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MAY 22 2003
CLARENCE MADDUX
CLERK U. S. DIST. CT.
S. D. OF FLA. - MIAMI

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-21754-CV- GRAHAM/GARBER

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ASSOCIATED RECORD DISTRIBUTORS, INC.,
a Florida corporation;

ALFREDO SUSI,
individually and as an officer
or director of the above corporation;

RUSSELL MACARTHUR,
individually and as an officer
or director of the above corporation;

DAVID SIEGEL,
individually and as an officer
or director of the above corporation;

BRIAN MORGENSTERN,
individually and as an officer
or director of the above corporation;

Defendants.

**STIPULATED FINAL JUDGMENT AND ORDER FOR
PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF
AS TO DEFENDANT BRIAN MORGENSTERN**

This matter comes before the Court on stipulation of Plaintiff Federal Trade Commission ("FTC" or "Commission"), and Defendant Brian Morgenstern ("Morgenstern"). On June 12, 2002, the Commission filed a Complaint for Injunctive and Other Equitable Relief, including redress to consumers, pursuant to Sections 5(a), 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 53(b) and 57b, and the FTC's Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business

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pk

Opportunity Ventures” (the “Franchise Rule” or the “Rule”), 16 C.F.R. Part 436, and moved *ex parte* for a Temporary Restraining Order (“TRO”) pursuant to Rule 65 of the Federal Rules of Civil Procedure and S.D. Fla. L.R. 7.1.E. That same day, this Court, having considered the Complaint, memorandum of law, declarations, and other exhibits filed in support of Plaintiff’s motion, issued a TRO including an asset freeze and appointment of a temporary receiver. Now, Plaintiff, the Federal Trade Commission and Defendant Morgenstern offer the following Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendant Morgenstern (the “Final Order”).

Upon the joint motion of the FTC and Morgenstern, it is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and the parties hereto.
2. Venue is proper as to all parties in the Southern District of Florida under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).
3. The activities of Defendant Morgenstern are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The Complaint alleges claims upon which relief may be granted against Defendant Morgenstern under §§ 5(a)(1), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 53(b), and 57b, and under the Franchise Rule.
5. The Federal Trade Commission and Defendant Morgenstern stipulate and agree to this Final Order to settle and resolve all matters in dispute arising from the Complaint to the date of entry of this Final Order.
6. Defendant Morgenstern has waived all rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, *amended by* Pub. L. 104-121, 110 Stat. 847, 863-64 (1996).

7. Defendant Morgenstern acknowledges that he has read the provisions of this Final Order and has agreed to abide by them.

8. Defendant Morgenstern waives all rights to seek appellate review or otherwise challenge or contest the validity of this Final Order.

9. Defendant Morgenstern waives and releases any claim he may have against the FTC and its employees, representatives or agents.

10. Entry of this Final Order is in the public interest.

DEFINITIONS

For the purposes of this Final Order, the following definitions shall apply:

1. "Assets" means any legal or equitable interest in, right to, or claim to, any real and personal property, including, but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, inventory, checks, notes, leaseholds, effects, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located, whether in the United States or abroad;

2. "Business venture" means any written or oral business arrangement, however denominated, whether or not covered by the Franchise Rule, which consists of the payment of any consideration for:

- a. The right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and
- b. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business;

3. "Defendant" means Brian Morgenstern and any person insofar as he or she is acting in the capacity of an agent, servant, employee or attorney of Brian Morgenstern and any person acting in active concert or participation with any of the foregoing who receives actual

notice of this Final Order by personal service or otherwise (Fed. R. Civ. P. 65(d));

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

5. "Person" means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

INJUNCTIVE PROVISIONS

VIOLATIONS OF SECTION 5 OF THE FTC ACT PROHIBITED

I.

IT IS THEREFORE ORDERED that, in connection with the offering for sale or selling of any franchise or other business venture, Defendant is hereby restrained and enjoined from making any material misrepresentation, or assisting others in making any material misrepresentation, either expressly or by implication, including but not limited to, the following:

- A. That purchasers of Defendant's business ventures are likely to earn substantial income;
- B. That Defendant provides purchasers of his business ventures with a specific quantity or quality of product, including, but not limited to, audio cassettes and compact discs of the "hottest-selling" music by today's "most popular" artists, such as Britney Spears and 'N Sync;
- C. That Defendant provides significant assistance in the operation of purchasers' businesses ventures, including but not limited to, claims that Defendant uses demographic research to individually select and provide the music that will sell

well in each purchaser's particular locations;

- D. That references have purchased Defendant's business ventures or will provide reliable descriptions of experiences with the business venture; or
- E. That Defendant has obtained the consent of store owners in the prospective business venture purchaser's geographic area for the placement of display racks.

VIOLATIONS OF THE FRANCHISE RULE PROHIBITED

II.

IT IS FURTHER ORDERED that, Defendant is hereby restrained and enjoined from violating or assisting others to violate any provisions of the Franchise Rule, 16 C.F.R. Part 436, as currently promulgated or as it may hereafter be amended, by, including but not limited to:

- A. Failing to provide a prospective purchaser with a complete and accurate disclosure document as required by the Franchise Rule, 16 C.F.R. § 436.1(a);
- B. Failing to provide a prospective purchaser with an earnings claim document as required by the Franchise Rule, 16 C.F.R. § 436.1(b)-(e);
- C. Failing to disclose, in immediate conjunction with any generally disseminated ("advertised") earnings claim, information required by the Franchise Rule including the number and percentage of prior purchasers known by Defendants to have achieved the same or better results, 16 C.F.R. § 436.1(e)(3)-(4);
- D. Failing to have a reasonable basis for any earnings claim at the time such claim is made, as required by the Franchise Rule, 16 C.F.R. § 436.1(b)-(e);
- E. Failing to disclose, in immediate conjunction with any earnings claim, and in a clear and conspicuous manner, that material which constitutes a reasonable basis for the earnings claim is available to the prospective purchasers;
- F. Failing to provide material which constitutes a reasonable basis for any earnings claim to prospective purchasers, the Commission, or its staff upon reasonable demand; or

- G. Making any claim or representation to prospective purchasers that is contradictory to the information required to be disclosed by Section 436.1 of the Franchise Rule.

MONITORING OF EMPLOYEES & AGENTS

III.

IT IS FURTHER ORDERED that, Defendant, in connection with the advertising, promoting, offering for sale, sale, or distribution of any product, service or Business Venture is permanently enjoined and restrained from:

- A. Failing to take reasonable steps sufficient to monitor and ensure that all Defendant's agents, representatives, employees, or independent contractors comply with Paragraphs I and II of this Order.
- B. Failing to investigate and resolve promptly any consumer complaint or request for refund received by Defendant, his assigns, officers, agents, servants, employees and distributors, and those persons in active concert or participation with them who receive actual notice of this Order, and to notify the consumer of the resolution of the complaint or request and the reason therefore.

REDRESS AND OTHER EQUITABLE RELIEF

IV.

IT IS FURTHER ORDERED that, judgement is entered against Morgenstern in the amount of \$21,807.50. *Provided* however, that this judgement shall be suspended without payment subject to the terms of Paragraph V.

RIGHT TO REOPEN

V.

IT IS FURTHER ORDERED that,

- A. The Commission's agreement to this Final Order is expressly premised upon the financial condition of Morgenstern as represented in his sworn financial

Nov 22, 2002

statement, dated October __, 2002, and provided to the Commission, which includes material information upon which the Commission relied in negotiating and consenting to this Final Order. If, upon motion by the Commission, this Court should find that Morgenstern made a material misrepresentation or omitted material information concerning his financial condition from his sworn financial statement, then the Court shall enter a modified judgment holding Morgenstern liable to the Commission in the amount of \$21,807.50, which Morgenstern and the Commission stipulate is the amount of money earned by Morgenstern from ARD. This amount shall become immediately due and payable by Morgenstern, and interest computed at the rate prescribed under 28 U.S.C. § 1961, as amended, shall immediately begin to accrue on the unpaid balance.

- B. Any funds paid pursuant to this Final Order shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including, but not limited to consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may pay any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the defendants practices as alleged in the complaint. Any funds not used for such equitable relief shall be deposited into the United States Treasury as disgorgement. Morgenstern shall have no right to challenge the Commission's choice of remedies under this Paragraph.
- C. Morgenstern agrees that the facts as alleged in the Complaint filed in this action shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including, but not limited to, a nondischargeability complaint filed in any bankruptcy proceeding.

- D. Any proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the FTC may initiate to enforce this Order.

CUSTOMER LISTS

VI.

IT IS FURTHER ORDERED that, Defendant is permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid money to any of the defendants to this matter for purchase of a business venture prior to entry of this Final Order; *provided* that Defendant may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

RECORD KEEPING

VII.

IT IS FURTHER ORDERED that, for a period of seven (7) years from the date of entry of this Final Order, in connection with any business where Morgenstern is the majority owner of the business or directly or indirectly manages or controls the business, Defendant is hereby restrained and enjoined from failing to create and retain the following records,

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, phone numbers, dollar amounts

paid, quantity of items or services purchased, and description of items or services purchased;

- D. Complaint and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests; and
- E. Copies of sales and customer service scripts, training materials, advertisements, form letter responses, or other marketing or customer service materials.

COMPLIANCE REPORTING

VIII.

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Final Order may be monitored:

- A. For a period of five (5) years from the date of entry of this Final Order, Morgenstern shall notify the Commission of the following:
 - 1. Any changes in Morgenstern's residence, mailing addresses, or telephone numbers, within thirty (30) days of the date of such change;
 - 2. Any changes in Morgenstern's employment status (including self-employment) within thirty (30) days of such change. Such notice shall include the name and address of each business Morgenstern is affiliated with or employed by, a statement of the nature of the business, and a statement of Morgenstern's duties and responsibilities in connection with the business or employment; and
 - 3. Any proposed change in the structure of any business entity owned or controlled by Morgenstern, such as creation, incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, or any other change that may affect compliance obligations arising out of this Final Order, thirty (30) days prior to the effective date of any proposed change.
- B. One hundred eighty (180) days after the date of entry of this Final Order,

Morgenstern shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which he has complied and is complying with this Final Order. This report shall include but not be limited to:

1. Morgenstern's then current residence addresses and telephone numbers;
2. Morgenstern's then current employment, business addresses and telephone numbers, a description of the business activities of each such employer, and Morgenstern's title and responsibilities for each employer;
3. A copy of each acknowledgment of receipt of this Final Order obtained by Morgenstern pursuant to this Final Order;
4. A statement describing the manner in which Morgenstern has complied and is complying with the injunctive provisions of this Final Order, including, but not limited to, the monitoring, record keeping, and compliance portions of this Final Order.

C. Upon written request by a representative of the Commission, Morgenstern shall submit additional written reports (under oath, if requested) and produce documents on fifteen (15) days' notice with respect to any conduct subject to this Final Order.

D. For the purposes of this Final Order, Morgenstern shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Associate Director for Marketing Practices
Federal Trade Commission
600 Pennsylvania Ave, N.W., Room 238
Washington, DC 20580
Re: *FTC v. ARD, Inc. et. al.*

E. For the purposes of this Paragraph, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" include any individual or entity for whom Morgenstern performs services as an

employee, consultant, or independent contractor.

- F. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate with Morgenstern at:

3000 South Ocean Blvd. Apt. 10B
Hollywood, FL 330219-2809

AUTHORITY TO MONITOR COMPLIANCE

IX.

IT IS FURTHER ORDERED that, the Commission is authorized to monitor Defendant's compliance with this Final Order by all lawful means, including but not limited to the following:

- A. The Commission is authorized, without further leave of the Court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating Morgenstern's compliance with any provision of this Final Order;
- B. The Commission is authorized to use representatives posing as consumers and suppliers to Morgenstern or his employees, or any other entity managed or controlled in whole or in part by Morgenstern, without the necessity of identification or prior notice;
- C. Nothing in this Final Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to investigate whether Morgenstern has violated any provision of this Final Order, Section 5 of the FTC Act, 15 U.S.C. § 45 or the Franchise Rule; and
- D. For purposes of the compliance monitoring authorized by this Section, the Commission, and its agents, are authorized to communicate directly with

Morgenstern and any of his employees, or any other entity managed or controlled in whole or in part by Morgenstern.

ACCESS TO BUSINESS PREMISES

X.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Final Order, for the purpose of further determining compliance with this Final Order, Morgenstern shall permit representatives of the Commission, within three (3) business days of receipt of written notice from the Commission:

- A. Access during normal business hours to any office, or facility storing documents, of any business where Morgenstern owns the majority of the business or directly or indirectly manages or controls the business. In providing such access, Morgenstern shall permit representatives of the Commission to inspect and copy all documents relevant to any matter contained in this Final Order; and shall permit Commission representatives to remove documents relevant to any matter contained in this Final Order, for a period not to exceed five (5) business days, so that the documents may be inspected, inventoried, and copied; and
- B. To interview the officers, directors, and employees, including all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Subparagraph A of this Paragraph applies, concerning matters relating to compliance with the terms of this Final Order. The person interviewed may have counsel present.

Provided that, upon application of the Commission and for good cause shown, the Court may enter an *ex parte* order granting immediate access to Morgenstern's business premises for the purposes of inspecting and copying all documents relevant to any matter contained in this Final Order.

ACKNOWLEDGMENT OF RECEIPT OF FINAL ORDER

XI.

IT IS FURTHER ORDERED that, within five (5) business days after receipt by Morgenstern of this Final Order as entered by the Court, Morgenstern shall submit to the Commission at the address provided in Subparagraph D of Paragraph VIII, above, a truthful sworn statement, in the form shown in *Appendix A*, that shall acknowledge receipt of this Final Order.

DISTRIBUTION OF FINAL ORDER

XII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Final Order, Morgenstern shall:

- A. Provide a copy of this Final Order to, and obtain a signed and dated acknowledgment of receipt of same from: each officer or director, each individual serving in a management capacity, all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, immediately upon employing or retaining any such persons, for any business where Morgenstern owns the majority of the business or directly or indirectly manages or controls the business; and
- B. Maintain, for a period of seven (7) years after creation and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Final Order, as required in Subparagraph A of this Paragraph.

COSTS

XIII.

IT IS FURTHER ORDERED that each party shall bear its own costs and attorney's fees incurred in connection with this action.

DUTY TO COOPERATE

XIV.

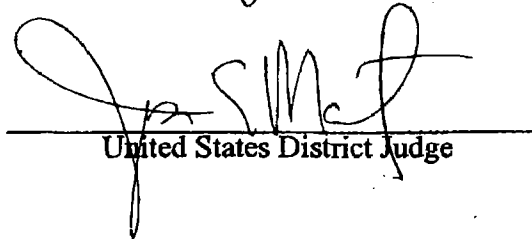
IT IS FURTHER ORDERED that Morgenstern shall cooperate fully, truthfully and completely with Plaintiff, the Federal Trade Commission, in any continuing litigation of this matter. This cooperation includes, but is not limited to, maintaining all documents relevant to this litigation and assisting in the preparation of testimony and testifying fully, truthfully and completely at any trial in this matter, if called upon to do so.

RETENTION OF JURISDICTION

XV.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the purpose of enabling the parties to apply to the Court at any time for such further orders and directives as may be necessary or appropriate for the interpretation or modification of this Final Order, for the enforcement of compliance therewith, or for the punishment of violations thereof.

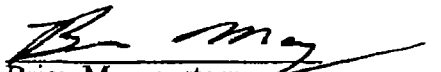
DONE AND ORDERED, this 22 day of May, 2003, in
Miami, Florida.


United States District Judge

FOR DEFENDANT

Dec. 24, 2002

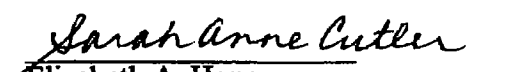
DATED: October, 2002


Brian Morgenstern
3000 South Ocean Blvd. Apt. 10B
Hollywood, FL 330219-2809

FOR PLAINTIFF

April 10, 2003

DATED: October, 2002


Elizabeth A. Hone
Sarah Anne Cutler
Counsel for Federal Trade Commission
600 Pennsylvania Ave, NW #238
Washington, D.C. 20580
202-326-3207/3367
202-326-3395 (fax)
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scutler@ftc.gov

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 02-21754-CIV-GRAHAM

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ASSOCIATED RECORD DISTRIBUTORS, INC.,
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individually and as an officer
or director of the above corporation;

RUSSELL MACARTHUR,
individually and as an officer
or director of the above corporation;

DAVID SIEGEL,
individually and as an officer
or director of the above corporation;

BRIAN MORGENSTERN,
individually and as an officer
or director of the above corporation;

Defendants.

AFFIDAVIT OF BRIAN MORGENSTERN

Brian Morgenstern, being duly sworn, hereby states and affirms as follows:

1. My name is Brian Morgenstern. I am one of the individual defendants in the above-captioned civil action. I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.

2. My current business address is _____ . My current business telephone number is _____ . My current residential address is _____ . My current residential telephone number is _____ .

3. On _____, _____, 2002, I received a copy of the Stipulated Judgment And Order For Permanent Injunction And Other Equitable Relief, which was signed and entered by the Court on _____, 2002. A true and correct copy of the Final Order that I received is appended to this Affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on _____, 2002, at _____.

Brian Morgenstern

State of _____, City of _____

Subscribed and sworn to before me this _____ day of _____, 2002.

Notary Public

My Commission Expires: _____

CERTIFICATE OF SERVICE

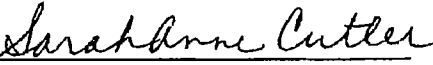
I hereby certify that on this 10th day of April 2003, copies of the attached Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendant Brian Morgenstern are being served by first class mail on the following:

Carl Schmitt, Esq.
1666 Kennedy Causeway, Suite 705
North Bay Village, Fl 33141
Counsel for ARD, Susi and MacArthur

Brian Morgenstern
3000 South Ocean Blvd. Apt. 10B
Hollywood, FL 33019-2809

David Siegel
1600 Polk St, Rear Apartment
Hollywood, FL 33020

Gaye Huxoll
Shook, Hardy & Bacon
Miami Center, Suite 2400
201 South Biscayne Blvd.
Miami, FL 33131-4332
Counsel for the Receiver


Sarah Anne L. Cutler