

ORIGINAL

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FEDERAL TRADE COMMISSION,)
)
Plaintiff,)
)
v.)
)
NATIONAL TESTING SERVICES LLC,)
a Tennessee limited liability company,)
)
EXAM PREPARATION, LLC,)
a Tennessee limited liability company,)
)
FUTURE PLANNING, LLC,)
a Tennessee limited liability company, and d/b/a)
Exam Prep, LLC, and Registration Department,)
and)
)
SEAN TERRANCE ASBERRY,)
)
Defendants.)

Case No. **3 - 05 0613**
Judge Campbell
Judge Griffin

STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION

Plaintiff, Federal Trade Commission ("FTC" or the "Commission"), commenced this action by filing a complaint for permanent injunctive and other equitable relief pursuant to Section 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § § 45(a) and 53(b). The complaint alleges that the Defendants have engaged in deceptive acts and practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, in connection with the

advertising, offering for sale, or sale of employment goods or services. The parties have agreed to settlement of this action without adjudication of any issue of fact or law, and without 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 is an action by the FTC instituted pursuant to Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b). The Commission seeks both permanent injunctive relief and consumer redress against Defendants for alleged deceptive acts and practices in connection with the advertising, offering for sale, or sale of employment goods or services.
2. The FTC has the authority pursuant to Section 13(b) of the FTC Act to seek the relief it has requested and the complaint states a claim upon which relief may be granted against the Defendants.
3. This Court has jurisdiction over the subject matter of this case and has personal jurisdiction over each Defendant. Venue in this district is proper.
4. The activities of Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
5. Defendants have entered into this Stipulated Final Judgment and Permanent Injunction ("Order") freely and without coercion. Defendants further acknowledge that they have read or otherwise been fully advised of the provisions of this Order and are prepared to abide by them.
6. Defendants waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order, and further waive and release any claim Defendants may have

against the FTC, its employees, and agents, including any 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. The parties shall each bear their own costs and attorneys' fees incurred in this action.

8. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies.

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

DEFINITIONS

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

1. "Asset" or "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, effects, leaseholds, premises, contracts, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, funds, and all cash, wherever located.

2. "Assisting others" means providing any of the following goods or services to any person or entity: (a) performing customer service functions, including but not limited to receiving or responding to customer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (c) providing names of, or assisting in the generation of, potential customers; (d) performing marketing services of any kind; or (e) acting as an officer or director of a business entity.

3. "Corporate Defendants" or "Receivership Defendants" means National Testing Services LLC, Exam Preparation, LLC, Future Planning, LLC and d/b/a Exam Prep, LLC and

Registration Department, and each of them by whatever names each might be known.

4. "Defendants" means National Testing Services LLC, Exam Preparation, LLC, Future Planning, LLC and d/b/a Exam Prep, LLC and Registration Department, and Sean Terrance Asberry, and each of them by whatever names each might be known.

5. "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.

6. "Employment goods or services" means any item, product, good or service represented to assist consumers in obtaining employment, including but not limited to preparation or other training for any employment examination.

7. "Material" means likely to affect a person's choice of, or conduct regarding, goods or services.

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

9. "Receiver" means Robert W. Waldschmidt, his officers, agents, representatives and all persons authorized by him to assist in carrying out the duties and functions of the receivership imposed on him by the temporary restraining order and preliminary injunction entered in this case.

10. "Record" means any document, as document is defined in definition 5 above, relating to the business or business practices of any Defendant.

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

ORDER

I. PROHIBITED BUSINESS ACTIVITY

IT IS FURTHER ORDERED that, in connection with the advertising, promotion, offering for sale, sale or distribution of any good or service, Defendants, as well as their successors and assigns, their officers, agents, servants, employees, and attorneys, and those persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division or other device, are hereby permanently restrained and enjoined from:

- A. Misrepresenting, expressly or by implication, that Defendants are connected with or endorsed by the Postal Service;
- B. Misrepresenting, expressly or by implication, that postal jobs are currently available in consumers' geographic areas where Defendants' advertisements appear;
- C. Misrepresenting, expressly or by implication, that consumers who use Defendants' materials are more likely to pass the employment exam than those who do not use Defendants' materials;
- D. Misrepresenting, expressly or by implication, that a passing score or a score of 90 or better on the postal employment exam will guarantee consumers a job with the Postal Service;
- E. Misrepresenting, expressly or by implication, that the fee to purchase Defendants' materials is fully refundable; and
- F. Misrepresenting, expressly or by implication, any material fact regarding any good or service.

II. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment is hereby entered in favor of the Commission and against Defendants, jointly and severally, in the amount of Three Million, Forty-Two Thousand Dollars (\$3,042,000), for the payment of equitable monetary relief – including, but not limited to, consumer redress and/or disgorgement, and for paying any attendant expenses of administration of any redress fund.

B. Except as provided in Paragraph III of this Order, the Judgment shall be suspended if the following conditions are satisfied:

1. Defendant Asberry shall immediately on entry of this Order take all steps necessary to assist CIT Group, or its authorized designee, in its foreclosure of the property located at 820 Renaissance Avenue, Murfreesboro, Tennessee 37129 (the “property”). To the extent that CIT Group fails or declines to foreclose on the property, Defendant Asberry shall immediately place the property for sale and shall take all steps necessary to sell the property. Upon said foreclosure or sale, Defendant Asberry shall immediately transfer to the FTC all proceeds from the foreclosure or sale to which he is entitled. Defendant Asberry hereby forever waives, releases, discharges and disclaims all right, title and interest in the property described in this Paragraph.

2. Defendant Asberry shall immediately on entry of this Order liquidate and turn over to the FTC or its designated representative all assets in the 401(k) account held by Paychecks, account number xxxxx8208. Defendant Asberry hereby forever waives, releases, discharges and disclaims all right, title and interest in the assets contained in the account described in this Paragraph. Defendant Asberry and the Court authorize

Paychecks to liquidate and immediately turn over all assets in this account to the FTC or its designated representative. Defendant Asberry shall provide full cooperation to the FTC to ensure that the assets in the above account are remitted to the FTC.

3. Defendants shall provide full cooperation to the Receiver in carrying out his duties pursuant to Paragraph V herein, including the collection of receivership property, the liquidation of receivership property and the winding up of the affairs of the Receivership Defendants. Defendants acknowledge that all property held by the Receiver, or lawfully owed to him, is comprised of assets held in constructive trust under applicable state law and irrevocably waive, release, discharge, and disclaim all right, title and interest in and to that property.

C. Funds paid over to the FTC pursuant to this Paragraph and Paragraph V shall be deposited into a fund administered by the FTC or its designated representative to be used for equitable relief, including, but not limited to, consumer redress and any attendant expenses for the administration of any redress fund. Defendants will cooperate fully to assist the FTC in identifying consumers who may be entitled to redress pursuant to this order. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply any remaining funds for any other equitable relief (including consumer information remedies) that it determines to be reasonably related to Defendants' practices alleged in the complaint. Any funds not used for this equitable relief shall be deposited into the U.S. Treasury as disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies under this Paragraph.

D. Defendants agree that the facts as alleged in the complaint filed in this action shall be taken as true for the purpose of any nondischargeability action in a bankruptcy proceeding.

E. Defendants acknowledge and agree that the judgment entered pursuant to this Paragraph is equitable monetary relief, solely remedial in nature, and is not a fine, penalty, punitive assessment, or forfeiture.

F. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the FTC their tax identification numbers, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of this Order.

III. RIGHT TO REOPEN AS TO MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. By agreeing to this Order, Defendants reaffirm and attest to the truthfulness, accuracy, and completeness of Defendant Asberry's sworn testimony taken under oath on March 14, 2006, and written financial statements submitted by Defendants to the FTC on August 18, 2005, October 12, 2005, and January 25, 2006 (designated collectively as the "Financial Statements"). This Court's Order, and Plaintiff's agreement to enter into this Order, is expressly premised upon the truthfulness, accuracy, and completeness of Defendants' financial condition, as represented in the Financial Statements referenced above, which contain material information upon which Plaintiff relied in negotiating and agreeing to the terms of this Order.

B. If, upon motion by Plaintiff, this Court finds that one or more Defendants failed to disclose any material asset, or materially misrepresented the value of any asset, or made any other material misrepresentation in or omission from the Financial Statements, the Court shall reinstate the suspended judgment against such Defendant, in favor of the FTC, in the amount of \$3,042,000, which the Defendants and the FTC stipulate is the amount of consumer injury jointly and severally caused by the Defendants, less any amounts paid to the FTC by Defendants pursuant to Paragraph II. B of this Order and any amounts paid to the FTC by the Receiver pursuant to Paragraph V of this Order. *Provided, however*, that in all other respects, this Order

shall remain in full force and effect unless otherwise ordered by the Court.

D. For purposes of this Paragraph, and any subsequent proceedings to enforce payment, including, but not limited to, a non-dischargeability complaint filed in a bankruptcy proceeding, the Defendants stipulate to all of the allegations in the FTC's complaint.

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

IV. ASSET FREEZE

IT IS FURTHER ORDERED that, upon entry of this Order and payment of the amounts set forth in Paragraph II. B, the freeze of the Defendants' assets shall be dissolved.

V. RECEIVERSHIP

IT IS FURTHER ORDERED THAT the receivership imposed in the Preliminary Injunction entered in this proceeding shall be continued. The Receiver is authorized to submit interim requests for payment of compensation for the performance of receivership duties.

A. After entry of this Order, the Receiver shall take all steps necessary to liquidate the assets of, and dissolve, the Receivership Defendants. If the Receiver determines that it is necessary to hire an accountant in connection with dissolving the Receivership Defendants, the Receiver shall make an application to the Court for permission to hire and compensate an accountant for such work.

B. Within seven (7) days of completion of the requirements of Paragraph A of this Paragraph, the Receiver shall move this Court to order termination of this receivership. At such time, the Receiver shall make a final request for payment of compensation for the performance of receivership duties.

C. Within five (5) days of receipt of the Court's decision regarding final compensation for the Receiver, the Receiver shall transfer all remaining funds of the Receivership Defendants to the Federal Trade Commission or its designated representative.

D. Within five (5) days of termination of the Receivership, the Receiver shall return all records of the Receivership Defendants in his possession relating to their financial operation to the individual Defendant so that he may prepare and file all necessary income tax returns. The Receiver is also directed to promptly turn over to the FTC all records containing the customer information described in Paragraph VI of this Order.

E. Defendants, their officers, employees, agents, servants, present and former attorneys, representatives, and their respective predecessors, successors, assigns and affiliates, release and discharge the Receiver and the law firm with which he is associated, Howell & Fischer PLLC, from any and all claims, demands, actions, causes of actions, or suits that now exist or may hereafter accrue, whether known or unknown that relate to this Order or to the lawsuit that is the subject of this Order.

VI. CONSUMER INFORMATION

IT IS FURTHER ORDERED that Defendants, and their successors and assigns, officers, agents, servants, employees, and attorneys, and all those persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, social security number, billing information (any data that enables any person to access another person's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card), e-mail address, or other identifying information of any consumer

who paid any money to any Defendant, at any time prior to entry of this Order, in connection with the purchase of any employment good or service. *Provided, however,* that Defendants may disclose such identifying information (i) to a law enforcement agency, or (ii) as required or authorized by any law, regulation, or court order.

VII. COMPLIANCE MONITORING

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

A. Within ten (10) days of receipt of written notice from a representative of the Commission, 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 possession or direct or indirect control to inspect the business operation.

B. In addition, the Commission is 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 prescribed by Fed. R Civ. P. 30, 31, 33, 34, 36 and 45;

2. Posing as consumers and suppliers to Defendants, Defendants' employees, or any other entity managed or controlled in whole or in part by Defendants, without the necessity of identification or prior notice.

C. Defendants shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to conduct subject to this Order. The person interviewed may have counsel present. *Provided, however,* 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)).

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 five (5) years from the date of entry of this Order,
 1. Sean Terrance Asberry shall notify the Commission of the following:
 - a. Any changes in residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in employment status (including self-employment), and any change in ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that he is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of his duties and responsibilities in connection with the business or employment;
 - c. Any changes in his name or use of any aliases or fictitious names;
 2. Defendants shall notify the Commission of any changes in corporate structure of any Corporate Defendant, or any business entity that Sean Terrance Asberry directly or indirectly controls, or has an ownership interest in, 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 entity; 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 a Defendant learns less than thirty (30) days prior to the date such action is to take place, the 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, Defendants 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 complying with this Order.

This report shall include, but not be limited to:

1. For Sean Terrance Asberry:
 - a. His then-current residence address, mailing addresses, and telephone numbers;
 - b. His then-current employment and business addresses and telephone numbers, a description of the business activities of each such employer or business, and his title or responsibilities for each such employer or business; and
 - c. Any other changes required to be reported under Subparagraph A of this Paragraph.
2. For all Defendants:
 - a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Paragraphs X and XI; and
 - b. Any other changes required to be reported under subparagraph A of this Paragraph.

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

Associate Director for Enforcement
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Re: *FTC v. National Testing Services LLC, et al.*

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

IX. RECORDKEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, each Defendant, in connection with any business where (1) such Defendant is an officer, director, manager, or majority owner, or directly or indirectly manages or controls the business and where (2) the business engages, or assists others engaged in the marketing, advertising, promotion, offering for sale, or sale of employment goods or services, in or affecting commerce, and their agents, employees, officers, servants, corporations, successors, and assigns, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, are 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, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by Paragraphs X and XI, and all reports submitted to the FTC pursuant to Paragraph VIII.

X. 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 deliver copies of the Order as directed below:

A. Each Corporate Defendant must deliver a copy of this Order to all of its principals, officers, directors, and managers. Each Corporate Defendant also must deliver copies of this Order to all of its employees, agents, and representatives who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within five (5) days of service of this Order upon the Corporate Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. For any business that Sean Terrance Asberry controls, directly or indirectly, or in which he has a majority ownership interest, said Defendant must deliver a copy of this Order to the principals, officers, directors and managers of that business. Sean Terrance Asberry must also deliver copies of this Order to all employees, agents, and representatives of that business

who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within five (5) days of service of this Order upon said Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

C. For any business where Sean Terrance Asberry is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, Sean Terrance Asberry must deliver a copy of this Order to all principals, officers, directors and managers of such business before engaging in such conduct.

D. Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Part.

XI. 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, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

XII. RETENTION OF JURISDICTION


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

SO ORDERED this ___ day of _____, 2006.


UNITED STATES DISTRICT JUDGE

CONSENTED TO BY THE PARTIES

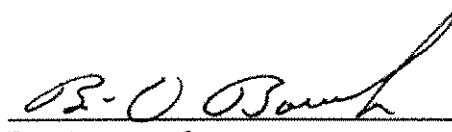
PLAINTIFF


Federal Trade Commission
Signed this 23rd Day of May 2006.

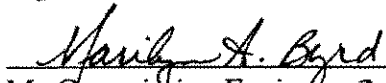
Valerie M. Verduce
Georgia Bar No. 727066
Trial Counsel for Federal Trade Commission

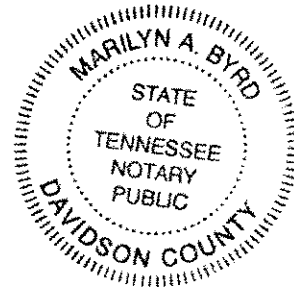
Federal Trade Commission
225 Peachtree Street, Suite 1500
Atlanta, Georgia 30303
Office 404-656-1355
Facsimile 404-656-1379

DEFENDANTS


By: Attorney for
NATIONAL TESTING SERVICES, LLC.


Signed and Notarized this 29th day of 2006 MARCH

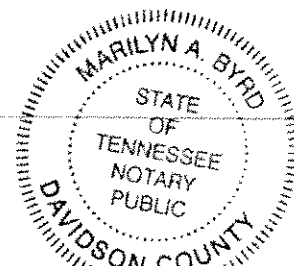

My Commission Expires: 3-21-2009




By: Attorney for
EXAM PREPARATION, LLC

Signed and Notarized this 29th day of 2006 MARCH


MY COMMISSION EXPIRES 3-21-2009



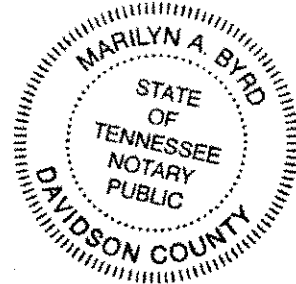
My Commission Expires:

B. O. Bowh

By: Attorney for
FUTURE PLANNING, LLC, and d/b/a
Exam Prep, LLC and Registration Department.

Signed and Notarized this 29th day of 2006 **MARCH**

Marilyn A. Byrd
My Commission Expires: 3-21-2009

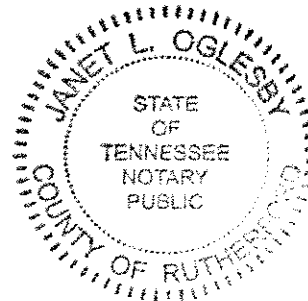


Sean Asberry

By: SEAN TERRANCE ASBERRY, in his individual capacity and as owner of
NATIONAL TESTING SERVICES, LLC, EXAM PREPARATION, LLC, and
FUTURE PLANNING, LLC, and d/b/a Exam Prep, LLC and Registration
Department.

Signed and Notarized this 29 day of 2006

Janet L. Oglesby
My Commission Expires:



Brian O. Bowhan
Attorney At Law
1132 Blue Willow Court
Antioch, Tennessee 37013-1607

Tel. # (615) 445-8669
Email= brianbowhan@tds.net

March 29, 2006


Re: FTC SETTLEMENT

Dear Sean:

By signing this letter, you stipulate to and agree to the following;

- That you have had the Stipulated Final Judgment and Permanent Injunction ["settlement"] read to you.
- ~~_____~~
- That you understand that this is the final settlement in the case.
- ~~_____~~
- That you further authorize me to sign the settlement on behalf of the corporate defendants, and that you have the capacity to issue said authorization.
- That this authorization for the corporate clients is being done in order to expedite the settlement as the corporate defendants are essentially either dissolved or defunct.
- Upon entry of this settlement by the Court, my services are terminated.

Sincerely,


Brian O. Bowhan


SIGNED: _____

Sean Terrance Asberry

DATED: _____

3/29/06