

APPENDIX A

ESCROW AGREEMENT

THIS ESCROW AGREEMENT, made and entered into this ____ day of _____, 2001, by and between Ira Smolev (hereinafter "Smolev"); and the Federal Trade Commission, an agency of the United States of America, by and through _____ (herein called "FTC"); and _____ (herein called "Escrow Agent");

WITNESSETH:

WHEREAS, the FTC has filed its complaint in *FTC v. Smolev, et al.*, Civ. Action No. _____ (SD FL); and

WHEREAS, the FTC and Smolev have entered into a Stipulated Final Judgment and Order for Permanent Injunction and Monetary Settlement (herein called "Order") in that matter, a copy of which is attached hereto and marked Attachment A; and

WHEREAS, the Order provides that Smolev, whether directly, in concert with others, or through any business entity or other device, is permanently enjoined from (a) advertising, promoting, offering for sale, selling or distributing to the general public any product or service, (b) engaging or participating in the business of telemarketing, or (c) assisting others to engage in or participate in the business of telemarketing, unless at least two (2) weeks prior to such activities, he establishes, funds and maintains an escrow account, under the terms and conditions specified in the Order;

NOW, WHEREFORE, in accordance with the terms of the Order, the terms of which are incorporated herein by reference, the parties covenant and agree as follows:

1. Smolev must establish an escrow account at _____, to be styled Smolev Escrow Account, _____, Escrow Agent. Smolev shall deposit into the Escrow Account a sum of One Million Five Hundred Thousand Dollars (\$1,500,000) in cash or marketable securities that have been specifically approved by the FTC's Associate Director for Enforcement; **provided** that the assets held in the escrow account established and maintained pursuant to Part XVII of the FTC order issued in *Synchronal Corp., et al.*, Docket 9251 (Oct. 28, 1991) (herein called "Synchronal order"), will be transferred, in partial satisfaction of this Part, into the Smolev Escrow Account (herein called "Escrow Account") and thereafter subject to this Escrow Agreement.

2. The Escrow Agent shall be the sole signatory on the Escrow Account and access to the funds or marketable securities, as well as any accrued interest, dividends and distributions, held in that account (herein referred to as "Escrow Account Assets") shall be solely through the Escrow Agent. The parties to this Escrow Agreement acknowledge that, upon the signing of this Agreement, Smolev relinquishes to the Escrow Agent, all legal title to the Escrow Account Assets. Until and unless the

Escrow Account is terminated as provided for herein, Smolev agrees to make no claim to or demand for the return of the Escrow Account Assets, directly or indirectly, through counsel or otherwise; and, in the event of bankruptcy, Smolev acknowledges that the Escrow Account Assets are not part of Smolev's estate, nor does the estate have any claim or interest therein.

3. The Escrow Agent and the parties hereto agree that the Escrow Account Assets shall be paid only in accordance with the terms of the Order and the Escrow Agreement. Smolev must pay all costs associated with the creation and funding of the Escrow Account. After the Escrow Account has been created and funded, the costs of operating and administering the Escrow Account shall be paid out of the Escrow Account Assets.

4. The Escrow Agent shall, on a weekly basis, monitor the market value of the Escrow Account Assets. If the average market value of the Escrow Account Assets during any calendar week falls below One Million Four Hundred Thousand Dollars (\$1,400,000), the Escrow Agent shall notify Smolev in writing, by overnight mail, and Smolev, within five (5) business days of receipt of such notice, must deposit additional cash or marketable securities into the Escrow Account to increase the value of the Escrow Account Assets to One Million and Five Hundred Thousand Dollars (\$1,500,000).

5. The Escrow Agent, within thirty (30) days following receipt of a notice that a final judgment/court order has been entered or an FTC order has become final against Smolev for consumer redress or disgorgement in an action brought under the provisions of the FTC Act or the Telemarketing, Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et seq.*, finding that Smolev has violated this Order, the Synchronal order, or any provision of the FTC Act, the Telemarketing Act, the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, and determining the amount of consumer redress or disgorgement to be paid, which notice shall also be mailed to Smolev at his last known address, shall pay to the FTC so much of the Escrow Account Assets as does not exceed the amount of consumer redress or disgorgement ordered, and which remains unsatisfied at the time notice is provided to the Escrow Agent; **provided, however**, that, if Smolev has agreed to the entry of a judgment/court order or an FTC order, a specific finding that Smolev has violated this Order, the Synchronal order, or any provision of the FTC Act, the Telemarketing Act, the TSR, shall not be necessary.

5. The Escrow Account shall continue until at least three (3) years after Smolev ceases (a) advertising, promoting, offering for sale, selling or distributing to the general public any goods or services; (b) engaging or participating in the business of telemarketing; or (c) assisting others to engage in or participate in the business of telemarketing, at which time, if there are no pending FTC investigations, legal or administrative actions by the FTC against Smolev, or unsatisfied obligations pursuant to a judgment/court order or an FTC order described in Paragraph 4 herein, for which a claim could be made against the Escrow Account Assets under the terms of the Order, the FTC shall, upon Smolev's request, instruct the Escrow Agent to terminate the Escrow Account and return the balance of the Escrow Account to Smolev. At such time, the Escrow Agent shall be fully and completely released from its agency as described herein. The legal title to the Escrow Account Assets shall vest in

Smolev at such time as the Escrow Agent, pursuant to instructions from the FTC, returns the Escrow Account Assets to Smolev.

WITNESS the signatures of the parties, the day and year first above written.

DATE:

IRA SMOLEV

CHARLES I. WEISMAN
Swidler Berlin Shereff Friedman LLP
Counsel for Ira Smolev

DATE:

FEDERAL TRADE COMMISSION

BY:

ELAINE D. KOLISH
Associate Director for Enforcement
Bureau of Consumer Protection