **VIII.**

11 **ACKNOWLEDGMENT OF RECEIPT**

12 **IT IS FURTHER ORDERED AND AGREED** that, within five
13 (5) business days after receipt of notice of entry of this Order,
14 Defendant Schwindt shall submit to the Commission a truthful sworn
15 and notarized statement, in the form shown on Appendix 1, that
16 shall acknowledge receipt of this Order as approved by the Court.

17 **IX.**

18 **RECORD KEEPING PROVISIONS**

19 **IT IS FURTHER ORDERED AND AGREED** that, for a period of six (6)
20 years from the date of entry of this Order, Defendant Schwindt--in
21 connection with any and every business entity (a) of which he is a
22 majority owner, or (b) which he otherwise manages or controls, and
23 (c) which is engaged in **telemarketing**, is hereby restrained and
24 enjoined from:

25 A. Failing to create the following records:

26 1. Accounting records that, in reasonable detail,
27 accurately and fairly reflect the cost to the business entity of
28

1 goods or services sold, revenues generated, and the disbursement of
2 such revenues;

3 2. Personnel records accurately reflecting the name,
4 address, and telephone number of each person employed in any
5 capacity by such business, including as an independent contractor
6 (but not an entity so engaged); that person's job title or
7 position; the date upon which the person commenced work; and the
8 date and reason for the person's termination, if applicable;
9 provided, however, that nothing in this provision shall be
10 construed to require the violation of any state or federal law or
11 regulation;

12 3. Consumer records containing the names, addresses,
13 phone numbers, dollar amounts paid, quantity of items or services
14 purchased, and description of items or services purchased, to the
15 extent such information is obtained in the ordinary course of
16 business; and

17 4. Consumer complaint and refund requests (whether
18 received directly, indirectly or through any third party) and any
19 responses to those complaints or requests;

20 B. Failing to retain, for a period of three (3) years, all
21 records required to be created pursuant to part A of this
22 Paragraph; and

23 C. Failing to retain, for a period of two (2) years after
24 the last date of dissemination, copies of all sales scripts,
25 training materials, advertisements, or other marketing materials
26 that are actually utilized.

1 X.

2 MONITORING COMPLIANCE OF SALES PERSONNEL

3 IT IS FURTHER ORDERED AND AGREED that Defendant Schwindt--in
4 connection with any and every business entity (a) of which he is a
5 majority owner, or (b) which he otherwise manages or controls, and
6 (c) which is engaged in **telemarketing** or assisting others engaged
7 in **telemarketing**--is hereby permanently restrained and enjoined
8 from:

9 1. Failing to take reasonable steps sufficient to monitor
10 and ensure that all employees and independent contractors engaged
11 in sales or other customer service functions comply with Paragraphs
12 I through III of this Order. Such steps shall include adequate
13 monitoring of sales presentations or other calls with customers,
14 and shall also include, at a minimum, the following:

15 (1) periodically listening to, or engaging an independent firm to
16 listen to and provide Defendant Schwindt with a report on, a
17 representative sample of the oral representations made by persons
18 engaged in sales or other customer service functions for or on
19 behalf of the business owned or managed by Defendant Schwindt; (2)
20 establishing a procedure for receiving and responding to consumer
21 complaints; and (3) ascertaining the number and nature of consumer
22 complaints regarding transactions in which each employee or
23 independent contractor is involved;

24 2. Failing to promptly and fully investigate any consumer
25 complaint received by any business to which this Paragraph applies;
26 and

27 3. Failing to take corrective action with respect to any
28 sales person whom Defendant Schwindt determines is not complying

1 with this Order, which may include training, disciplining, and/or
2 terminating such sales person.

3 **XI.**

4 **COMPLIANCE REPORTING**

5 **IT IS FURTHER ORDERED AND AGREED** that, in order that
6 compliance with the provisions of this Order may be monitored:

7 A. Defendant Schwindt shall, within one (1) week of written
8 notice of entry of this Order by the Court, notify counsel for the
9 Commission, in writing, of his current residence address and
10 telephone number;

11 B. Defendant Schwindt shall, for a period of four (4) years
12 from the date of entry of this Order, notify the Commission of:

13 1. Any changes in his residence, mailing address, and
14 telephone numbers, within ten (10) business days of the date of
15 such change; and

16 2. Any changes in his employment status (including
17 self-employment) within ten (10) days of such change. Such notice
18 shall include the name and address of each business that Defendant
19 Schwindt is affiliated with or employed by, a statement of the
20 nature of the business, and a statement of Defendant Schwindt's
21 duties and responsibilities in connection with the business or
22 employment;

23 C. Defendant Schwindt shall, for a period of four (4) years
24 from the date of entry of this Order, notify the Commission of any
25 proposed change in the structure of any business entity (including
26 Defendant MSI, if it is still in existence and no longer under the
27 control of the Receiver) that is owned or controlled by Defendant
28 Schwindt, such as creation, incorporation, dissolution, assignment,

1 sale, merger, creation or dissolution of subsidiaries, proposed
2 filing of a bankruptcy petition, or change in the company name or
3 address, or any other change that may affect compliance obligations
4 arising out of this Order, thirty (30) days prior to the effective
5 date of any proposed change;

6 D. One hundred eighty (180) days after the date of entry of
7 this Order, Defendant Schwindt shall provide a written report to
8 the Commission, sworn to under penalty of perjury, setting forth in
9 detail the manner and form in which he has complied and is
10 complying with this Order. This report shall include but not be
11 limited to:

- 12 1. Defendant Schwindt's then current residence address
13 and telephone number(s);
- 14 2. Defendant Schwindt's then current employment,
15 business addresses and telephone numbers, a
16 description of the business activities of each such
17 employer, and Defendant Schwindt's title and
18 responsibilities for each employer;
- 19 3. A copy of each acknowledgment of receipt of this
20 Order obtained by Defendant Schwindt pursuant to
21 Paragraph XV of this Order;
- 22 4. A statement describing the manner in which Defendant
23 Schwindt has complied and is complying with
24 Paragraphs I through III of this Order;

25 E. Upon reasonable written request by a representative of
26 the Commission, Defendant Schwindt shall submit additional written
27 reports (under oath, if requested) and produce **documents** on thirty
28

1 (30) days' notice with respect to any conduct subject to this
2 Order, unless additional time is mutually agreed to;

3 F. For purposes of this Paragraph, the term "employment"
4 includes the performance of services as an employee, consultant, or
5 independent contractor; and "employers" include any individual or
6 entity for whom Defendant Schwindt performs services as an
7 employee, consultant or independent contractor; and

8 G. For purposes of the compliance reporting required by this
9 Paragraph, the Commission is authorized to communicate directly
10 with Defendant Schwindt. Provided, however, that the Commission
11 shall initiate any such communication in writing and inquire in the
12 initial communication whether Defendant Schwindt wishes to obtain
13 counsel before responding. Provided further that if, within one
14 week of delivery of the Commission's initial communication,
15 Defendant Schwindt advises the designated representative of the
16 Commission in writing that he wishes to obtain counsel to respond
17 to the Commission's inquiry, the Commission shall cease direct
18 communications with Defendant Schwindt for up to (but no longer
19 than) two weeks from the date of such written notification to the
20 Commission, to allow Defendant Schwindt a reasonable opportunity to
21 obtain counsel. Provided further, that if Defendant Schwindt does
22 in fact retain counsel and the Commission is so notified, the
23 Commission shall direct all further communications regarding
24 compliance reporting to counsel for Defendant Schwindt or in
25 accordance with such counsel's directions.

1 XII.

2 ACCESS TO BUSINESS PREMISES

3 IT IS FURTHER ORDERED AND AGREED that, for a period of four
4 (4) years from the date of entry of this Order, for the purpose of
5 further determining compliance with this Order, Defendant Schwindt
6 shall permit representatives of the Commission, within five (5)
7 business days of receipt of written notice from the Commission:

8 A. Access during normal business hours to any office, or
9 facility storing **documents**, of any business that engages in
10 **telemarketing** where Defendant Schwindt (a) owns a majority interest
11 in the business or (b) directly or indirectly manages or controls
12 the business. In providing such access, Defendant Schwindt shall
13 permit representatives of the Commission to inspect and copy all
14 **documents** relevant to any matter contained in this Order; and shall
15 permit Commission representatives to remove **documents** relevant to
16 any matter contained in this Order for a period not to exceed five
17 (5) calendar days so that the **documents** may be inspected,
18 inventoried, and copied. Provided, however, that the Commission,
19 will not, in the absence of appropriate consent, review, seize,
20 copy, remove, possess or exercise dominion over any materials which
21 the Commission knows or has reason to know constitute or contain
22 attorney-client communications or work product, and will not
23 otherwise order, direct, instruct, permit or condone same.
24 Provided further, that in the event the Commission, without prior
25 consent, obtains materials which it knows or has reason to know
26 constitute or contain attorney-client communications or work
27 product, the Commission will return all originals and copies of
28 such material within five business days;

1 B. To interview the officers, directors, and employees,
2 including all personnel involved in responding to **consumer**
3 complaints or inquiries, and all sales personnel, whether
4 designated as employees, consultants, independent contractors or
5 otherwise, of any business to which Part A of this Paragraph
6 applies, concerning matters relating to compliance with the terms
7 of this Order. The person interviewed may have counsel present and
8 will promptly be so informed by the Commission.

9 *Provided that, upon application of the Commission and for good*
10 *cause shown, the Court may enter an ex parte order granting*
11 *immediate access to Defendant Schwindt's business premises for the*
12 *purposes of inspecting and copying all **documents** relevant to any*
13 *matter contained in this Order. In such event, Commission*
14 *representatives shall be permitted to remove documents as*
15 *identified in the ex parte order for a period not to exceed five*
16 *(5) calendar days so that the documents may be inspected,*
17 *inventoried and copied. Provided further, that the Commission will*
18 *not, in the absence of appropriate consent, review, seize, copy,*
19 *remove, possess or exercise dominion over any materials which the*
20 *Commission knows or has reason to know constitute or contain*
21 *attorney-client communications or work product, and will not*
22 *otherwise order, direct, instruct, permit or condone same.*
23 *Provided further, that in the event the Commission, without prior*
24 *consent, obtains materials which it knows or has reason to know*
25 *constitute or contain attorney-client communications or work*
26 *product, the Commission will return all originals and copies of*
27 *such material within five business days*

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XIII.

FTC'S AUTHORITY TO MONITOR COMPLIANCE

3 **IT IS FURTHER ORDERED AND AGREED** that the Commission is
4 authorized to monitor Defendants' compliance with this Order by all
5 lawful means, including, but not limited to, the following:

6 A. The Commission is authorized, without further leave of
7 this Court, to obtain discovery from any person in the manner
8 provided by Chapter V of the Federal Rules of Civil Procedure,
9 Fed. R. Civ. P. 26-37, including the use of compulsory process
10 pursuant to Federal R. Civ. P. 45, for the purpose of investigating
11 Defendants' compliance with any provision of this Order;

12 B. The Commission is authorized, without the necessity of
13 identification or prior notice, to use representatives posing as
14 customers or prospective customers of (i) either Defendant, (ii)
15 the employees of either Defendant, or (iii) any other entity
16 managed or controlled in whole or in part by either Defendant;

17 C. Nothing in this Order shall limit the Commission's lawful
18 use of compulsory process, pursuant to Sections 9 and 20 of the FTC
19 Act, 15 U.S.C. §§ 49, 57b-1, for the purpose of investigating
20 compliance with this Order, Section 5 of the FTC Act, 15 U.S.C.
21 § 45, or the Rule, 16 C.F.R. Part 435.

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XIV.

REQUESTS FOR MODIFICATION

24 A. **IT IS FURTHER ORDERED AND AGREED** that the parties may
25 stipulate to modify any provision of this Order at any time
26 following entry of this Order by the Court. Any such stipulation
27 must be approved by the Court before it is binding upon the
28 parties. Defendant Schwindt shall submit any requests for

1 modification to the undersigned counsel for the Commission, to the
2 Assistant Regional Director at the address set forth below in
3 Paragraph XVI, or as otherwise directed by the Commission or its
4 representative. In seeking the Commission's stipulation to any
5 modification, Defendant Schwindt may advance any argument that he
6 deems relevant. Provided, however, that the Commission shall be
7 under no obligation to accept any such proposal by Defendant
8 Schwindt. Provided further, that nothing in this Paragraph shall
9 be construed to establish or modify any standards that would be
10 applicable to a unilateral motion by either party for modification
11 to this Order.

12 **XV.**

13 **ORDER DISTRIBUTION**

14 **IT IS FURTHER ORDERED AND AGREED** that, for a period of four
15 (4) years from the date of entry of this Order, Defendant Schwindt
16 shall:

17 A. Immediately provide a copy of this Order to, and obtain a
18 signed and dated acknowledgment of receipt of the same from, each
19 officer, director and managing agent of any company or other
20 business entity which is directly or indirectly owned, operated or
21 controlled by Defendant Schwindt and which is engaged in
22 **telemarketing**; and

23 B. Maintain for a period of three (3) years after creation,
24 and upon reasonable notice make available to the FTC's
25 representatives, the original signed and dated acknowledgments of
26 the receipt of copies of this Order, as required by this Part A of
27 this Paragraph.

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XVI.

NOTICES

IT IS FURTHER ORDERED AND AGREED that for purposes of this Order, Defendant Schwindt shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

ASSISTANT REGIONAL DIRECTOR
Federal Trade Commission
Western Region-Los Angeles
10877 Wilshire Blvd., Ste. 700
Los Angeles, CA 90024
Re: FTC v. Membership Services, Inc.

XVII.

INDEPENDENCE OF OBLIGATIONS

IT IS FURTHER ORDERED AND AGREED that each of the obligations imposed by this Order is independent of all other obligations under the Order, and that the expiration of any requirements imposed by this Order shall not affect any other obligation arising under this Order.

XVIII.

COSTS AND ATTORNEYS FEES

IT IS FURTHER ORDERED AND AGREED that each party to this Order bear its own costs and attorneys fees incurred in connection with this action.

XIX.

CONTINUED JURISDICTION

IT IS FURTHER ORDERED AND AGREED that this Court shall retain jurisdiction of this matter for all purposes.

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ENTRY BY CLERK

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Order.

SO STIPULATED:

FEDERAL TRADE COMMISSION

Dated: December 10, 2003

John D. Jacobs
John D. Jacobs
Jerome M. Steiner, Jr.
Attorneys for Plaintiff FTC

STATE OF ILLINOIS

Dated: December 11, 2003

Elizabeth A. Blackston
Elizabeth A. Blackston
Attorney for Plaintiff State of Illinois

Dated: July 23RD, 2003

James M. Schwandt
James M. Schwandt, Defendant
Individually and as sole
shareholder of Defendant
Membership Services, Inc.

APPROVED AS TO FORM AND CONTENT:

Dated: _____, 2003

Robert F. Hinton
Attorney for Defendant Schwandt

IT IS SO ORDERED.

Dated: _____, 2003

Judge of the District Court

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XX.

ENTRY BY CLERK

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Order.

SO STIPULATED:

FEDERAL TRADE COMMISSION

Dated: _____, 2003

John D. Jacobs
Jerome M. Steiner, Jr.
Attorneys for Plaintiff FTC

STATE OF ILLINOIS

Dated: _____, 2003

Elizabeth A. Blackston
Attorney for Plaintiff State of Illinois

Dated: July 23RD, 2003

James M. Schwindt
James M. Schwindt, Defendant
Individually and as sole
shareholder of Defendant
Membership Services, Inc.

APPROVED AS TO FORM AND CONTENT:

Dated: July 23, 2003

Robert F. Hinton
Robert F. Hinton
Attorney for Defendant Schwindt

IT IS SO ORDERED.

Dated: _____, 2003

Judge of the District Court

[APPENDIX 1]

JOHN D. JACOBS (CA Bar No. 134154)
Federal Trade Commission
10877 Wilshire Boulevard, Suite 700
Los Angeles, CA 90024
(310) 824-4343; Fax (310) 824-4380

JEROME M. STEINER, JR.
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94131
(415) 848-5100; Fax (415) 848-5184

ELIZABETH A. BLACKSTON
Office of the Illinois Attorney General
500 South Second Street
Springfield, IL 62706
(217) 782-4436; Fax (217) 782-1097

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION AND
STATE OF ILLINOIS,

Plaintiffs,

v.

MEMBERSHIP SERVICES, INC., a
Delaware corporation, and

JAMES M. SCHWINDT,
individually and as an
officer of Membership
Services, Inc.,

Defendants.

01 CV 1868 JM (POR)

DEFENDANT JAMES M.
SCHWINDT'S AFFIDAVIT
ACKNOWLEDGING RECEIPT OF
SETTLEMENT AND STIPULATED
FINAL ORDER

I, _____, hereby declare as follows:

1. I am a defendant in the action FTC v. Membership Services, Inc. (United States District Court, Southern District of California, Case No. 01CV1868 JM (POR)). I am a citizen of the

[APPENDIX 1]

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2 United States and over the age of eighteen. I have personal
3 knowledge of the facts set forth in this Affidavit.

4 2. I agreed to entry of a Settlement and Stipulated Final
5 Order For Permanent Injunction and Other Equitable Relief
6 ("Stipulated Order") against me to settle the charges in the
7 Complaint. I read the provisions of the Stipulated Order,
8 including Attachment A (the Telemarketing Sales Rule, 16 C.F.R.
9 Part 310) before signing it. I understand all the provisions of
10 the Stipulated Order. By signing the Stipulated Order I agreed to
11 be bound by those provisions.

12 3. On _____, 20____, I received a copy of the
13 Stipulated Order which was signed by a United States District Judge
14 on _____, 20____. A true and correct copy of the
15 Stipulated Order that I received, including Attachment A (the
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[APPENDIX 1]

Telemarketing Sales Rule), is appended to this affidavit. I reviewed the document and confirmed it was the document I had previously signed.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on _____, 20____, at _____, California.

James M. Schwindt

State of _____, City of _____

Subscribed and sworn to before me this _____ day of _____, 20____.

Notary Public
My Commission Expires: