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U.S. DISTRICT COURT

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27 JUN 03 AM 9:51

DISTRICT OF UTAH

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UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, NORTHERN DIVISION

UNITED STATES OF AMERICA, )  
)  
PLAINTIFF, )  
)  
v. )  
)  
TURNKEY VENDING, INC., a Utah )  
corporation, and )  
MICHAEL S. BURNETT, individually and )  
as an officer of the corporation, )  
and )  
JEFFREY L. MARSH, individually and )  
as an officer of the corporation, )  
)  
DEFENDANTS. )

Case No.: 1:02-cv-75-ST

STIPULATED JUDGMENT  
AND ORDER FOR  
PERMANENT INJUNCTION

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Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or the "Commission"), has commenced this action by filing the Complaint herein, and Defendants have been served with the summons and the complaint. The parties, represented by the attorneys whose names appear hereafter, have agreed to settlement of this action without adjudication of any issue of fact or law, and without the Defendants admitting liability for any of the violations alleged in the Complaint.

THEREFORE, on the joint motion of the parties, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

**FINDINGS**

1. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b.

2. Venue is proper as to all parties in the District of Utah.

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

4. The Complaint states a claim upon which relief may be granted against the Defendants, under Sections 5(a), 5(m)(1)(A), 9, 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 49, 53(b), and 57b.

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5. Defendants have entered into this Stipulated Judgment and Order ("Order") freely and without coercion. Defendants further acknowledge that they have read the provisions of this Order and are prepared to abide by them.

6. Plaintiff and Defendants hereby waive all rights to appeal or otherwise challenge or contest the validity of this Order.

7. Defendants have agreed that this Order does not entitle Defendants to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and Defendants further waive any rights to attorneys' fees that may arise under said provision of law.

8. Entry of this Order is in the public interest.

#### **DEFINITIONS**

For the purpose of this Order, the following definitions shall apply:

1. "Asset" means any legal or equitable interest in, or right or claim to, any real and personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

**STIPULATED JUDGMENT AND ORDER**

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2. "Business Venture" means any written or oral business arrangement, however denominated, whether or not covered by the Franchise Rule, in which a participant or purchaser:

a. pays consideration for 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. receives the promise of, or actual, advice, instruction, or assistance (including, but not limited to, referrals to any persons providing or promising location services), in connection with: (1) the establishment, maintenance, or operation of a new business, or (2) the entry by an existing business into a new line or type of business.

3. "Defendants" means the Corporate Defendant and Individual Defendants. The "Corporate Defendant" is Turnkey Vending, Inc., a Utah corporation. The "Individual Defendants" are Michael S. Burnett and Jeffrey L. Marsh, individually and as officers of the Corporate Defendant.

4. The "Franchise Rule" or "Rule" means the FTC Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions concerning Franchising and Business Opportunity Ventures," 16 C.F.R. Part 436.

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5. "Franchise" and "Franchisor" are defined as those terms are defined in Sections 436.2(a) and (c) of the Franchise Rule, 16 C.F.R. § 436.2(a) and (c), and include "business opportunity ventures" as defined in Sections 436.2(a)(1)(ii) and (2) of the Rule, and discussed in the FTC's Final Interpretive Guide for the Franchise Rule, 44 Fed. Reg. 49966-68 (August 24, 1979). The term "franchise" in this Order shall also encompass any successor definition of "franchise," "business opportunity" and "business opportunity venture" in any future trade regulation rule or rules that may be promulgated by the Commission to modify or supersede the Franchise Rule, in whole or part, from the date any such rule takes effect.

6. "Franchise broker" is defined as that term is defined in Section 436.2(j) of the Franchise Rule, 16 C.F.R. § 436.2(j). The term "Franchise broker" in this Order shall also encompass any other entity through which the franchisor sells franchises, including, but not limited to, subfranchisors, master franchisees, or regional franchisees.

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

8. "Representatives" means the Defendants' successors, assigns, officers, agents, servants, employees and those persons

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in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

9. "Telemarketing" means the advertising, offering for sale, or sale of any good or service to any person by means of telephone sales presentations, either exclusively or in conjunction with the use of other advertising.

10. "UFOC format" is defined as the Uniform Franchise Offering Circular disclosure format which has been adopted by the North American Securities Administrators' Association and is now accepted by the Commission for use in lieu of the Franchise Rule's disclosure format.

#### **ORDER**

##### **I. COMPLIANCE WITH FRANCHISE RULE**

IT IS ORDERED, ADJUDGED AND DECREED that, in connection with the advertising, telemarketing, offering for sale, licensing, contracting, sale or other promotion, in or affecting commerce, of a franchise, the Defendants and their Representatives are hereby permanently restrained and enjoined from violating, or assisting others to violate, any provision of the Franchise Rule as promulgated, or as it may hereinafter be amended, including, but not limited to:

A. Failing to provide any prospective franchisee with a complete and accurate basic disclosure document containing all the information in the form required by Sections 436.1(a)(1)-(24)

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of the Franchise Rule, in the manner and within the time frame prescribed by the Rule;

B. Failing to provide any prospective franchisee with an earnings claim document as required by Sections 436.1(b)-(e) of the Franchise Rule, in the manner and within the time frame prescribed by the Rule;

C. Failing to include in any advertisement that states or suggests a specific level of sales, income or gross or net profits that appears in a newspaper or other medium of general dissemination, including the Internet, the disclosures required by Section 436.1(e) of the Franchise Rule, including a clear and conspicuous disclosure of the number and percentage of prior purchasers known to have earned or made the amount claimed;

D. Making any earnings claim or projection without having a reasonable basis for the claim or projection at the time such claim or projection is made, as required by Sections 436.1(b)-(e) of the Franchise Rule; and

E. Engaging in any other act or practice prohibited by the Franchise Rule, 16 C.F.R. Part 436, or failing to fulfill any obligation imposed by the Rule.

*Provided, however,* that if the Commission promulgates a trade regulation rule or rules that modify or supersede the Franchise Rule, in whole or part, Defendants shall comply fully and completely with all applicable requirements thereof on and after

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the effective date of any such rule; and *provided, further,* that Defendants may choose to comply with the disclosure requirements of the Franchise Rule now in effect by fully and completely complying with the disclosure requirements set forth in the UFOC format for so long as the current Rule remains in force.

## II. PROHIBITED REPRESENTATIONS

IT IS FURTHER ORDERED that in connection with the advertising, telemarketing, offering for sale, licensing, contracting, sale or other promotion, in or affecting commerce, of any Franchise, Business Venture, or income-generating product or service, the Defendants and their Representatives are hereby permanently restrained and enjoined from making, or assisting in the making of, any statement or representation of material fact that is fraudulent, false, or misleading, whether directly or by implication, orally or in writing, including, but not limited to, any or all of the following:

A. The income, profit, or sales volume that a purchaser is likely to achieve;

B. The income, profit or sales volume actually achieved by prior purchasers;

C. The length of time that it is likely to take a purchaser to recoup the entire purchase price or investment;

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D. The independence or authenticity of any third-party references, including persons represented to be prior purchasers, that are provided to potential purchasers;

E. The amount of competition within, or a purchaser's territorial rights to, any geographic territory;

F. The availability or existence of profitable locations in a purchaser's geographic area; and

G. The terms and conditions of any assurances, refunds or guarantees of profitability that relate to any location service or company to which a Defendant refers a purchaser.

### **III. TRANSFER OF CUSTOMER LISTS**

IT IS FURTHER ORDERED that the Defendants and their Representatives are hereby 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, in connection with the advertising, promotion, telemarketing, offering for sale or sale of any Franchise, Business Venture or income-generating product or service, paid any money to any Defendant at any time prior to entry of this Order; *provided, however,* that Defendants may disclose such identifying information to a law enforcement agency, or as required by any law, regulation (including the

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limited disclosures required by the Franchise Rule) or court order.

#### IV. CIVIL PENALTY

IT IS FURTHER ORDERED that judgment in the amount of Twenty-two Thousand Dollars (\$22,000.00) is hereby entered against the Defendants, jointly and severally, as a civil penalty, pursuant to Section 5(m) (1) (A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m) (1) (A).

A. Prior to or concurrently with their execution of this Order, Defendants shall turn over the full amount of the civil penalty to their attorney, who shall hold the entire sum in escrow. Within five (5) days of receipt of notice of the entry of this Order, Defendants' attorney shall transfer the escrowed civil penalty payment in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to the Director, Office of Consumer Litigation, Civil Division, P.O. Box 386, Washington, D.C. 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3105.

B. In the event of default on the payment required to be made by this Paragraph, the entire unpaid civil penalty, together with interest computed under 28 U.S.C. § 1961 -- accrued from the date of default until the date of payment -- shall be immediately

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due and payable. Defendants agree that, in such event, the facts as alleged in the Complaint filed in this action shall be taken as true in any subsequent litigation filed by Plaintiff or the Commission to enforce their rights pursuant to this Order, including but not limited to a nondischargeability complaint in any subsequent bankruptcy proceeding.

C. Defendants shall cooperate fully with Plaintiff and the Commission and their agents in all attempts to collect the amount due pursuant to this Paragraph if any of the Defendants fails to pay fully the amount due at the time specified herein. In such an event, Defendants agree to provide Plaintiff and the Commission with their federal and state tax returns for the preceding two years, and to complete new standard-form financial disclosure forms fully and accurately within ten (10) business days of receiving a request from Plaintiff or the Commission to do so. Defendants further authorize Plaintiff and the Commission to verify all information provided on their financial disclosure forms with all appropriate third parties, including but not limited to financial institutions.

D. In accordance with 31 U.S.C. § 7701, the Defendants are hereby required, unless they have done so already, to furnish to Plaintiff and the FTC their respective taxpayer identifying numbers (social security numbers or employer identification numbers) which shall be used for purposes of collecting and

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reporting on any delinquent amount arising out of the Defendants' relationship with the government.

E. The Individual Defendants further agree, if they have not done so already, to provide the FTC with clear, legible and full-size photocopies of all valid driver's licenses they possess, which will be used for collection, reporting and compliance purposes.

#### **V. ACCURACY OF FINANCIAL INFORMATION**

IT IS FURTHER ORDERED that Plaintiff's and the Commission's agreement to and the Court's approval of this Order is expressly premised upon the truthfulness, accuracy, and completeness of the financial statements and information provided by each of the Defendants and their counsel to the Plaintiff; namely, the OBD-500 "Financial Statement of Debtor" form provided by Defendant Michael S. Burnett dated February 27, 2003; the OBD-500 "Financial Statement of Debtor" form provided by Defendant Jeffrey L. Marsh dated February 27, 2003; and the OBD-500C "Financial Statement of Corporate Debtor" form signed by Jeffrey L. Marsh on February 27, 2003. If, upon motion by the Plaintiff, this Court finds that any of the Defendants' financial statements failed to disclose any Asset the value of which exceeds \$1,000, or materially misrepresented the value of any Asset, or made any other material misrepresentations in or omissions of Assets, the Plaintiff may request that this Order be

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reopened for the purpose of requiring restitution or additional civil penalties from each Defendant who made such a misrepresentation or omission; *provided however*, that in all other respects this Order shall remain in full force and effect unless otherwise ordered by this Court; and *provided further*, that proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies available by law. Solely for the purposes of reopening or enforcing this Paragraph, Defendants waive any right to contest any of the allegations set forth in the Complaint filed in this matter.

**VI. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

IT IS FURTHER ORDERED that each Defendant, within five (5) business days of receipt of this Order as entered by the Court, shall submit to Plaintiff and the Commission a truthful sworn statement acknowledging receipt of this Order.

**VII. DISTRIBUTION OF ORDER BY DEFENDANTS**

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

A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from, each officer and 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

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employees, consultants, independent contractors or otherwise, within five (5) business days after receipt of this Order, and thereafter immediately upon employing any such person, for any business that Defendants directly or indirectly manage, control, or have a majority ownership interest in, that is engaged in the sale or distribution of any Franchise, Business Venture, or income-generating product or service, or assisting others engaged in these activities; and

B. Maintain for a period of three (3) years after creation, and upon reasonable notice make available to representatives of Plaintiff or the Commission, the original signed and dated acknowledgments of receipt of copies of this Order, as required in Subsection A of this Paragraph.

#### **VIII. COMPLIANCE REPORTING BY DEFENDANTS**

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

A. For a period of four (4) years after the date of entry of this Order, the Defendants shall notify the FTC in writing of the following:

1. Any changes in the residence, mailing addresses and telephone numbers of any Individual Defendant, within ten (10) days of the date of such change;

2. Any changes in the employment status (including self-employment) of any Individual Defendant, within ten

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(10) days of such change. Such notice shall include the name and address of each business that the Individual Defendant is affiliated with, employed by, or performs services for, a statement of the nature of the business, and a statement of the Individual Defendant's duties and responsibilities in connection with the business;

3. Any proposed changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided that*, with respect to any proposed change in the corporation about which the Defendant learns less than thirty (30) days prior to the date such action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Order, each Defendant shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are

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complying with this Order. This report shall include, but not be limited to:

1. Any changes required to be reported pursuant to subparagraph (A) above;

2. A copy of each acknowledgment of receipt of this Order obtained by Defendant pursuant to this Order.

C. For the purposes of this Order, Defendant 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: United States v. Turnkey Vending et al., Civ.  
No. 1:02CV00075

D. For the purposes of this Order, Defendants shall, unless otherwise directed by a representative of Plaintiff, identify all written notifications to Plaintiff as provided in reference to DJ# 102-3105, and mail them to:

Director, Office of Consumer Litigation  
U.S. Department of Justice - Civil Division  
P.O. Box 386  
Washington, D.C. 20044

E. For purposes of the compliance reporting required by this Order, representatives of Plaintiff and the Commission are authorized to communicate directly with Defendants.

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**IX. MONITORING COMPLIANCE OF SALES PERSONNEL**

IT IS FURTHER ORDERED that, in connection with any business that any Defendant directly or indirectly manages, controls or has a majority ownership interest in, that is engaged in the sale or distribution of any Franchise, Business Venture, or income-generating product or service, or assisting others engaged in these activities, Defendants and their Representatives are hereby permanently restrained and enjoined from:

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

1. Listening to the oral representations made by persons engaged in sales or other customer service functions;
2. Establishing a procedure for receiving and responding to consumer complaints; and
3. Ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved;

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B. Failing promptly to investigate fully any consumer complaint received by any business to which this Paragraph applies; and

C. Failing to take corrective action with respect to any sales person whom any Defendant or Representative determines is not complying with this Order, which may include training, disciplining, and/or terminating such sales person; *Provided, however,* that this Paragraph does not authorize or require a Defendant to take any action that violates any federal, state, or local law.

#### **X. RECORD-KEEPING PROVISIONS**

IT IS FURTHER ORDERED that, for a period of four (4) years from the date of entry of this Order, in connection with any business that any Defendant directly or indirectly manages, controls or has a majority ownership interest in, that is engaged in the sale or distribution of any Franchise, Business Venture, or income-generating product or service, or assisting others engaged in these activities, Defendants and their agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create, and thereafter to maintain for a period of three (3)

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years following the date of their creation, unless otherwise specified:

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, telephone number and social security 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; *provided, however,* that the businesses subject to this requirement shall retain such records during the employment of any person, and for a period of two (2) years after the date of their termination;

C. Customer files containing the name, address, telephone number, dollar amounts paid, quantity of goods or services purchased, and description of goods or services purchased, for all consumers to whom the business has sold, invoiced or shipped any Franchise, Business Venture or income-generating product or service;

D. Records that reflect, for every written or oral consumer complaint or refund request received by any of the Defendants or their Representatives, whether directly or indirectly or through any third party: (1) the customer's name,

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address, telephone number; (2) the dollar amount paid by the consumer; (3) the written complaint or refund request, if any; (4) the basis of the complaint or refund request, including the name of any salesperson complained about; (5) the nature and result of any investigation conducted concerning the complaint or refund request; (6) each response and the date of the response to the complaint or refund request; and (7) any final resolution of the complaint or refund request, and the date of the resolution; and (8) in the event of a denial of a refund request, the reason for the denial; and

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials utilized, which shall be retained for three (3) years after the last date of their dissemination or use.

#### **XI. COMPLIANCE MONITORING**

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within twenty (20) days of receipt of written notice from a representative of the Commission or Plaintiff, each Defendant shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such Defendant's

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possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission and Plaintiff are authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of court, using the procedures proscribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

2. posing as consumers and suppliers to: one or more of the Defendants, a Defendant's employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice;

*Provided that nothing in this 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 obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).*

C. Each Defendant shall permit representatives of the Commission or Plaintiff to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any

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conduct subject to this Order. The person interviewed may have counsel present.

**XII. FEES AND COSTS**

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

**XIII. RETENTION OF JURISDICTION**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the purposes of construction, modification, and enforcement of this Order.

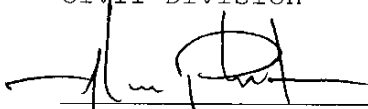
**XIV. COMPLETE SETTLEMENT**

The parties, by their respective counsel, hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing Order shall constitute a full, complete and final settlement of this action.

FOR THE PLAINTIFF:

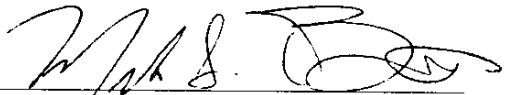

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FOR THE DEFENDANTS:

  
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SO ORDERED this 25<sup>th</sup> day of June, 2003.

  
HON. TED STEWART  
United States District Judge

**STIPULATED JUDGMENT AND ORDER**

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kam

United States District Court  
for the  
District of Utah  
June 27, 2003

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:02-cv-00075

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Jeannette F. Swent, Esq.  
US ATTORNEY'S OFFICE  
, 84111  
EMAIL

Alan Phelps, Esq.  
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