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CENTRAL DIST. OF CALIF.
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12 FEDERAL TRADE COMMISSION

13
14 **UNITED STATES DISTRICT COURT**
FOR THE CENTRAL DISTRICT OF CALIFORNIA
15 **WESTERN DIVISION**

16 FEDERAL TRADE COMMISSION,)
17 Plaintiff,)
18 v.)
19 AMERICAN BARTENDING INSTITUTE, INC.,)
a California corporation,)
20 dba American Bartender's Institute,)
Shopping for Cash, and Consumer)
21 Response Group,)
22 INTUITIVE LOGIC, INC., a California)
corporation, dba American)
23 Bartender's Institute, Shopping)
for Cash, and Consumer Response)
24 Group,)
25 STEVAN P. TODOROVIC, individually)
and as an officer of the)
26 corporations, and)
27 MICHAEL G. HARVEY, individually)
and dba Harvey Computer)
28 Solutions, Secret Shoppers Online)

Civ. No.

CV05-5261 SVW

PLA

**COMPLAINT FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF**

1 and Secret Shoppers Resource,)
2 Defendants.)
3 _____)

4 Plaintiff, the Federal Trade Commission ("FTC" or
5 "Commission"), for its complaint alleges:

6 1. The FTC brings this action under Sections 13(b) and 19
7 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.
8 §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and
9 Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-
10 6108, to secure preliminary and permanent injunctive relief,
11 rescission of contracts and restitution, disgorgement of ill-
12 gotten gains, and other equitable relief against American
13 Bartending Institute, Inc., Intuitive Logic, Inc., Stevan P.
14 Todorovic, and Michael G. Harvey (collectively, "Defendants") for
15 Defendants' deceptive acts or practices in violation of Section
16 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Trade
17 Regulation Rule entitled "Telemarketing Sales Rule" ("TSR"), 16
18 C.F.R. Part 310.

19 **JURISDICTION AND VENUE**

20 2. This Court has jurisdiction over this matter pursuant to
21 28 U.S.C. §§ 1331, 1337(a), and 1345, as well as 15 U.S.C.
22 §§ 45(a), 53(b), 57b, and 6105(b).

23 3. Venue in the United States District Court for the
24 Central District of California is proper under 28 U.S.C. § 1391(b)
25 and (c), as well as under 15 U.S.C. § 53(b).

26 **THE PARTIES**

27 4. Plaintiff, the Federal Trade Commission, is an
28 independent agency of the United States Government created by

1 statute. 15 U.S.C. §§ 41-58, as amended. The Commission enforces
2 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits
3 unfair or deceptive acts or practices in or affecting commerce.
4 The Commission also enforces the TSR, 16 C.F.R. Part 310, which
5 prohibits deceptive or abusive telemarketing acts or practices.
6 The Commission is authorized to initiate federal district court
7 proceedings, by its own attorneys, to enjoin violations of the FTC
8 Act and the TSR and to secure such equitable relief as may be
9 appropriate in each case, including restitution for injured
10 consumers. 15 U.S.C. § 53(b), 57b, 6102(c), and 6105(b).

11 5. Defendants American Bartending Institute, Inc. and
12 Intuitive Logic, Inc., both dba American Bartender's Institute,
13 Shopping for Cash, and Consumer Response Group, are California
14 corporations with their principal place of business at 25 West
15 Anapamu Street, Santa Barbara, California. American Bartending
16 Institute and Intuitive Logic transact, or have transacted,
17 business in the Central District of California.

18 6. Defendant Stevan P. Todorovic is an officer of American
19 Bartending Institute and Intuitive Logic. At all times material
20 to this complaint, acting alone or in concert with others, he has
21 formulated, directed, controlled, or participated in the acts and
22 practices of American Bartending Institute and Intuitive Logic,
23 including the acts and practices set forth in this complaint. He
24 resides and transacts, or has transacted, business in the Central
25 District of California.

26 7. Defendant Michael G. Harvey does business as Harvey
27 Computer Solutions. He also has done business as Secret Shoppers
28 Online and Secret Shoppers Resource. At all times material to

1 this complaint, acting alone or in concert with others, he has
2 formulated, directed, controlled, or participated in the acts and
3 practices set forth herein. He resides and transacts, or has
4 transacted, business in the Central District of California.

5 **COMMERCE**

6 8. At all times relevant to this complaint, Defendants have
7 maintained a substantial course of trade in or affecting commerce,
8 as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C.
9 § 44.

10 **DEFENDANTS' BUSINESS PRACTICES**

11 **Bartending Program**

12 9. From at least October 2001 to July 2004, Defendants,
13 doing business as American Bartending Institute and American
14 Bartender's Institute (collectively, "ABI"), offered a purported
15 training and job placement service for bartenders. As part of
16 this program, Defendants placed classified advertisements in media
17 throughout the United States, inviting those interested in
18 bartending positions to call Defendants' toll-free telephone
19 number for further information.

20 10. Defendants generally placed their advertisements in the
21 "Help Wanted" sections of local newspapers, and the advertisements
22 appeared to be "help wanted" ads for actual bartending positions.
23 A typical ad stated, "BARTENDER TRAINEES NEEDED. \$250 a day
24 potential. Local Positions. 800-293-3984 ext 3369." In most
25 instances, consumers who responded to the ads believed they were
26 calling either a job placement service or local bars that had
27 bartending positions available.

28 11. Consumers who called the toll-free telephone number

1 listed in the advertisements were connected to one of Defendants'
2 telemarketers, who began by asking consumers if they were calling
3 about the bartending positions that needed to be filled. When
4 consumers responded that they were, Defendants' telemarketers then
5 asked consumers for their zip codes. Upon providing their zip
6 codes, consumers were told that a specific number of bartending
7 positions were then available in the consumer's local area.
8 Defendants' telemarketers told consumers, expressly or by
9 implication, that a list of local available bartending positions
10 would be provided, but that first the consumer would have to
11 become certified by ABI. Defendants' telemarketers made it appear
12 that certification by ABI was required before consumers could be
13 considered for any of the available positions.

14 12. In numerous instances, Defendants expressly or impliedly
15 guaranteed that consumers would obtain bartending jobs after being
16 certified by ABI. Defendants advised consumers to show their ABI
17 certification to potential employers and to say that they were
18 referred by ABI.

19 13. Consumers who agreed to purchase ABI's bartending
20 program subsequently received in the mail a bound publication
21 entitled "Guide to Professional Bartending," along with a
22 "Certification Test" comprised of 70 questions. The test
23 indicated that ABI would "certify" any consumer who answered at
24 least 49 questions correctly on this open book test.

25 14. Once consumers were certified by ABI, they were supposed
26 to receive a list of bars in their area that were seeking to hire
27 ABI certified bartenders. Unfortunately, the list of bars that
28 ABI provided was no more valuable to consumers than the listing of

1 bars that is readily available in consumers' local Yellow Pages.
2 The bars on ABI's list had no relationship with ABI, often had
3 never heard of ABI, and in many instances were not even hiring
4 bartenders. Even if a bar on the list may have had positions
5 available, the fact that a consumer had been certified as a
6 bartender by ABI meant nothing to the prospective employer.

7 **Mystery Shopping Program**

8 15. In addition to their bartending program, since at least
9 June 2003, Defendants, doing business as Shopping for Cash, Secret
10 Shoppers Online, Secret Shoppers Resource, and Consumer Response
11 Group, also have offered a purported training and job placement
12 service for mystery shoppers. As part of this program, Defendants
13 placed classified advertisements in media throughout the United
14 States, inviting consumers to call a toll-free telephone number
15 for further information on becoming a mystery shopper.

16 16. Defendants generally placed their mystery shopping
17 advertisements in the "Help Wanted" sections of local newspapers,
18 and the advertisements appeared to be "help wanted" ads for actual
19 mystery shopping positions. A typical ad stated: "MYSTERY
20 SHOPPERS NEEDED! National businesses need shoppers to evaluate
21 products & services. Get paid to shop! (email req'd) 1-800-706-
22 5507 ext. 9934." In most instances, consumers who responded to
23 the ad believed they were calling a company that actually was
24 offering employment for mystery shoppers.

25 17. Consumers who called the toll-free telephone number were
26 connected to one of Defendants' telemarketers, who began by asking
27 consumers if they were calling about starting work as a mystery
28 shopper. When consumers responded that they were, Defendants'

1 telemarketers then asked consumers for their zip codes. Upon
2 providing their zip codes, consumers were told that a specific
3 number of stores and businesses in the consumer's local area were
4 looking for mystery shoppers. Defendants' telemarketers told
5 consumers that a list of local available mystery shopping
6 assignments would be provided, but that first the consumer would
7 have to become certified as a mystery shopper. Defendants'
8 telemarketers made it appear that certification was required
9 before consumers could be considered for any of the mystery
10 shopping assignments.

11 18. Defendants' telemarketers claimed that consumers could
12 earn up to \$20 or \$30 per assignment, or up to \$50,000 per year,
13 as a mystery shopper. In numerous instances, Defendants expressly
14 or impliedly guaranteed that consumers would obtain mystery
15 shopping assignments after being certified by Defendants.

16 19. Some consumers who agreed to purchase Defendants'
17 mystery shopping program subsequently received in the mail a bound
18 publication entitled "Mystery Shopping 101 Course," along with a
19 "Certification Test" comprised of 50 questions. Other consumers
20 obtained access to these materials on Defendants' website. The
21 "Certification Test" indicated that Defendants would "certify" any
22 consumer who answered at least 35 questions correctly on this open
23 book test.

24 20. Once consumers were certified by Defendants, they were
25 supposed to receive a list of available mystery shopping
26 assignments. Unfortunately, Defendants did not provide its
27 customers with actual mystery shopping assignments. Defendants
28 instead provided such customers with a list of companies that may

1 or may not be looking for mystery shoppers. Defendants'
2 certification meant nothing to those companies.

3 **Defendants' Unauthorized Billing Practices**

4 21. In the course of advertising and telemarketing their
5 bartending and mystery shopping programs, Defendants'
6 telemarketers sometimes told consumers that Defendants needed
7 consumers' credit card or checking account information for a
8 "credit check," "registration," or for "account" purposes only.
9 Consumers understood this to mean that they would not be charged
10 unless they later authorized a charge to their credit card or a
11 debit to their checking account. In other instances, consumers
12 were told that they would not be charged until after the
13 expiration of a thirty day trial period. In either case, however,
14 Defendants often proceeded to charge consumers' accounts right
15 away.

16 22. Defendants' telemarketers also employed several tactics
17 to attempt to confuse consumers about how much they would be
18 charged for Defendants' bartending and mystery shopping programs.
19 In the initial sales call, for example, Defendants' telemarketers
20 first indicated that the cost of the bartending program was
21 \$79.00. This was the only price for the program that defendants'
22 telemarketers had quoted at the time they asked for consumers'
23 billing information. At the end of the sales call, however, after
24 the billing information had been provided, consumers were told
25 that their accounts would be charged \$98.90. The higher cost
26 allegedly was due to a shipping and handling charge of \$19.90.
27 Some consumers complained that they were never told of this
28 additional shipping and handling charge in the initial sales call.

1 23. Similarly, Defendants' telemarketers initially indicated
2 that the cost of the mystery shopping program was either \$49.00 or
3 \$59.00. This was the only price for the program that defendants'
4 telemarketers had quoted at the time they asked for consumers'
5 billing information. At the end of the sales call, however, after
6 the billing information had been provided, consumers were told
7 that their accounts would be charged either \$58.90 or \$68.90. The
8 higher cost allegedly was due to a "registration fee" or a
9 shipping and handling charge. Some consumers complained that they
10 were never told of this additional charge in the initial sales
11 call.

12 24. One month from the date of the initial sales call,
13 moreover, Defendants often charged consumers' credit cards or
14 checking accounts an additional monthly charge of \$9.95 or \$4.95,
15 allegedly for additional training or for access to Defendants' job
16 databases. In some instances, consumers were not told of these
17 additional monthly charges at the time of their purchase. In
18 other instances, defendants did not provide consumers with the at-
19 home course materials or the certification materials in time for
20 consumers to avoid incurring the additional monthly charge.

21 **Defendants' Deceptive Refund Practices**

22 25. Defendants' telemarketers also misrepresented the
23 bartending and mystery shopping programs as low-risk purchases by
24 indicating that consumers would receive the materials on a thirty
25 day trial basis and that they would have thirty days to review and
26 return the materials for a full refund. Yet Defendants later
27 relied on conditions that were not clearly and conspicuously
28 disclosed at the time of the order to deny consumers requested

1 refunds.

2 26. For example, consumers were required to return
3 Defendants' materials, along with a completed refund request,
4 within thirty days of their order, not within thirty days of
5 receiving the materials in the mail from Defendants. The returned
6 materials also had to be received by Defendants within the thirty
7 day period before a refund would be issued. Defendants sometimes
8 delayed sending consumers the initial course materials that
9 included the refund request form, thereby minimizing the
10 possibility that a consumer would be able to meet Defendants'
11 thirty-day deadline.

12 27. Defendants also required consumers to fill out the
13 refund request form in order to obtain a refund, but that
14 requirement often was not clearly and conspicuously disclosed to
15 consumers during the sales call. The refund form was required
16 even if the program was accessed by consumers only on Defendants'
17 website. In that situation, consumers were required to call
18 Defendants to request that a refund form be mailed to them and
19 then to return the completed form to Defendants within thirty
20 days. Defendants generally refused to issue refunds unless
21 consumers completed the refund form, even if consumers had
22 returned Defendants' materials without opening them.

23 28. Defendants also refused to issue refunds to those
24 consumers who had taken and passed Defendants' bartending or
25 mystery shopping certification test. Defendants told such
26 consumers that they had paid to become certified as a bartender or
27 mystery shopper and that they therefore had received what they had
28 paid for. Yet because Defendants represented to consumers during

1 the initial sales call that they were required to pass Defendants'
2 certification test before applying for bartending or mystery
3 shopping jobs, consumers often first realized that Defendants'
4 certification was worthless when they attempted to obtain a
5 bartending job or a mystery shopping assignment after becoming
6 certified. Consumers then sought refunds from Defendants, which
7 were refused.

8 29. Even in instances where Defendants offered to refund a
9 portion of the cost to the consumer, Defendants refused to refund
10 the purported \$19.90 shipping and handling fee for the bartending
11 program, or the \$9.90 registration or shipping and handling fee
12 for the mystery shopping program. Defendants' actual cost to mail
13 their programs to consumers was approximately \$1.43. In numerous
14 instances, the fact that the shipping and handling or registration
15 fees were non-refundable was not clearly and conspicuously
16 disclosed to consumers at the time they placed their orders.

17 **Upsell**

18 30. After obtaining consumers' billing information for the
19 purchase of Defendants' bartending or mystery shopping programs,
20 Defendants' telemarketers then were required to offer consumers an
21 "upsell." "Upselling" is a telemarketing technique where one
22 seller sells its products or services through inbound or outbound
23 telemarketing calls, and then offers a second seller's goods or
24 services after the consumer already has provided billing
25 information to purchase the initial product or service.

26 31. The "upsell" products offered by Defendants generally
27 involved a free-to-pay conversion feature, meaning that the
28 product or service initially would be provided to the consumer

1 free of charge for a limited time, but after the expiration of the
2 free trial period, the consumer would be charged unless the
3 consumer took some action to cancel.

4 32. In numerous instances, in the course of offering these
5 "upsells" to consumers, Defendants' telemarketers introduced the
6 "upsell" as a bonus, to thank the consumer for the initial sales
7 transaction. The telemarketers typically stated that "we" will
8 provide the consumer with a free trial period of the upsold
9 product or service. Defendants' telemarketers did not clearly and
10 conspicuously disclose that the seller for the upsold products or
11 services actually was someone other than Defendants or that the
12 purpose of the "upsell" portion of the call was to sell goods or
13 services.

14 33. In numerous instances, in the course of offering these
15 "upsells" to consumers, Defendants' telemarketers used the billing
16 information that consumers had provided for the bartending or
17 mystery shopping program to charge consumers for the "upsell." In
18 doing so, Defendants' telemarketers often did not obtain from
19 consumers the last four digits of the account number to be
20 charged.

21 34. Defendants' telemarketers also often did not obtain the
22 consumer's express agreement to have a particular account number
23 charged. In many instances, the upsell scripts did not require
24 the consumer to expressly agree to the offer but ended with an
25 ambiguous "OK." At that juncture, unless the consumer expressly
26 objected, the free trial of the upsold product or service would be
27 provided, and the consumer's credit card or bank account would be
28 charged or debited once the trial period expired. That sometimes

1 occurred even where consumers expressly stated that they were not
2 interested in the upsell.

3 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

4 **COUNT ONE**

5 35. In numerous instances, in the course of offering for
6 sale or selling their bartending program, Defendants represented,
7 expressly or by implication, that they would provide consumers who
8 purchased and completed their bartending program with a list of
9 local bars in the consumer's area that were seeking to hire
10 bartenders who had been certified by Defendants.

11 36. In truth and in fact, Defendants did not provide
12 consumers who purchased and completed their bartending program
13 with a list of local bars in the consumer's area that were seeking
14 to hire bartenders who had been certified by Defendants.

15 37. Therefore, the representation set forth in Paragraph 35
16 was, and is, false and misleading and constitutes a deceptive act
17 or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
18 § 45(a).

19 **COUNT TWO**

20 38. In numerous instances, in the course of offering for
21 sale or selling their mystery shopping program, Defendants
22 represented, expressly or by implication, that they would provide
23 consumers who purchased and completed their mystery shopping
24 program with a list of companies in the consumer's area that were
25 seeking to hire mystery shoppers who had been certified by
26 Defendants.

27 39. In truth and in fact, Defendants did not provide
28 consumers who purchased and completed their mystery shopping

1 program with a list of companies in the consumer's area that were
2 seeking to hire mystery shoppers who had been certified by
3 Defendants.

4 40. Therefore, the representation set forth in Paragraph 38
5 was, and is, false and misleading and constitutes a deceptive act
6 or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
7 § 45(a).

8 **COUNT THREE**

9 41. In numerous instances, in the course of offering for
10 sale or selling their mystery shopping program, Defendants
11 represented, expressly or by implication, that consumers would
12 earn up to \$20-\$30 per mystery shopping assignment, or up to
13 \$50,000 per year, if consumers purchased and completed Defendants'
14 mystery shopping program.

15 42. In truth and in fact, in numerous of these instances,
16 consumers did not earn up to \$20-\$30 per mystery shopping
17 assignment, or up to \$50,000 per year, if consumers purchased and
18 completed Defendants' mystery shopping program.

19 43. Therefore, the representation set forth in Paragraph 41
20 was, and is, false and misleading and constitutes a deceptive act
21 or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
22 § 45(a).

23 **COUNT FOUR**

24 44. In numerous instances, in the course of offering for
25 sale or selling their bartending and mystery shopping programs,
26 Defendants represented, expressly or by implication, that they
27 would not use consumers' checking account or credit card
28 information for the purpose of debiting consumers' bank accounts

1 or billing consumers' credit card accounts without consumers'
2 authorization.

3 45. In truth and in fact, in numerous of these instances,
4 Defendants did use consumers' checking account or credit card
5 information for the purpose of debiting consumers' bank accounts
6 or billing consumers' credit card accounts without consumers'
7 authorization.

8 46. Therefore, the representation set forth in Paragraph 44
9 was, and is, false and misleading and constitutes a deceptive act
10 or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
11 § 45(a).

12 **COUNT FIVE**

13 47. In numerous instances, in the course of offering for
14 sale or selling their bartending and mystery shopping programs,
15 Defendants represented, expressly or by implication, that they
16 would charge consumers' accounts one time only for a stated price,
17 such as \$49.00, \$59.00, or \$79.00.

18 48. In truth and in fact, in numerous of these instances,
19 Defendants charged consumers' accounts one or more times for a
20 total amount greater than the stated price.

21 49. Therefore, the representation set forth in Paragraph 47
22 was, and is, false and misleading and constitutes a deceptive act
23 or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
24 § 45(a).

25 **COUNT SIX**

26 50. In numerous instances, in the course of offering for
27 sale or selling their bartending and mystery shopping programs,
28 Defendants represented, expressly or by implication, that they

1 would provide refunds to consumers upon request.

2 51. In truth and in fact, in numerous of these instances,
3 Defendants failed to disclose that they actually impose additional
4 conditions and restrictions that discourage consumers from seeking
5 refunds or restrict the availability of refunds. These conditions
6 and restrictions would be material to consumers in their decisions
7 to purchase Defendants' programs.

8 52. In light of the representation set forth in Paragraph
9 50, above, the failure to disclose that Defendants actually impose
10 additional refund conditions and restrictions was, and is, false
11 and misleading and constitutes a deceptive act or practice in
12 violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

13 **THE TELEMARKETING SALES RULE**

14 53. In the Telemarketing Act, 15 U.S.C. §§ 6101-6108,
15 Congress directed the FTC to prescribe rules prohibiting abusive
16 and deceptive telemarketing acts or practices. On August 16,
17 1995, the Commission promulgated the Telemarketing Sales Rule
18 ("TSR"), 16 C.F.R. Part 310, with a Statement of Basis and
19 Purpose, 60 Fed. Reg. 43842 (Aug. 23, 1995). On January 29, 2003,
20 the FTC amended the TSR by issuing a Statement of Basis and
21 Purpose and the final amended TSR (the "Amended TSR"). 68 Fed.
22 Reg. 4580, 4669. The Amended TSR became effective on March 31,
23 2003.

24 54. Defendants are "sellers" or "telemarketers" engaged in
25 "telemarketing," as those terms are defined in the TSR, 16 C.F.R.
26 § 310.2(z), (bb), and (cc).

27 55. The TSR generally does not apply to "[t]elephone calls
28 initiated by a customer or donor in response to an advertisement

1 through any medium." 16 C.F.R. § 310.6(b)(5). This exemption
2 does not apply, however, to "any instances of upselling" during
3 the above telephone calls. Id. As a result, the TSR is
4 applicable to the "upsells" that Defendants offer to those
5 consumers who have purchased the bartending or mystery shopping
6 programs.

7 56. The Amended TSR requires telemarketers that use upsells
8 to induce the purchase of goods or services of a seller different
9 from the seller involved in the initial transaction to disclose
10 promptly and in a clear and conspicuous manner the following
11 information:

- 12 a. the identity of the seller
- 13 b. that the purpose of the call is to sell goods or
14 services; and
- 15 c. the nature of the goods or services.

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

17 57. The Amended TSR's Statement of Basis and Purpose
18 explains that the oral disclosures "must be promptly disclosed at
19 the initiation of the upsell if any of the information in these
20 disclosures differs from the disclosures made in the initial
21 transaction." 68 Fed. Reg. at 4648. Because Defendants offered
22 upsells that involved the products or services of a different
23 seller, the above disclosures were required to be made at the
24 initiation of the upsell.

25 58. The Amended TSR provides that it is an abusive
26 telemarketing act or practice for a seller or telemarketer to
27 cause "billing information to be submitted for payment, directly
28 or indirectly, without the express informed consent" of the

1 consumer. 16 C.F.R. § 310.4(a)(6). In order to establish the
2 consumer's "express informed consent" in a telemarketing
3 transaction that involves preacquired account information and a
4 free-to-pay conversion feature, the seller or telemarketer must:
5 "obtain from the customer, at a minimum, the last four (4) digits
6 of the account number to be charged" and also "obtain from the
7 customer his or her express agreement to be charged for the goods
8 or services and to be charged using the account number" for which
9 the last four digits were provided. 16 C.F.R. § 310.4(a)(6)(i)(A)
10 and (B).

11 59. Pursuant to Section 3(c) of the Telemarketing Act, 15
12 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C.
13 § 57a(d)(3), violations of the TSR constitute unfair or deceptive
14 acts or practices, in or affecting commerce, in violation of
15 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

16 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

17 **COUNT SEVEN**

18 60. In numerous instances since March 31, 2003, in
19 connection with Defendants' efforts to "upsell" various products
20 and services of other sellers, Defendants have caused billing
21 information to be submitted for payment without the express
22 informed consent of their customers.

23 61. Defendants' practice as alleged in Paragraph 60 is an
24 abusive telemarketing practice that violates Section 310.4(a)(6)
25 of the Amended TSR, 16 C.F.R. § 310.4(a)(6).

26 **COUNT EIGHT**

27 62. In numerous instances since March 31, 2003, in
28 connection with Defendants' efforts to "upsell" various products

1 and services of other sellers, Defendants have failed to disclose
2 promptly and in a clear and conspicuous manner at the initiation
3 of the upsell:

- 4 a. the identity of the seller; and
- 5 b. that the purpose of the call is to sell goods or
6 services.

7 63. Defendants' practice as alleged in Paragraph 62 is an
8 abusive telemarketing practice that violates Sections 310.4(d)(1)
9 and (2) of the Amended TSR, 16 C.F.R. § 310.4(d)(1) and (2).

10 **CONSUMER INJURY**

11 64. Consumers throughout the United States have suffered and
12 continue to suffer substantial monetary loss as a result of
13 Defendants' unlawful acts or practices. In addition, Defendants
14 have been unjustly enriched as a result of their unlawful
15 practices. Absent injunctive relief by this Court, Defendants are
16 likely to continue to injure consumers, reap unjust enrichment,
17 and harm the public interest.

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

19 65. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
20 empowers this Court to grant injunctive and other relief as the
21 Court may deem appropriate to halt and redress violations of any
22 provision of law enforced by the Commission.

23 66. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section
24 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this
25 Court to grant such relief as the Court finds necessary to redress
26 injury to consumers or other persons resulting from Defendants'
27 violations of the TSR, including the rescission or reformation of
28 contracts, and the refund of money.

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Respectfully Submitted,

WILLIAM BLUMENTHAL
General Counsel

DATED: July 19, 2005

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