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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DAYTON FAMILY PRODUCTIONS, INC.,  
*et al.*

Defendants.

Case No. 2:97-CV-00750-PMP (LRL)

FILED UNDER SEAL

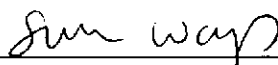
**FEDERAL TRADE COMMISSION'S EX PARTE MOTION TO HOLD  
GLEN BURKE AND AMERICAN HEALTH ASSOCIATES, LLC, IN CONTEMPT**

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1 Pursuant to Federal Rule of Civil Procedure 65 and LR 7-5, Plaintiff Federal Trade  
2 Commission respectfully moves *ex parte* to hold Glen Burke and American Health Associates,  
3 LLC in contempt of this Court's October 1, 1998, Stipulated Final Order for Permanent  
4 Injunction. The grounds for this motion, and for submitting it *ex parte*, are set forth in the  
5 accompanying memorandum in support, exhibits, and Rule 65(b) certification.  
6

7 Dated: January 28, 2013

Respectfully submitted,

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**FEDERAL TRADE COMMISSION'S MEMORANDUM IN SUPPORT OF ITS  
*EX PARTE* MOTION TO HOLD GLEN BURKE AND  
AMERICAN HEALTH ASSOCIATES, LLC, IN CONTEMPT**

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## INTRODUCTION

Glen Burke (“Burke”), a recidivist fraudulent telemarketer, is using his company, American Health Associates, LLC (“AHA”), to deceptively telemarket a purported prize promotion, in violation of this Court’s order<sup>1</sup> banning Burke from telemarketing and from making misrepresentations. AHA telemarketers call consumers with exciting news – they have been specially selected to receive a valuable prize. The telemarketers claim the consumer has “already won” a new car, boat, jewelry, vacation, or thousands of dollars in cash. The only catch is that, to claim the prize, the consumer must purchase vitamins from the company for \$300 to \$500. When consumers hesitate to pay so much for a product they do not even want, the telemarketers assure them the value of their “guaranteed” prize far outweighs the purchase price of the vitamins. AHA later presses consumers who bought into the initial pitch to pay thousands more as part of a “next level” or “second round,” which purportedly offers even more valuable prizes. Once consumers pay, however, AHA either ignores their calls and sends them nothing (other than the vitamins), or sends cheap costume jewelry worth far less than what the consumers paid.

Burke, who has been the subject of numerous law enforcement proceedings, conceals his involvement in this and other schemes. In addition to using fictitious firm names, shell companies, rented mailboxes, and hired fronts, Burke orchestrates a morass of fund transfers among bank accounts, including overseas accounts, to reap the profits of his schemes while evading detection.

Accordingly, the FTC seeks civil contempt sanctions against Burke and AHA (collectively, “Contempt Defendants”), including compensatory relief for consumers victimized by Contempt Defendants’ fraudulent scheme. In addition, pursuant to Federal Rule of Civil Procedure 65(b), the FTC has concurrently filed an *Ex Parte* Motion for a Temporary Restraining Order and Preliminary Injunction to preserve the Court’s ability to grant effective

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<sup>1</sup> Stipulated Final Order for Permanent Injunction, entered October 1, 1998 (“Permanent Injunction”).

1 final relief pending resolution of this matter, including an asset freeze, appointment of a receiver,  
2 and expedited discovery.<sup>2</sup>

3 As discussed in its Motion for a Temporary Restraining Order, the FTC has conducted its  
4 investigation to this point without contacting Contempt Defendants because of the risk that  
5 Contempt Defendants would otherwise dissipate assets and destroy evidence. The FTC therefore  
6 respectfully requests that this Court permit a short period of discovery before holding any  
7 hearing on this Motion, to allow the FTC to present the Court with a full picture of Contempt  
8 Defendants' violations of the Permanent Injunction and the harm they caused to consumers. The  
9 FTC further requests that, following that brief period of discovery, the Court find the Contempt  
10 Defendants in contempt and enter sanctions in the full amount necessary to compensate  
11 consumers for their losses.<sup>3</sup>

#### 12 STATEMENT OF FACTS<sup>4</sup>

##### 13 I. The Original Action

14 In the underlying action, Burke stipulated to the Permanent Injunction with the FTC to  
15 resolve charges that he telemarketed investments in a film company by making wildly inflated  
16 earnings representations. Complaint for Injunction and Other Equitable Relief, ¶¶21-24  
17

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18 <sup>2</sup> The FTC is also concurrently filing an *Ex Parte* Motion for an Order Temporarily Sealing  
19 Entire File and Docket. Grounds for the *ex parte* filing are explained more fully in the  
20 accompanying Certification of Counsel filed pursuant to Federal Rule of Civil Procedure 65(b)  
and Local Rule 7-5(b).

21 <sup>3</sup> Pursuant to the Federal Rules of Civil Procedure, contempt proceedings may be initiated,  
22 as here, through a motion for contempt that states the grounds for the motion, describes the relief  
23 sought, and gives defendants an opportunity to be heard. *SEC v. Hyatt*, 621 F.3d 687, 695 (7th  
24 Cir. 2010); *see also* Fed. R. Civ. P. 6(c), 7(b); *cf. Thomas, Head and Greisen Employees Trust v.*  
25 *Buster*, 95 F.3d 1449, 1458-59 (9th Cir. 1996) (recognizing district court's power to manage  
26 contempt procedures). It is therefore no longer necessary to initiate contempt proceedings  
through a motion for an order to show cause. *Hyatt*, 621 F.3d at 695 (FRCP render orders to  
show cause antiquated, "unnecessary formalities which take up the time of judges and add  
nothing of value.").

27 <sup>4</sup> The Statement of Facts is the same as that included in the FTC's concurrently filed *Ex*  
28 *Parte* Motion for a Temporary Restraining Order. Both motions refer to the same combined  
exhibits.

(attached hereto as Appendix A); Permanent Injunction (attached hereto as Appendix B). This Court entered the Permanent Injunction against Burke and others on September 30, 1998. App'x B, Permanent Injunction, p. 16. Among other things, the Permanent Injunction (1) bans Burke from telemarketing and (2) prohibits him from misrepresenting any fact material to a consumer's decision to buy a good or service. App'x B, Permanent Injunction, ¶¶II.B, III.

## **II. Contempt Defendants**

### **A. Glen Burke**

Burke has been the subject of numerous law enforcement proceedings by the FTC and other agencies concerning his fraudulent telemarketing, including the underlying action. In 1991, the U.S. Postal Inspection Service ("USPIS") investigated a telemarketing operation Burke ran in Las Vegas, Nevada, which shut down within a year after the USPIS executed search warrants. (PX3 ¶3.)<sup>5</sup> The FTC obtained its first order against Burke in 1996, when he failed to answer a complaint alleging violations of the FTC Act and the Franchise Rule arising from a business opportunity scam. (PX1 ¶30, Att. T.) The following year, the Securities and Exchange Commission ("SEC") obtained an order against Burke after charging that he failed to disclose to investors that at least five states had commenced law enforcement proceedings against his publicly traded telemarketing operation. (PX1 ¶31, Att. U.) Finally, in 1998, Burke stipulated to, and this Court entered, the Permanent Injunction underlying this action. App'x B, Permanent Injunction.

Even after this Court entered the Permanent Injunction against him, Burke continued to run deceptive marketing operations, though he has taken greater steps to conceal his

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<sup>5</sup> Citations to "PX\_\_" refer to the combined exhibits the FTC is submitting in support of its ex parte filings. These exhibits are contained in the concurrently filed volumes titled "Federal Trade Commission's Exhibits to Memoranda in Support of Federal Trade Commission's Ex Parte Motion For a Temporary Restraining Order And Preliminary Injunction and Ex Parte Motion to Hold Glen Burke And American Health Associates, LLC in Contempt."

Exhibits filed in support of the FTC's motions have been redacted pursuant to Federal Rule of Civil Procedure 5.2(a) and District of Nevada Special Order No. 108, and to protect individuals' privacy.

1 involvement. Along with his former employee Katrinka Willard, Burke registered dozens of  
2 fictitious firm names (“DBAs”) with Clark County, Nevada, often through limited liability  
3 companies. (PX1 ¶¶5-9, 10-12, Att. A-B, Att. I-L.) Since 2007, consumers have registered more  
4 than 300 complaints about these DBAs, most concerning prize or sweepstakes ventures operating  
5 out of Nevada. (PX1 ¶16.) Furthermore, the USPIS and the Department of Homeland Security  
6 (“DHS”) have been investigating a series of mailed sweepstakes operations run through shell  
7 companies, rented mailboxes, and hired fronts. According to USPIS and DHS officials, the  
8 operations’ solicitations typically state that the recipients have won thousands of dollars and  
9 need only mail a small fee to claim it. (PX1 ¶32, Att. V pp. 1-5, 9-16; PX3 ¶4.) After  
10 consumers mail the fee, however, they receive nothing in return. (PX 1 Att. V, p.5; PX3 ¶4.)  
11 Two of Burke’s former employees, including Willard, state that Burke is behind these prize and  
12 sweepstakes operations.<sup>6</sup> (PX1 ¶7; PX2 ¶¶2-4, 6-8, 12, 15-16.) Furthermore, the USPIS and the  
13 DHS have linked Burke to locations, mailboxes, and mass mailings used to run these operations.  
14 The USPIS traced the scheme to Willard, who was operating from one of Burke’s longtime  
15 addresses, and confirmed that Burke and Willard knew one another. (PX3 ¶¶4-17, Att. A-B.)  
16 Then, in early 2012, U.S. Immigration and Customs Enforcement (“ICE”) intercepted packages  
17 routed through Mexico to Burke’s office at 2451 S. Buffalo Street in Las Vegas that contained  
18 checks and money orders U.S. consumers sent in response to the sweepstakes solicitations. (PX1  
19 Att. V pp. 1-5, 9-16.) The investigating agent confirmed that Burke’s company leased the office  
20 and learned from individuals who worked there that Burke was the “owner.” (PX1 Att. V pp. 4,  
21 6-8, 17-38.) The FTC’s contempt action currently focuses on one of Burke’s sweepstakes scams  
22 – a telemarketing company called American Health Associates.  
23  
24

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25 <sup>6</sup> Katrinka Willard spoke with FTC Investigator Ronald D. Lewis about Burke’s activities  
26 in May 2012. Following this conversation, however, the FTC’s repeated attempts to reach or  
27 locate Willard were unsuccessful. Lewis recounts the information Willard provided about  
28 Burke’s operations in his sworn declaration. (PX1 ¶¶3-9). A sworn declaration from another  
former employee in Burke’s operation, Tina Craig, is attached at PX2.



**B. American Health Associates, LLC**

American Health Associates, LLC is a limited liability company organized in Nevada with a business address at 2550 Duneville Street, Suite A, Las Vegas, Nevada 89146. (PX1 Att. C.) Vincent P. Calise is the sole officer identified in AHA's corporate filings with the state of Nevada, and he is also the sole signatory on AHA's current bank account. (PX1 Att. C, Att. N pp. 2-3.) Burke, however, is AHA's *de facto* principal, as demonstrated by his financial ties to the company, oversight of its operations, and connection to the company's location.

Burke has provided financial backing for AHA, used the company's funds to support his other businesses, and received AHA's profits. Specifically, initial deposits into AHA's bank account included thousands of dollars from accounts for which Burke is the sole signatory. (PX1 Att. M pp. 78-84, 108-109; Att. O pp. 2-3.) Burke also controls the American Express merchant account that funnels consumers' credit card payments into AHA's bank account. (PX1 Att. N, pp. 2-3; Att. Q pp. 3, 5-6.) Moreover, checks drawn on AHA's bank accounts have been issued to: the U.S. Treasury, with "Burke 2003" in the memo line; a commercial mail receiving agency, with "GlenburkeD8" in the memo line; and several individuals, with "SEO" or "Your First SEO" (a company Burke founded) in the memo line. (PX1 Att. A; Att. F; Att. M pp. 95-98; Att. N pp. 113-116.) In addition, since AHA commenced operations in early 2011, more than \$130,000 in checks from AHA's accounts have been deposited directly into accounts for which Burke is the sole signatory. (PX1 Att. M pp. 85-93, 108-109, 115-116, 122-123; Att. N pp. 98-112; Att. O pp. 2-3.)

Furthermore, according to former employees, Burke is "running the show" and "in charge" of an enterprise that includes AHA. (PX1 ¶¶5-7; PX2 ¶3.) Burke hired Katrinka Willard to manage customer service functions and handle additional duties for AHA and other sweepstakes ventures. (PX1 ¶¶5-7; PX2 ¶¶12-15.) During her employment, Willard reported directly to Burke and acted at his direction, communicating with him regularly regarding the receipt of revenues relating to his various operations. (PX1 ¶¶5-6; PX2 ¶¶3, 6, 8-10.) Willard in turn hired an assistant, Tina Craig, who answered telephone calls from AHA consumers and

1 performed data entry for the many ventures with which Willard and Burke were involved. (PX2  
2 ¶¶2, 4-5, 8-10, 13-14.) When Craig's employment was terminated, she was told it was because  
3 Burke "wanted to downsize." (PX2 ¶3.) Similarly, an accountant who worked out of the same  
4 office space as Willard and Craig kept the books for Burke's operations and reported directly to  
5 Burke, calling him with questions and using a laminated copy of Burke's driver's license to  
6 assist in managing his affairs. (PX2 ¶11; PX1 Att. M pp. 99-105; Att. N pp. 117-139.)

7 AHA operates from two locations in Las Vegas that Burke has used for many years: 2550  
8 Duneville Street and 2451 S. Buffalo Street. In its interactions with consumers and filings with  
9 the state of Nevada, AHA lists its address as 2550 Duneville Street, Suite A, Las Vegas, Nevada.  
10 (PX1 Att. C; PX7 Att. E; PX8 Att. I; PX10 Att. C, Att. F; PX11 Att. B; PX12 Att. D; PX13 Att.  
11 C, Att. E; PX19 Att. D.) The USPIS executed search warrants at that location against one of  
12 Burke's former telemarketing operations in 1991. (PX3 ¶3.) In the ensuing years, Burke has  
13 continued to use the address in filings with the Clark County (Nevada) Fictitious Firm Name  
14 registry and Nevada Secretary of State, most recently in 2011. (PX1 ¶12(a), Att. E-F, Att. H-I.)  
15 Moreover, bank accounts for which Burke is the sole signatory list the Duneville Street address  
16 on checks and account-opening documents. (PX1 Att. M pp. 108-109, 114-116, 121.)

17 AHA has also conducted business through Burke's office at 2541 S. Buffalo, Suites  
18 100B/102 and 112. In August 2012, AHA issued a check to "2451 Buffalo Drive LLC, c/o  
19 Gatski Comm'l Real Estate" to pay the rent for suites 102 and 112. (PX1 Att. N p. 158; *see also*  
20 PX1 Att. M p. 107 (check issued to UPS by AHA at the 2451 S. Buffalo address).) A subpoena  
21 that Immigrations and Customs Enforcement served on Gatski Commercial Real Estate, and the  
22 ICE investigator's visit to the site, revealed that Burke leases suite 100B (also referred to as suite  
23 102 in the lease documents) and suite 112 at the 2451 S. Buffalo address. (PX1 Att. V pp. 4, 6-8,  
24 17-38.) Underscoring Burke's ties to both locations, USPIS investigators interviewed Burke at  
25 2451 S. Buffalo in February 2010, and he told them they could find Katrinka Willard at the 2550  
26 Duneville location. (PX3 ¶¶11-15.)  
27  
28

### III. Contempt Defendants' Violative Business Practices

As described below, Burke has violated the Permanent Injunction by carrying out a deceptive telemarketing sweepstakes operation through AHA. Telemarketers for AHA employ a misleading pitch, claiming consumers have "already won" a purportedly valuable prize they will receive upon paying for a shipment of vitamins. Once consumers pay, however, AHA either fails to deliver any prize or sends items worth far less than promised. Contempt Defendants have caused approximately \$2 million in consumer injury through this scheme.

#### A. Contempt Defendants Use a Deceptive Telemarketing Pitch to Convince Consumers to Pay.

Contempt Defendants first contact consumers by placing outbound telemarketing calls. (PX6 ¶2; PX7 ¶2; PX8 ¶¶2-3; PX9 ¶¶2-3; PX10 ¶2; PX11 ¶2; PX12 ¶2; PX13 ¶2; PX14 ¶4; PX15 ¶2; PX16 ¶2-3; PX18 ¶2-3; PX19 ¶3; PX20 ¶¶2-3; PX21 ¶3.) AHA telemarketers tell consumers they have won one of five valuable prizes and give various explanations about how the consumers won a contest without entering. *Id.* For example, AHA telemarketers told Janice Austin, Silvia Cruz, and Melissa Follin the company entered them in a sweepstakes "as a courtesy" after calling them previously, even though the consumers did not purchase anything on the initial call. (PX6 ¶2; PX8 ¶¶2-3; PX9 ¶2-3.) Another AHA telemarketer told Shalenna Stoker she was entered in the sweepstakes when she purchased an exercise DVD. (PX16 ¶2.)

AHA telemarketers repeatedly assure consumers they are not offering a chance to enter a contest, but, rather, are calling because the consumer has "already won" a "guaranteed" prize. (PX6 ¶2; PX9 ¶6; PX10 ¶2; PX11 ¶3; PX15 ¶4; PX16 ¶3; PX18 ¶2; PX20 ¶3; PX21 ¶3.) According to the telemarketer, the only remaining question is which of the five valuable prizes the consumer will receive: a current-model-year car; a Boston Whaler boat; a piece of jewelry (e.g., a sapphire-and-diamond bracelet); thousands of dollars in cash; or a cruise or vacation (which may be exchanged for cash if the consumer is unable to travel). (PX6 ¶2; PX7 ¶2; PX8 ¶3; PX9 ¶3; PX10 ¶2; PX11 ¶3; PX12 ¶2; PX13 ¶2; PX14 ¶4; PX15 ¶2; PX16 ¶3; PX18 ¶2; PX20 ¶3; PX21 ¶3.) Some consumers later receive a letter reiterating this list of five possible

1 prizes, consistent with the descriptions provided during the initial telemarketing pitch. (PX7 Att.  
2 B; PX8 Att. D; PX10 Att. A; PX11 Att. A; PX12 Att. B-2.)

3 After describing these items in detail, AHA telemarketers tell consumers that to receive  
4 their prize, all they have to do is purchase vitamins from the company. (PX6 ¶3; PX7 ¶2; PX8  
5 ¶5; PX9 ¶4; PX10 ¶4; PX11 ¶4; PX12 ¶2; PX13 ¶3; PX14 ¶4; PX15 ¶3; PX16 ¶4; PX18 ¶3;  
6 PX20 ¶¶3-4; PX21 ¶3.) In the initial pitch, telemarketers typically quote a price between \$299  
7 and \$499 (ostensibly for a supply lasting several months) and claim consumers must buy  
8 vitamins to claim the prizes because the sweepstakes is part of a promotion. *Id.* Indeed,  
9 telemarketers often bolster this claim by asking consumers to send in pictures of themselves with  
10 their prizes, so the company can use the photos for promotional purposes. (PX9 ¶4; PX10 ¶4;  
11 PX11 ¶2; PX15 ¶3.) For instance, AHA telemarketers told Melissa Follin and Clifton Gordon  
12 that, if they won cars, dealerships near their homes would set up an appointment to take a picture  
13 with their cars. (PX9 ¶6; PX10 ¶10.)

14 If a consumer hesitates, telemarketers reiterate the high value of the prizes and emphasize  
15 the consumer will come out ahead even after paying for the vitamins. (PX8 ¶6; PX11 ¶4; PX13  
16 ¶¶3-4; PX18 ¶3.) The list of prizes – which includes obviously valuable items like new cars,  
17 boats, vacations, and thousands of dollars in cash – creates an impression that all prizes are worth  
18 more than the cost of the vitamins. In some instances, the telemarketer claims all the prizes are  
19 worth more than a specified amount, ranging from \$1,000 to \$2,300. (PX10 ¶3; PX11 ¶¶3-4;  
20 PX12 ¶2; PX13 ¶2; PX16 ¶3; PX20 ¶3.) Numerous consumers reported agreeing to pay solely  
21 because of Contempt Defendants' representations about the value of the prizes, not because they  
22 want AHA's high-priced vitamins. (PX7 ¶2; PX8 ¶7; PX11 ¶4; PX13 ¶4; PX14 ¶4; PX16 ¶4;  
23 PX20 ¶4.)

24 After convincing consumers to pay, the telemarketer obtains payment information and  
25 claims the company will notify the consumer within a few weeks which prize the consumer will  
26 receive. (PX7 ¶2; PX8 ¶7; PX10 ¶¶5-6; PX11 ¶4; PX12 ¶¶2-3; PX13 ¶4; PX14 ¶4; PX15 ¶5-6;  
27 PX16 ¶4; PX18 ¶6.) Some consumers later received a "confirmation code" that supposedly  
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1 corresponded to one of the five prizes. (PX7 Att. B; PX8 Att. D; PX10 Att. A; PX11 Att. A;  
 2 PX12 Att. B-2.) Bob Pierce reported that when he hesitated to give AHA his financial  
 3 information, the telemarketer told him his “prize code” on the spot, thus assuring him this  
 4 promotion was “for real;” Pierce sent his payment to AHA shortly afterward. (PX15 ¶¶5-6.)

5 The Contempt Defendants then seek to bilk consumers who paid in response to the initial  
 6 pitch for an even more expensive “next level” or “second round” prize. In these instances, an  
 7 AHA telemarketer calls the consumer with the “good news” that he or she will receive the  
 8 jewelry prize described in the first call (either a set of diamond watches or a diamond-and-  
 9 sapphire bracelet). (PX7 ¶5; PX8 ¶10; PX13 ¶7; PX15 ¶7; PX18 ¶11.) Capitalizing on the  
 10 excitement this promise generates, an AHA telemarketer then claims the consumer has won an  
 11 additional – and even more valuable – prize as part of a “VIP” promotion. (PX7 ¶7; PX8 ¶10;  
 12 PX11 ¶¶7-8; PX12 ¶5; PX13 ¶8; PX15 ¶9; PX18 ¶11; PX20 ¶8.) The telemarketer lists five new  
 13 big-ticket items and assures the consumer he or she is “guaranteed” to receive one of them.  
 14 (PX8 ¶10; PX10 ¶¶8-10; PX11 ¶¶7-8; PX12 ¶5; PX13 ¶8; PX15 ¶9; PX18 ¶11; PX20 ¶8.) These  
 15 items include: a current-model-year car; a home theater; a larger amount of cash than in the first  
 16 round; a vacation cruise (which the consumer may elect to exchange for thousands in cash  
 17 instead); gold bars; a set of diamond watches; or a lithograph by a purportedly well-known artist.  
 18 *Id.* As before, some consumers later receive a letter listing the same prizes the telemarketer  
 19 described over the phone. (PX7 Att. D; PX8 Att. H; PX10 Att. E; PX11 Att. D.)

20 As with the first round, telemarketers tell consumers they must purchase more vitamins  
 21 from the company to claim their prizes. (PX7 ¶7; PX8 ¶10; PX11 ¶8; PX12 ¶5; PX13 ¶8; PX18  
 22 ¶12; PX20 ¶9.) This time, the vitamins cost more – usually between \$1,200 and \$1,500. (PX8  
 23 ¶¶10, 12; PX10 ¶14; PX11 ¶8; PX12 ¶5; PX13 ¶8; PX14 ¶6; PX18 ¶12; PX20 ¶9; PX21 ¶¶6-7.)  
 24 As before, the telemarketer again assures skeptical consumers that their prize is worth far more  
 25 than the cost of the vitamins. (PX8 ¶11; PX10 ¶10; PX11 ¶8; PX12 ¶5; PX13 ¶8; PX18 ¶12.)  
 26 Once consumers agree to pay, AHA representatives take consumers’ payments and promise  
 27  
 28

1 further contact that will reveal which prize the consumer won.<sup>7</sup> (PX7 ¶¶8-9, Att. D; PX8 ¶¶13-  
 2 14, Att. D; PX10 ¶¶11, 17, Att. E; PX11 ¶¶9, 12, Att. D; PX13 ¶10; PX18 ¶¶16-17.)

3 **B. Contempt Defendants Fail to Deliver Prizes of the Promised Value.**

4 After charging consumers hundreds or even thousands of dollars – which consumers  
 5 agree to pay because of AHA’s assurances they are “guaranteed” to receive prizes worth far  
 6 more than the payment – Contempt Defendants fail to deliver.

7 AHA sends consumers their supply of vitamins and an “affidavit and release” form the  
 8 consumer must sign and send back to the company to claim the prize. (PX7 ¶¶4-5, 9-10, Att. E;  
 9 PX8 ¶¶9, 14, 17, 19, Att. D, Att. I; PX10 ¶¶7, 12, Att. C; PX11 ¶¶5-6, 12, Att. B; PX12 ¶¶3, 10,  
 10 Att. D; PX13 ¶¶6, 9, 13-14, Att. C, Att. E; PX16 ¶6; PX18 ¶¶7-8, 18; PX20 ¶¶5, 11.) AHA  
 11 refuses to send prizes to consumers without signed releases. (PX7 ¶6; PX8 ¶22; PX10 ¶13;  
 12 PX13 ¶7; PX18 ¶20.) These forms include a vague statement, in the midst of dense text, that  
 13 AHA made no “representations or warranties with respect to the Award,” as well as several  
 14 provisions by which the consumer supposedly releases AHA and a long list of affiliated parties  
 15 from all claims and liability relating to the prize. (PX7 Att. E; PX8 Att. D, Att. I; PX10 Att. C;  
 16 PX11 Att. B; PX12 Att. D; PX13 Att. C, Att. E.)

17 No consumer receives the promised valuable prizes. Some consumers never receive any  
 18 prizes, even after paying hundreds of dollars and calling AHA repeatedly to try to sort out the  
 19 matter. (PX7 ¶¶9-10; PX10 ¶¶19-21; PX11 ¶13; PX12 ¶¶4, 8, 9; PX15 ¶8; PX16 ¶¶9-11; PX18  
 20 ¶¶20-23.) Former employee Craig fielded numerous calls from consumers complaining they had  
 21 paid the money requested, but did not receive a prize. (PX2 ¶¶13-14.) Some consumers  
 22 complained to Craig that they had not even received the vitamins, much less any of the prizes  
 23 AHA promised. (PX2 ¶14.)

24  
 25 <sup>7</sup> Some consumers report AHA telemarketers tried to induce a third purchase with  
 26 promises of a third round of prizes. (PX15 ¶¶13-14; PX13 ¶13; PX20 ¶¶15-16.) By then,  
 27 however, consumers are generally too skeptical to agree to pay any more money. *Id.* One  
 28 consumer, however, paid for several rounds and received a “lithograph” – a framed print the  
 consumer’s wife describes as “nothing special” – as the third-round prize. (PX21 ¶¶5, 8.)

1 Consumers who do receive “prizes” fare no better. Consumers are invariably told they  
 2 will receive a piece of jewelry – never the car, boat, cash, gold bars, home theater system,  
 3 vacation or cruise AHA’s telemarketers describe.<sup>8</sup> (PX7 ¶5; PX8 ¶¶10, 18; PX10 ¶12; PX11 ¶6;  
 4 PX12 ¶10; PX13 ¶¶7, 13; PX14 ¶7; PX15 ¶7; PX16 ¶7; PX18 ¶¶11, 19; PX20 ¶¶11, 9; PX21  
 5 ¶¶5, 8.) Consumers who ultimately receive the jewelry are disappointed almost immediately; it  
 6 arrives in flimsy cardboard or plastic packaging, and the item itself has visible flaws and looks  
 7 “cheap.” (PX8 ¶¶15; PX13 ¶¶12, 16; PX14 ¶8; PX20 ¶¶12, 18.) Dorothy Lambing and Yundi  
 8 Zhang brought their jewelry to appraisers who turned them away because the items were not  
 9 even worth the cost of the appraisal. (PX13 ¶15; PX20 ¶¶14, 19.) Furthermore, Dorothy  
 10 Lambing searched for her purported “diamond watches” online and found an eBay listing for an  
 11 identical item, with the same design and brand name, for \$39.99. (PX13 ¶17, Att. G.) Indeed,  
 12 AHA’s own bank records include a check for \$2,830 with the notation “100 bracelets” in the  
 13 memo line – indicating that AHA paid only \$28.30 per bracelet. (PX1 Att. N p. 141.)

14 A highly credentialed, expert appraiser, Martin Fuller, evaluated the jewelry “prizes”  
 15 consumers received from AHA. (PX1 ¶39; PX4 ¶¶2, 4-6.) His appraisal confirms the purported  
 16 “diamond and sapphire” bracelets are made of “poorly cut” and “chipped or broken” stones of  
 17 very low quality, including only miniscule diamond chips. (PX4 ¶5.) He estimated the fair  
 18 market value of the bracelets to range from \$35 to \$60. (PX4 ¶10.) Furthermore, he found that  
 19 the purported “gold” and “diamond” watches are in fact made of base metal and stainless steel,  
 20 with a few “broken pieces of diamond glued in place” on the face. (PX4 ¶4.) Fuller estimated  
 21 the fair market value of the men’s watch model to be \$39.99, and the women’s watch model to  
 22 be \$59.99. (PX4 ¶¶8-9.)

### 23 **C. Contempt Defendants Often Fail to Issue Refunds.**

24 Once consumers realize Contempt Defendants have not delivered as promised, some seek  
 25 to return the vitamins. They face a chaotic return process rigged to discourage them from  
 26 obtaining a refund. In numerous instances, AHA simply refuses to accept returned vitamins,  
 27

28 <sup>8</sup> Furthermore, AHA’s bank records do not indicate payment for such prizes. (PX1 ¶24.)



1 often claiming various laws prohibit the return of “consumable products.” (PX7 ¶12; PX10 ¶19;  
 2 PX11 ¶¶11, 15; PX12 ¶8; PX13 ¶18; PX14 ¶9; PX18 ¶21; PX20 ¶20.) In other cases, AHA  
 3 shunts consumers seeking refunds from representative to representative until the consumers  
 4 become frustrated. (PX2 ¶¶13-14; PX8 ¶¶18, 20, 23; PX16 ¶¶8-11; PX19 ¶6; PX21 ¶¶10-11.)  
 5 In at least three instances, AHA cautioned consumers not to go to their credit card companies  
 6 and stated that all refunds are issued by check. (PX10 ¶18, Att. F; PX19 ¶15, Att. D, Att. G;  
 7 PX21 ¶12.)

8 When frustrated consumers eventually turn to the BBB or their credit card companies to  
 9 seek refunds, Contempt Defendants change their tune, contending that consumers did not comply  
 10 with a mandatory 30-day return policy. (PX8 ¶20; PX11 ¶14; PX14 ¶12.) AHA’s tactic  
 11 sometimes succeeds even though the company itself was responsible for consumers’ purported  
 12 failure to return the vitamins promptly (*e.g.*, by stringing consumers along beyond the 30-day  
 13 period with unreturned calls and unfulfilled assurances of a prompt resolution, or by refusing to  
 14 accept the consumer’s return package). (PX8 ¶21; PX14 ¶12.) Notwithstanding Contempt  
 15 Defendants’ attempts to avoid chargebacks, known AHA merchant accounts with Visa and  
 16 MasterCard show chargeback rates of 4% to 6%. (PX1 ¶29, Att. R, Att. S.) Those rates greatly  
 17 exceed the industry’s 1% threshold. (PX5 ¶10.)

#### 18 **D. Contempt Defendants Caused Approximately \$2 Million in Consumer Harm.**

19 AHA’s known bank accounts show a total of \$2,217,280.91 in deposits from January  
 20 2011, when it commenced operations, through the fall of 2012, when its banks produced  
 21 documents to the FTC. (PX1 ¶23, Att. M pp. 2-77, Att. N pp. 4-96.) This figure reflects, or is at  
 22 least a reasonable estimate of, the amount consumers paid AHA in response to Contempt  
 23 Defendants’ deceptive telemarketing.

### 24 **ARGUMENT**

25 Civil contempt is warranted where there is clear and convincing evidence the contemnors  
 26 violated a specific and definite order of the court. *FTC v. Affordable Media, LLC*, 179 F.3d  
 27 1228, 1239 (9th Cir. 1999). Here, there is clear and convincing evidence the Permanent  
 28



1 Injunction binds each of the Contempt Defendants, and that Contempt Defendants violated two  
2 specific and definite provisions of the Permanent Injunction and should be held in contempt.  
3 Furthermore, Contempt Defendants should be ordered to pay compensatory sanctions, following  
4 a brief period of discovery to establish the extent of their violative conduct and confirm the  
5 amount of financial harm their actions caused consumers.<sup>9</sup>

6 **I. The Permanent Injunction Binds Each of the Contempt Defendants.**

7  
8 Injunctions bind parties with notice of an order, as well as any person or entity with  
9 notice of the order that acts in "active concert or participation" with a party to violate the order.  
10 Fed. R. Civ. P. 65(d)(2)(A). As Burke is a party to the Permanent Injunction and stipulated to its  
11 entry, he is bound by its prohibitions. *See* Permanent Injunction, App'x B, p. 16.

12 Furthermore, AHA is also bound by the Permanent Injunction because (1) it has notice of  
13 the order through Burke, its *de facto* principal; and (2) it acted under Burke's control to aid him  
14 in violating the Permanent Injunction.

15 First, Burke's knowledge of the Permanent Injunction may be imputed to AHA because  
16 he is its *de facto* principal. When an individual finances a company, controls its financial  
17 resources, exercises hiring and firing authority, and makes operational decisions, his knowledge  
18 of an injunction is imputed to the company even if the individual is not formally an officer or  
19 principal. *FTC v. Data Med. Capital, Inc.*, No. SA CV 99-1266 AHS (EEx), 2010 WL 1049977,  
20 at \*20 (C.D. Cal. Jan. 15, 2010); *FTC v. Vocational Guides, Inc.*, No. 3:01-0170, 2009 WL  
21 943486, at \*15 (M.D. Tenn. April 6, 2009). Although Burke is not named in AHA's corporate  
22 papers, financial records show Burke provided early financial backing for AHA from an account  
23 on which he is the sole signatory. He also controls AHA's accounts, paying both his personal  
24 expenses (including his taxes and payments for his PostNet account) and expenses relating to his  
25 other businesses (including Your First SEO) with AHA funds. Furthermore, Burke controls the  
26 American Express merchant account that processes consumers' payments into AHA's bank

27 <sup>9</sup> Should the Court grant the FTC's concurrent motion seeking appointment of a receiver,  
28 coercive remedies may not be necessary to halt the violative conduct.

1 account. Former employee Craig reports Burke is “in charge,” has hiring and firing authority  
 2 over staff, and oversees key personnel – such as the accountant who keeps the books for AHA –  
 3 who act at his direction. Former employee Willard confirms that this matches Burke’s usual  
 4 method of controlling his operations from the background while using others as fronts.  
 5 Moreover, Burke ultimately receives the proceeds of AHA’s deceptive telemarketing scheme.  
 6 Accordingly, Burke’s knowledge of the Permanent Injunction may be imputed to AHA.

7       Second, AHA acts in “active concert” with Burke to violate the Permanent Injunction  
 8 because it is “subject to [his] control” and abets him in violating the order. *Regal Knitwear Co.*  
 9 *v. NLRB*, 324 U.S. 9, 13-14 (1945) (entities “subject to [a party’s] control” are bound by  
 10 injunctions entered against the party); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1324  
 11 (9th Cir. 1998) (non-party that has notice of an order and abets defendant in violating it is in  
 12 contempt). As discussed above, Burke controls AHA. He has authority over its merchant  
 13 account, exercises hiring and firing authority, oversees key personnel, receives the proceeds of  
 14 its activities, and uses those proceeds for his own ends. Furthermore, AHA abets him in  
 15 violating the order by acting as the vehicle through which Burke conducts his deceptive  
 16 telemarketing. Therefore, because AHA is under Burke’s control and abets him in violating the  
 17 Permanent Injunction, it is also bound by the Permanent Injunction’s prohibitions.

## 18 **II. The Contempt Defendants Violate the Permanent Injunction.**

19       Burke and AHA violate two specific and definite provisions of the Permanent Injunction:  
 20 (1) Section III’s permanent telemarketing ban; and (2) Section II.B’s prohibition against material  
 21 misrepresentations.

### 22 **A. Contempt Defendants Telemarket in Violation of the Permanent Injunction.**

23       Section III of the Permanent Injunction permanently bans Burke from “engaging in  
 24 telemarketing” or “assisting others in telemarketing.” The Permanent Injunction defines  
 25 “telemarketing” as “a plan, program, or campaign which is conducted to induce the purchase of  
 26 goods or services by use of one or more telephones and which involves more than one interstate  
 27 telephone call.” Permanent Injunction, App’x B, p. 3. As described above, consumers in many  
 28

1 states report receiving unsolicited phone calls from Contempt Defendants' telemarketers seeking  
2 to sell vitamins through a purported prize promotion. In these calls, the telemarketers make  
3 nearly identical promises to each consumer and follow a similar pattern of escalating offers – and  
4 fees – after a consumer agrees to pay. Contempt Defendants' representatives explicitly state that  
5 their calls are part of a promotional campaign designed to induce the purchase of their vitamins.  
6 As Burke uses AHA to conduct this “program or campaign” to “induce the purchase” of  
7 vitamins, both Burke and AHA violate the Permanent Injunction's clear and definite  
8 telemarketing ban.

9 **B. Contempt Defendants Misrepresent That Consumers Were Specially**  
10 **Selected to Receive Valuable Prizes.**

11 Section II.B of the Permanent Injunction prohibits “[m]isrepresenting, in any manner,  
12 directly or by implication, or failing to disclose any fact material to a consumer's decision to  
13 purchase any item, product, good, service, or investment.”

14 Here, Contempt Defendants make several related material representations to consumers.  
15 First, AHA telemarketers expressly claim consumers were specially selected to win one of five  
16 prizes in a promotional contest and need only buy vitamins to claim the prize. This  
17 representation is material because it convinces consumers that the “prize” is worth more than  
18 they must pay to claim it. Second, Contempt Defendants reinforce the initial representation by  
19 claiming, both expressly and implicitly, that the prizes consumers will receive are valuable. For  
20 example, the telemarketers describe several prizes with verifiable values, such as \$3,000 cash or  
21 specifically named current-model-year cars. This representation convinces consumers that the  
22 other prizes on the list are comparably valuable. Some telemarketers claim the prizes are listed  
23 in descending order of value, with the least valuable worth \$1,500 or more. Other telemarketers  
24 claim all prizes are worth much more than the buy-in price of \$300 to \$500 for the first round, or  
25 \$1,200 to \$1,500 for the second. These representations are also material because numerous  
26 consumers report that they paid for vitamins only because they wanted the valuable prizes the  
27 Contempt Defendants offered.

1 In reality, the supposed "contest" is nothing but a ruse. Instead of awarding "prizes" only  
2 to a select few consumers, Contempt Defendants will take money from any consumer who will  
3 pay. Despite telemarketers' representations that prize availability is strictly limited, the  
4 company's bank records reflect the bulk purchase of costume jewelry – in one instance, 100  
5 pieces at a time – to send as "prizes." Some consumers receive no prizes whatsoever, and those  
6 who receive prizes get nothing but mass-produced items worth much less than Contempt  
7 Defendants claim. In fact, one consumer found her "valuable prize," a watch, listed on eBay for  
8 \$39.99; others were turned away by appraisers who told them the items were not even worth the  
9 cost of an appraisal. AHA's own records show that it paid \$23.80 per item for one shipment of  
10 bracelets. An expert appraiser who examined several pieces of jewelry AHA sent consumers  
11 confirmed that none of the items had a fair market value above \$60. Finally, AHA's accounts do  
12 not show purchases of any of the other "valuable" prizes they supposedly awarded (*e.g.*, cars,  
13 boats, cruises).

14 These misrepresentations deceive consumers into paying for Contempt Defendants'  
15 ridiculously overpriced vitamins, as shown by consumers' testimony and Contempt Defendants'  
16 excessive chargeback rates. *See FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1221 (D.  
17 Nev. 2011) (excessive chargeback rates "suggest that in fact consumers were deceived."). Thus,  
18 because AHA abets Burke and acts under his control in misrepresenting to consumers that they  
19 won a contest and will receive a valuable prize, both Contempt Defendants violate Section II.B  
20 of the Permanent Injunction.<sup>10</sup>

---

24 <sup>10</sup> The purported releases consumers must sign to claim their prizes do not, in fact, release  
25 the Contempt Defendants from liability. The Contempt Defendants fraudulently induced  
26 consumers to sign the "affidavits" with false promises about the valuable prizes they would  
27 supposedly receive, rendering any purported waivers invalid. *J.A. Jones Const. Co. v. Lehrer*  
28 *McGovern Bovis, Inc.*, 120 Nev. 277, 290-91 (2004); *Friendly Irishman, Inc. v. Ronnow*, 74 Nev.  
316, 318-19 (1958) (knowingly false representations intended to induce a contract render the  
contract voidable).

### III. Contempt Defendants' Violations Have Caused \$2 Million in Consumer Harm.

After appropriate contempt proceedings, Contempt Defendants should be found in contempt and ordered to compensate consumers victimized by their actions. The Court has broad authority to impose sanctions for violations of its orders, including requiring compensation for losses sustained as a result of the failure to comply with the order. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947); *Koninklijke Philips Elec. N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008) (purpose of civil contempt is coercive or compensatory). In an FTC contempt action, consumer loss is an appropriate measure of the compensatory remedy. *FTC v. EDebitPay, LLC*, 695 F.3d 938, 945 (9th Cir. 2012). In this case, consumer loss is the amount all consumers paid AHA, as Contempt Defendants induced all of their "customers" to pay with false representations. Furthermore, no offset is warranted for the value of the vitamins or the cheap prizes some consumers received, as consumers paid based on false promises about valuable prizes. *See FTC v. Figgie*, 994 F.2d 595, 606 (9th Cir. 1993) (consumers enticed by false promises are entitled to full refunds regardless of the value of merchandise received because they are injured by "the fraud in the selling"); *see also FTC v. Trudeau*, 579 F.3d 754, 773 n. 16 (7th Cir. 2009); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000) (all applying *Figgie* in measuring contempt sanctions).

At this time, the FTC estimates that Contempt Defendants' conduct defrauded consumers of approximately \$2 million, as deposits into AHA's known bank accounts total \$2,217,280.91. However, this figure is an estimation based on evidence gathered through an undercover investigation and may be further refined based on evidence gathered during discovery. Following such discovery, the FTC will present any further evidence in support of its request for an order holding Contempt Defendants in civil contempt and ordering them to pay a compensatory sanction in the full amount consumers paid them.

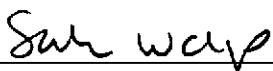
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**CONCLUSION**

For the foregoing reasons, the FTC requests that, following a brief period of discovery and appropriate contempt proceedings, the Court find the Contempt Defendants in contempt of the Permanent Injunction and order compensatory sanctions measured by the full amount consumers paid.

Dated: January 28, 2013

Respectfully submitted,

  
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FEDERAL TRADE COMMISSION

## **APPENDIX A**

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CV-S-97-00750-PMP (LRL)

13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 DAYTON FAMILY PRODUCTIONS, INC.;  
19 J. J. DAYTON ASSOCIATES, INC.; HIGH  
20 VOLTAGE PICTURES, INC. aka High Voltage  
Entertainment; JOHN RUBBICO, individually and  
21 doing business as J J Family Film Productions;  
GLEN E. BURKE, KEVIN ROY; IGNACIO  
JIMENEZ; JOHN IAVARONE; and FRED  
DAVIDSON,

22 Defendants.  
23

CV-S-

COMPLAINT FOR INJUNCTION AND  
OTHER EQUITABLE RELIEF

24 Plaintiff, the Federal Trade Commission ("Commission"), by its undersigned attorneys,  
25 alleges as follows:  
26





1 its principal place of business at 4480 W. Spring Mountain Road in Las Vegas, Nevada. DFP is  
2 the initial managing partner of Family Movie Partners, an entity that purportedly owns the rights  
3 to a Lyman Dayton film called *The Last Resort*, and of Wolf Creek Partners, an entity that  
4 purportedly owns or will own the rights to a Lyman Dayton film to be called *Wolf Creek a/k/a*  
5 *Wind River a/k/a Cry of the Spirit* (hereinafter "*Wolf Creek*"). DFP also solicits consumers to  
6 invest in Wolf Creek Partners. DFP transacts business in the District of Nevada.

7       7. Defendant High Voltage Pictures, Inc. ("High Voltage") is a Nevada corporation  
8 with its principal place of business at 4480 W. Spring Mountain Road in Las Vegas, Nevada.  
9 High Voltage is also known as High Voltage Entertainment. High Voltage is the executive  
10 producer of *Wolf Creek*. High Voltage also solicits consumers to invest in general partnerships  
11 that purportedly will own the rights to films produced by Lyman Dayton. High Voltage transacts  
12 business in the District of Nevada.

13       8. The foregoing defendant corporations — J. J. Dayton, DFP, and High Voltage —  
14 operate together as part of a common enterprise (hereinafter "the Dayton Enterprise") to raise  
15 funds for films, including *The Last Resort* and *Wolf Creek*.

16       9. Defendant John Rubbico is the sole proprietor of a telemarketing business called  
17 J J Family Film Productions, which solicits consumers to invest in the Wolf Creek Partners  
18 general partnership. Individually, or in concert with others, defendant Rubbico directs, controls,  
19 formulates, or participates in the acts and practices of the Dayton Enterprise. He transacts  
20 business in the District of Nevada.

21       10. Defendant Glen Burke is a consultant to the Dayton Enterprise. Individually, or  
22 in concert with others, defendant Burke directs, controls, formulates, or participates in the acts  
23 and practices of the Dayton Enterprise. He resides and transacts business in the District of  
24 Nevada.

25       11. Defendant Kevin Roy is the president, secretary, treasurer, and sole director of  
26 defendant J. J. Dayton. Individually, or in concert with others, defendant Roy directs, controls,

1 formulates, or participates in the acts and practices of the Dayton Enterprise. He transacts  
2 business in the District of Nevada.

3 12. Defendant Ignacio Jimenez is a consultant to the Dayton Enterprise and a past  
4 director of defendant J. J. Dayton. Individually, or in concert with others, defendant Jimenez  
5 directs, controls, formulates, or participates in the acts and practices of the Dayton Enterprise.  
6 He resides and transacts business in the District of Nevada.

7 13. Defendant John Iavarone is the president, secretary, and treasurer of defendant  
8 High Voltage. He is also the former president and director of defendant J. J. Dayton.  
9 Individually, or in concert with others, defendant Iavarone directs, controls, formulates, or  
10 participates in the acts and practices of the Dayton Enterprise. He resides and transacts business  
11 in the District of Nevada.

12 14. Defendant Fred Davidson is the president of defendant DFP. Individually, or in  
13 concert with others, defendant Davidson directs, controls, formulates, or participates in the acts  
14 and practices of the Dayton Enterprise. He transacts business in the District of Nevada.

#### 15 DEFENDANTS' COURSE OF CONDUCT

16 15. Since at least July 1995, and continuing thereafter, defendants have maintained a  
17 substantial course of trade in the offering and sale of general partnership investments involving  
18 films produced and/or directed by Lyman Dayton. Defendants offer and sell their investment  
19 opportunities to consumers across the country using telephone sales presentations and written  
20 promotional materials.

21 16. Defendants represent to prospective investors that Lyman Dayton's past films  
22 have generated, on average, profits for investors of roughly five dollars for every dollar invested  
23 in the films.

24 17. Defendants represent to prospective investors that Lyman Dayton and/or his films  
25 have won several prestigious film industry awards, thus demonstrating the quality of his past  
26 films and the likely commercial viability of *The Last Resort* and *Wolf Creek*.

1           18. In the course of their business, during 1995 and early 1996, defendants  
2 represented to prospective investors that they would raise a \$2.625 million from the sale of units  
3 in a general partnership, Family Movie Partners, to produce and market a film called *The Last*  
4 *Resort*. In fact, defendants have raised over \$4.1 million from the sale of units in Family Movie  
5 Partners. Since mid-1996, defendants have represented to prospective investors that they will  
6 raise \$3.5 million through the sale of units in a second general partnership, Wolf Creek Partners,  
7 to produce and market a film called *Wolf Creek*. In fact, defendants have raised over \$4.5  
8 million from the sale of units in Wolf Creek Partners. This overselling has diluted substantially  
9 each investor's stake in the partnerships that defendants promote. The overselling also has raised  
10 substantially the "break-even" points for the partnerships that defendants promote, thus reducing  
11 the likelihood of a positive return on the investments.

12           19. Defendants, individually or in concert with others, have used the above  
13 representations, or others similar to those described above, to induce consumers to purchase  
14 investments in their Family Movie Partners and Wolf Creek Partners offerings.

15           20. Defendants' course of trade is in or affecting commerce, within the meaning of  
16 Section 4 of the FTC Act, 15 U.S.C. § 44.

17                   COUNT ONE: DEFENDANT'S VIOLATIONS OF THE  
18                   FEDERAL TRADE COMMISSION ACT

19           21. Defendants represent, expressly or by implication, that Lyman Dayton's past  
20 films have generated, on average, profits for investors of roughly five dollars for every dollar  
21 invested in the films. In truth and in fact, Lyman Dayton's past films have not generated, on  
22 average, profits for investors of roughly five dollars for every dollar invested in the films.  
23 Instead, the films have generated, on average, substantially fewer profits, or no profits at all, for  
24 the investors who invested in the films.

25           22. Defendants represent, expressly or by implication, that Lyman Dayton and/or his  
26 films have won the following awards: a National Association of Theater Owners 1985 award for

1 "Producer of the Year" for Lyman Dayton, a Motion Picture Association of America "Best  
 2 Family Picture of the Year Award" for Lyman Dayton's film *Baker's Hawk*, and a Cannes Film  
 3 Festival Award for Lyman Dayton's film *Dream Machine*. In truth and in fact, Lyman Dayton  
 4 and/or his films have not won the following awards: a National Association of Theater Owners  
 5 1985 award for "Producer of the Year" for Lyman Dayton, a Motion Picture Association of  
 6 America "Best Family Picture of the Year Award" for Lyman Dayton's film *Baker's Hawk*, and  
 7 a Cannes Film Festival Award for Lyman Dayton's film *Dream Machine*.

8 23. Defendants represent, expressly or by implication, that they will raise no more  
 9 than specified amounts for each of the partnerships they promote. In truth and in fact, defendants  
 10 raise substantially more than the specified amounts for each of the partnerships they promote.

11 24. Therefore, defendants' representations as set forth in Paragraphs 21-23, above, are  
 12 false and misleading, and constitute deceptive acts or practices in violation of the FTC Act, 15  
 13 U.S.C. § 45(a).

#### 14 THE TELEMARKETING SALES RULE

15 25. Defendants are "sellers" or "telemarketers" engaged in "telemarketing" of  
 16 "investment opportunities," as those terms are defined in the Telemarketing Sales Rule, 16 C.F.R.  
 17 §§ 310.2(r), (t), (u), and (j).

18 26. The Telemarketing Sales Rule prohibits: "Misrepresenting, directly or by  
 19 implication . . . any material aspect of an investment opportunity." 16 C.F.R.  
 20 § 310.3(a)(2)(vi).

21 27. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and  
 22 Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales  
 23 Rule constitute unfair or deceptive acts or practices in or affecting commerce, in violation of  
 24 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

1 COUNT TWO: DEFENDANTS' VIOLATIONS OF THE TELEMARKETING SALES RULE

2 28. In the course of telemarketing, in numerous instances since December 31, 1995,  
3 defendants have misrepresented, directly or by implication, material aspects of their investment  
4 opportunities. These misrepresentations include statements:

5 (a) that Lyman Dayton's past films have generated, on average, profits for  
6 investors of roughly five dollars for every dollar invested in the films;

7 (b) that Lyman Dayton and/or his films have won the following awards: a  
8 National Association of Theater Owners 1985 award for "Producer of the Year" for  
9 Lyman Dayton, a Motion Picture Association of America "Best Family Picture of the  
10 Year Award" for Lyman Dayton's film *Baker's Hawk*, and a Cannes Film Festival  
11 Award for Lyman Dayton's film *The Dream Machine*; and

12 (c) that defendants will raise no more than specified amounts for each of the  
13 partnerships they promote.

14 29. In truth and in fact:

15 (a) Lyman Dayton's past films have generated, on average, profits for  
16 investors of substantially less than five dollars for every dollar invested in the films;

17 (b) Lyman Dayton and/or his films have not won the following awards: a  
18 National Association of Theater Owners 1985 award for "Producer of the Year" for  
19 Lyman Dayton, a Motion Picture Association of America "Best Family Picture of the  
20 Year Award" for Lyman Dayton's film *Baker's Hawk*, and a Cannes Film Festival  
21 Award for Lyman Dayton's film *Dream Machine*; and

22 (c) defendants raise substantially more than the specified amounts for each of  
23 the partnerships they promote.

24 30. Therefore, defendants' representations as set forth in Paragraph 29, above, violate  
25 Section 310.3(a)(2)(vi) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(2)(vi).

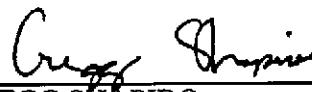


1 (3) Award such relief as the Court finds necessary to redress injury to investors resulting  
2 from defendants' violations of Section 5(a) of the FTC Act and the Telemarketing Sales Rule,  
3 including, but not limited to, the rescission of contracts or refund of money, and the  
4 disgorgement of unlawfully obtained monies; and

5 (4) Award plaintiff the cost of bringing this action as well as such additional equitable  
6 relief as the Court may determine to be just and proper.

7  
8 Respectfully submitted,

9  
10 DATED: June 20, 1997

  
\_\_\_\_\_  
GREGG SHAPIRO  
JAMES GARLAND  
JEROME M. STEINER, JR.  
Federal Trade Commission

13  
14 BLAINE T. WELSH  
Assistant United States Attorney

15 Attorneys for Plaintiff  
16  
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26



## **APPENDIX B**

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GREGG SHAPIRO  
Federal Trade Commission  
600 Pennsylvania Ave., N.W., Rm. 200  
Washington, D.C. 20580  
(202) 326-3549 (voice)  
(202) 326-3392 (facsimile)

CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA

BY \_\_\_\_\_ DEPUTY

JEROME M. STEINER, JR.  
Federal Trade Commission  
901 Market St., Ste. 570  
San Francisco, CA 94103  
(415) 356-5270

BLAINE T. WELSH  
Assistant United States Attorney  
701 E. Bridger Ave., Ste. 800  
Las Vegas, NV 89101  
(702) 388-6336

Attorneys for Plaintiff

ENTERED  
SERVED

OCT - 1 1998

CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA

BY \_\_\_\_\_ DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DAYTON FAMILY PRODUCTIONS, INC.,  
et al.

Defendants.

CV-S-97-750-PMP (LRL)

STIPULATED FINAL ORDER  
FOR PERMANENT INJUNCTION  
AND SETTLEMENT OF CLAIMS  
FOR MONETARY RELIEF AGAINST  
DEFENDANTS GLEN BURKE, JOHN  
IAVARONE, IGNACIO JIMENEZ,  
KEVIN ROY, J.J. DAYTON  
ASSOCIATES, INC., HIGH VOLTAGE  
PICTURES, INC., HIGH VOLTAGE  
ENTERTAINMENT, INC., and AZTEC  
ESCROW, INC.,

Plaintiff, the Federal Trade Commission ("Commission"), commenced this action by  
filing its complaint against defendants Dayton Family Productions, Inc., J. J. Dayton Associates,  
Inc., High Voltage Pictures, Inc., John Rubbico, individually and doing business as J J Family  
Film Productions, John Iavarone, Glen Burke, Ignacio Jimenez, Kevin Roy, and Fred Davidson.

Stipulated Order

Page 1 of 16

1 The Commission later amended its complaint to name American Family Productions, Inc.,  
2 American Family Consultants, Inc., High Voltage Entertainment, Inc., Reunion Management,  
3 Inc., Icon Management Services, Inc., Aztec Escrow, Inc., Raymond Filosi, and Richard S. Hart  
4 as additional defendants. The amended complaint alleges that the defendants engaged in unfair  
5 or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act  
6 ("FTC Act"), 15 U.S.C. § 45, and of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310,  
7 and seeks a permanent injunction and monetary relief pursuant to Section 13(b) of the FTC Act  
8 and the TSR. The Commission and these defendants, as hereinafter defined, hereby stipulate to  
9 the entry of this Final Order for Permanent Injunction and Settlement of Claims for Monetary  
10 Relief ("Order"). Being advised of the premises, the Court finds:

11 A. This is an action by the Commission instituted under Sections 5 and 13(b) of the  
12 Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), and the TSR, 16 C.F.R. Part  
13 310. The amended complaint seeks both permanent injunctive relief and consumer  
14 redress for alleged unfair or deceptive acts or practices by these defendants in connection  
15 with the promotion of investments in films.

16 B. The Commission has the authority under Section 13(b) of the FTC Act and the  
17 TSR to seek the relief it has requested.

18 C. This Court has jurisdiction over the subject matter of this case and has jurisdiction  
19 over each of these defendants. Venue in the District of Nevada is proper, and the  
20 complaint states a claim upon which relief may be granted against these defendants under  
21 Sections 5 and 13(b) of the FTC Act and under the TSR.

22 D. The activities of these defendants are in or affecting commerce, as defined in 15  
23 U.S.C. § 44.

24 E. Each of these defendants neither admits nor denies the allegations set forth in the  
25 amended complaint.

26 F. Each of these defendants waives all rights to seek judicial review or otherwise

1 challenge or contest the validity of this Order. Each of these defendants also waives any  
 2 claim that he or it may have held under the Equal Access to Justice Act, 28 U.S.C.  
 3 § 2412, concerning the prosecution of this action to the date of this Order. Each of these  
 4 defendants shall bear his or its own costs and attorneys fees incurred in connection with  
 5 this action.

6 G. The Commission and the defendants have agreed that the entry of this Order  
 7 resolves all matters of dispute between them arising from the complaint in this action, up  
 8 to the date of entry of this Order. This action and the relief awarded herein are in addition  
 9 to, and not in lieu of, other remedies as may be provided by law, including both civil and  
 10 criminal remedies.

11 H. Consistent with the principles set forth in United States v. Halper, 490 U.S. 435  
 12 (1989), each of these defendants, by signing and stipulating to this Order, acknowledges  
 13 and agrees that this civil action has not placed him or it in jeopardy and that this Order  
 14 does not preclude subsequent criminal action against him or it.

15 I. Entry of this Order is in the public interest.

16 IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

#### 17 DEFINITIONS

18 I. For purposes of this Order, the following definitions shall apply:

19 A. "Telemarketing" means a plan, program, or campaign which is conducted to  
 20 induce the purchase of goods or services by use of one or more telephones and which  
 21 involves more than one interstate telephone call. The term does not include the  
 22 solicitation of sales through the mailing of a catalog which: contains a written description  
 23 or illustration of the goods or services offered for sale; includes the business address of  
 24 the seller; includes multiple pages of written material or illustrations; and has been issued  
 25 not less frequently than once a year, when the person making the solicitation does not  
 26 solicit customers by telephone but only receives calls initiated by customers in response

1 to the catalog and during those calls takes orders only without further solicitation. For  
 2 purposes of the previous sentence, the term "further solicitation" does not include  
 3 providing the customer with information about, or attempting to sell, any other item  
 4 included in the same catalog which prompted the customer's call or in a substantially  
 5 similar catalog. The term "telemarketing" does not include telephone calls initiated by a  
 6 consumer in response to an advertisement through any media, other than direct mail or e-  
 7 mail solicitations; provided, however, that this exception does not apply to calls initiated  
 8 by a consumer in response to an advertisement relating to investments.

9 B. "Assisting others" means knowingly providing any of the following goods or  
 10 services to any person or entity (1) performing customer service functions for an entity  
 11 including, but not limited to, receiving or responding to consumer complaints; (2)  
 12 formulating or providing, or arranging for the formulation or provision of, any telephone  
 13 sales script or any other marketing material for an entity; (3) providing names of, or  
 14 assisting in the generation of, potential customers for an entity; or (4) performing  
 15 marketing services of any kind for an entity.

16 C. Unless otherwise indicated, the term "these defendants" or "defendants" refers to  
 17 and includes the following individuals: John Iavarone, Glen Burke, Ignacio Jimenez, and  
 18 Kevin Roy (the "individual defendants"); and refers to the following corporations or  
 19 business entities: J. J. Dayton Associates, Inc., High Voltage Pictures, Inc., High Voltage  
 20 Entertainment, Inc., and Aztec Escrow, Inc. (the "corporate defendants").

## 21 PROHIBITED BUSINESS PRACTICES

22 II. THEREFORE, IT IS HEREBY ORDERED that defendants and their agents, employees,  
 23 officers, and servants, and all other persons or entities in active concert or participation with  
 24 them who receive actual notice of this order by personal service or otherwise, in connection with  
 25 the advertising, promotion, offer for sale, or sale of any item, product, good, service, or  
 26 investment interest of any kind, including but not limited to investments in films, are hereby

1 restrained and enjoined from:

2 A. Misrepresenting, directly or by implication:

- 3 1. the returns, revenues, or profits that any film has generated for investors;
- 4 2. the performance (including gross revenues generated and box office
- 5 receipts) of any film;
- 6 3. the awards received by any film or by any person who has worked on or
- 7 been associated with a film;
- 8 4. the likely profits to be made through any investment involving films or
- 9 any other investment;
- 10 5. the amount of money or other capital that will be raised for any investment
- 11 involving films or any other investment;
- 12 6. the purposes for which funds raised from consumers will be used;
- 13 7. the costs associated with the advertising, promotion, offer for sale, or sale
- 14 of any item, product, good, service, or investment, including but not limited to
- 15 any investment involving films;
- 16 8. the risk, liquidity, market value, resale value, or expected income or profit
- 17 associated with any item, product, good, service, or investment, including but not
- 18 limited to any investment involving films;

19 B. Misrepresenting, in any manner, directly or by implication, or failing to disclose  
20 any fact material to a consumer's decision to purchase any item, product, good, service, or  
21 investment, including but not limited to any investment involving films;

22 C. Assisting others in violating any provision in Subsections A and B of this  
23 Paragraph;

24 D. Violating or assisting others to violate any provision of the Telemarketing Sales  
25 Rule, 16 C.F.R. Part 310, including but not limited to: misrepresenting, directly or by  
26 implication "[a]ny material aspect of an investment opportunity including, but not limited

1 to, risk, liquidity, earnings potential, or profitability." 16 C.F.R. § 310.3(a)(2)(vi).

2 **BAN ON TELEMARKETING**

3 III. IT IS FURTHER ORDERED that defendants John Iavarone, Glen Burke, Ignacio  
4 Jimenez, Kevin Roy, J. J. Dayton Associates, Inc., High Voltage Pictures, Inc., High Voltage  
5 Entertainment, and Aztec Escrow, Inc. are hereby permanently restrained and enjoined from  
6 either (1) engaging in telemarketing; or (2) assisting others in telemarketing.

7 **LISTS**

8 IV. IT IS FURTHER ORDERED that defendants and their officers, agents, servants, and  
9 employees, and all other persons or entities in active concert or participation  
10 with them who receive actual notice of this Order by personal service or otherwise, are  
11 permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise  
12 disclosing the name, address, telephone number, credit card number, bank account number,  
13 e-mail address, or other identifying information of any person who paid any money to any  
14 defendant, at any time prior to entry of this Order, in connection with investments involving  
15 films. *Provided* that defendants may disclose such identifying information with the express  
16 written consent of the person whose information is disclosed, to a law enforcement agency, or as  
17 required by any law, regulation, or court order.

18 **MONETARY RELIEF**

19 V. IT IS FURTHER ORDERED:

20 A. That judgment is hereby entered against each of the defendants, jointly and  
21 severally, in the amount of TEN THOUSAND DOLLARS (\$10,000) for equitable  
22 monetary relief, including but not limited to consumer redress, and for paying any  
23 attendant expenses of administering any redress fund. This \$10,000 judgment shall be  
24 separate and in addition to any assets turned over to the Commission pursuant to  
25 Paragraph VI of this Order.

26 B. That any funds paid by defendants pursuant to Paragraphs V and VI of this Order

1 shall be paid into a redress fund administered by the Commission. If the Commission, in  
 2 its sole discretion, determines that redress is wholly or partially impractical, any funds not  
 3 so used shall be deposited into the United States Treasury as an equitable disgorgement  
 4 remedy. Defendants shall have no right to contest the manner of distribution chosen by  
 5 the Commission or its designated agent.

#### 6 **TURNOVER OF FROZEN ASSETS**

7 VI. IT IS FURTHER ORDERED THAT all funds in the following previously frozen  
 8 accounts shall be transferred to the Commission:

- 9 - Nevada Federal Credit Union account number 182580234, to which defendant  
 10 Iavarone is a signatory (approximate balance = \$1,811);
- 11 - First Bank of Beverly Hills account number 0150600716, to which defendant  
 12 Burke is a signatory (approximate balance = \$545);
- 13 - California Federal Bank account number 894-4023962, to which defendant  
 14 Ignacio Jimenez is a signatory (approximate balance = \$375);
- 15 - California Federal Bank account number 894-4007189, to which defendant  
 16 Ignacio Jimenez is a signatory (approximate balance = \$2,200);
- 17 - American Express account number 3783-497460-62004, to which defendant  
 18 Iavarone is a signatory (approximate balance = \$785); and
- 19 - American Bank of Commerce account number 404017796, to which defendant  
 20 Burke is a signatory (approximate balance = \$3,816).

21 For each of the foregoing transfers, the Commission shall be responsible for any withdrawal  
 22 penalties and fees to the extent that such penalties and fees do not exceed the value of the  
 23 transfer.

#### 24 **ORDER DISTRIBUTION**

25 VII. IT IS FURTHER ORDERED that, for a period of three years from the date of entry of  
 26 this Order, each individual defendant shall:



1 A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of  
 2 receipt of same from, each officer or director, each individual serving in a management  
 3 capacity, all personnel involved in responding to consumer complaints or inquiries, and  
 4 all sales personnel, whether designated as employees, consultants, independent  
 5 contractors or otherwise, immediately upon employing or retaining any such persons, for  
 6 any business where (1) that individual defendant is the majority owner of the business or  
 7 otherwise directly or indirectly manages or controls the business, and where (2) the  
 8 business engages in, or assists others engaged in, telemarketing or the sale of  
 9 investments; and

10 B. Maintain for a period of three (3) years after creation, and upon reasonable notice,  
 11 make available to representatives of the Commission, the original signed and dated  
 12 acknowledgments of the receipt of copies of this Order, as required in Subpart A of this  
 13 Paragraph.  
 14

#### 15 RECORD KEEPING PROVISIONS

16 VIII. IT IS FURTHER ORDERED that, for a period of three years from the date of entry of  
 17 this Order, each individual defendant and his officers, agents, servants, and employees, and all  
 18 other persons or entities in active concert or participation with him who receive actual notice of  
 19 this Order by personal service or otherwise, in connection with any business where (1) said  
 20 individual defendant is the majority owner of the business or directly or indirectly manages or  
 21 controls the business, and where (2) the business engages in, or assists others engaged in,  
 22 telemarketing or the sale of investments, is hereby restrained and enjoined from:

23 A. Failing to create, and from failing to retain for a period of three (3) years  
 24 following the date of such creation, unless otherwise specified:

- 25 1. Books, records, and accounts that, in reasonable detail, accurately and  
 26 fairly reflect the cost of goods or services sold, revenues generated, and the

1 disbursement of such revenues;

2 2. Records accurately reflecting: the name, address, and telephone number of  
3 each person employed in any capacity by such business, including as an  
4 independent contractor; that person's job title or position; the date upon which the  
5 person commenced work; and the date and reason for the person's termination, if  
6 applicable. The business subject to this paragraph shall retain such records for  
7 any terminated employee for a period of two (2) years following the date of  
8 termination;

9 3. Records containing the names, addresses, phone numbers, dollar amounts  
10 paid, quantity of items, services or investments purchased, and description of  
11 items, services, or investments purchased for all consumers to whom such  
12 business has sold, invoiced or shipped any good, service, or investment;

13 4. Records that reflect, for every consumer complaint or refund request,  
14 whether received directly or indirectly or through any third party;

15 a. the consumer's name, address, telephone number and the dollar  
16 amount paid by the consumer;

17 b. the written complaint or refund request, if any, and the date of the  
18 complaint or refund request;

19 c. the basis of the complaint, including the name of any salesperson  
20 complained against, and the nature and result of any investigation  
21 conducted concerning any complaint;

22 d. each response and the date of the response;

23 e. any final resolution and the date of the resolution; and

24 f. in the event of a denial of a refund request, the reason for the  
25 denial; and

26 5. Copies of all sales scripts, training materials, advertisements, or other

1 marketing materials utilized; *provided* that copies of all sales scripts, training  
 2 materials, advertisements, or other marketing materials utilized shall be retained  
 3 for three (3) years after the last date of dissemination of any such materials.

4 B. Destroying, throwing away, mutilating, changing, concealing, altering,  
 5 transferring, or otherwise disposing of, in any manner, directly or indirectly, any books,  
 6 records, tapes, discs, accounting data, checks (fronts and backs), correspondence, forms,  
 7 advertisements, brochures, manuals, electronically stored data, banking records,  
 8 consumer lists, files, invoices, telephone records, ledgers, payroll records, or other  
 9 business or financial documents of any kind, including information stored in computer-  
 10 maintained form, in the possession, custody, or control of defendant or any other person  
 11 or entity in active concert or participation with defendant.

#### 12 COMPLIANCE REPORTING BY DEFENDANTS

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

- 15 A. For a period of three years from the date of entry of this Order, each individual  
 16 defendant shall notify the Commission in writing within 30 days of the following:
- 17 1. Any changes in the defendant's residence, mailing addresses, and  
 18 telephone numbers within 10 days of such change;
  - 19 2. Any changes in the defendant's employment status (including self-  
 20 employment) within 10 days of such change. Such notice shall include the name  
 21 and address of each business that the defendant is affiliated with or employed by,  
 22 a statement of the nature of the business, and a statement of the defendant's duties  
 23 and responsibilities in connection with the business or employment; and
  - 24 3. Any proposed change in the structure of any business entity owned or  
 25 controlled by the defendant, such as creation, incorporation, dissolution,  
 26 assignment, sale, merger, creation, dissolution of subsidiaries, proposed filing of

1 bankruptcy petition, or change in the corporate name or address, or any change  
2 that may affect compliance obligations arising out of this Order, thirty (30) days  
3 prior to the effective date of any proposed change; *provided*, however, that, with  
4 respect to any proposed change in the corporation about which the defendant  
5 learns less than thirty (30) days prior to the date such action is to take place, the  
6 defendant shall notify the Commission as soon as is practicable after learning of  
7 such proposed change;

8 B. One hundred eighty (180) days after the date of entry of this Order, each  
9 defendant shall provide a written report to the Commission, sworn to under penalty of  
10 perjury, setting forth in detail the manner and form in which the defendant has complied  
11 and is complying with this Order. This report shall include but not be limited to:

- 12 1. The defendant's then current residence (if an individual defendant) or  
13 business address (if a corporate defendant) and telephone number;
- 14 2. For individual defendants, the defendant's then current employment,  
15 business addresses and telephone numbers, a description of the business activities  
16 of each such employer, and the defendant's title and responsibilities for each  
17 employer;
- 18 3. A copy of each acknowledgment of receipt of this Order obtained by each  
19 defendant pursuant to Paragraph VII of this Order;
- 20 4. A statement describing the manner in which the defendant has complied  
21 and is complying with Paragraphs II through VIII of this Order; and

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

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

Associate Director for Service Industry Practices  
Room H-200  
Federal Trade Commission  
Washington, D.C. 20580

Re: FTC v. Dayton Family Productions

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

#### COMMISSION'S AUTHORITY TO MONITOR COMPLIANCE

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

A. The Commission is authorized, without further leave of court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26 - 37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating defendants' compliance with any provision of this Order;

B. The Commission is authorized to use representatives 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. 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 investigate whether any defendant has violated any provision of this Order or Section 5 of the FTC Act, 15 U.S.C. § 45.

#### ACCESS TO BUSINESS PREMISES

XI. IT IS FURTHER ORDERED that, for a period of three years from the date of entry of this Order, for the purpose of further determining compliance with this Order, each defendant

1 shall permit representatives of the Commission, within three (3) business days of receipt of  
2 written notice from the Commission:

3 A. Access during normal business hours to any office, or facility storing documents,  
4 of any business where the named defendant is the majority owner of the business or  
5 directly or indirectly manages or controls the business, and where the business is engaged  
6 in telemarketing or the sale of investments, or assisting others engaged in said activities.  
7 In providing such access, defendants shall permit representatives of the Commission to  
8 inspect and copy all documents relevant to any matter contained in this Order; and shall  
9 permit Commission representatives to remove documents relevant to any matter  
10 contained in this Order for a period not to exceed five (5) business days so that the  
11 documents may be inspected, inventoried, and copied; and

12 B. To interview the officers, directors, and employees, including all personnel  
13 involved in responding to consumer complaints or inquiries, and all sales personnel,  
14 whether designated as employees, consultants, independent contractors or otherwise, of  
15 any business to which Subsection A of this Paragraph applies, concerning matters relating  
16 to compliance with the terms of this Order. The person interviewed may have counsel  
17 present.

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

#### 21 SUBSEQUENT PROCEEDINGS

22 XII. Notwithstanding any other provision of this Order, defendants agree that the facts as  
23 alleged in the complaint shall be taken as true in any subsequent litigation filed by the  
24 Commission to enforce this Order, including but not limited to a non-dischargeability complaint  
25 in any subsequent bankruptcy proceeding.

**1 REAFFIRMATION OF FINANCIAL STATEMENT AND ACKNOWLEDGMENT OF**  
**2 RECEIPT OF FINAL ORDER**

3 XIII. IT IS FURTHER ORDERED that, within five business days from the date of entry of this  
4 Order, each defendant shall submit to the Commission a truthful sworn statement in a form  
5 substantially similar in language to Attachment A that shall acknowledge receipt of this Order  
6 and reaffirm and attest to the truth, accuracy and completeness of that defendant's financial  
7 statements previously submitted to the Commission.

**8 RIGHT TO REOPEN**

9 XIV. IT IS FURTHER ORDERED that the Commission's agreement to this Order is expressly  
10 premised upon the truthfulness, accuracy, and completeness of defendants' financial condition as  
11 represented in each of the defendants' financial statements previously submitted to the  
12 Commission, which contain material information relied upon by the Commission in negotiating  
13 and agreeing to the terms of this Order. If the Commission has reason to believe that any of the  
14 above-referenced financial statements failed to disclose any material asset, materially  
15 misrepresented the value of any asset, or made any other material misrepresentation or omission,  
16 the Commission may request that this Order be reopened for the sole purpose of allowing the  
17 Commission to modify the monetary liability of the defendant who submitted the financial  
18 statement. If the Court finds that such defendant failed to disclose any material asset, materially  
19 misrepresented the value of any asset, or made any other material misrepresentation or omission  
20 in the above-referenced financial statement, the Court shall enter judgment against that  
21 defendant, in favor of the Commission, in the amount of one million dollars (\$1,000,000), less  
22 the amount the defendants have already paid to the Commission under Paragraph V of this  
23 Order; *provided*, however, that in all other respects this Order shall remain in full force and effect  
24 unless otherwise ordered by the Court and that such defendant has no right to contest any of the  
25 allegations in the Commission's complaint in this matter in any proceedings brought pursuant to  
26 this Paragraph.

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**RETENTION OF JURISDICTION**

XV. IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

**ENTRY OF THIS JUDGMENT**

XVI. IT IS FURTHER ORDERED that there is no just reason for delay of entry of this judgment, and that, pursuant to Fed. R. Civ. P. 54(b), the Clerk shall enter this Order immediately.



1 STIPULATED AND AGREED TO:

2  
3 Jerome M. Steiner, Jr.  
4 Gregg Shapiro  
5 Jerome M. Steiner, Jr.  
6 Federal Trade Commission  
7 Blaine T. Welsh  
8 Assistant United States Attorney

9  
10 Attorneys for Plaintiff  
11 Federal Trade Commission

12  
13 John Spilotro  
14 Spilotro & Kulla  
15 Attorney for Defendant John Iavarone

16  
17 Glen Burke  
18 Defendant

19  
20 Lonnie Paulus  
21 Aztec Escrow, Inc., by Lonnie Paulus aka  
22 Lonnie Little, President

John Iavarone  
John Iavarone, Individually and as  
President of Defendant High Voltage  
Pictures, Inc., and Defendant High  
Voltage Entertainment, Inc.

Scott Cantor  
Scott Cantor  
Graziadei & Cantor  
Attorney for Defendants Glen Burke,  
Ignacio Jimenez, and Kevin Roy

Ignacio Jimenez  
Defendant

Kevin Roy  
Kevin Roy, Individually and as President  
of Defendant J.J. Dayton Associates, Inc.

23 IT IS SO ORDERED.

24 Dated: Sept 30, 1998

The Honorable Philip M. Pro  
United States District Judge

25  
26 Stipulated Order

ATTACHMENT A

1  
2  
3 1. My name is \_\_\_\_\_. I am a citizen of the United States and am  
4 over the age of 18. I reside in \_\_\_\_\_. I have knowledge of the matters  
5 discussed in this declaration.

6 2. I am a defendant in FTC v. Dayton Family Productions, Inc. et al., CV-S-97-750-PMP  
7 (RLH) (U.S. District Court, District of Nevada).

8 3. I have received a copy of the Stipulated Final Order for Permanent Injunction and  
9 Settlement of Claims for Monetary Relief entered against me in FTC v. Dayton Family  
10 Productions, Inc., et al.

11 4. The information contained in the Financial Statement executed by me on  
12 \_\_\_\_\_, and previously provided to the Federal Trade Commission, was true,  
13 accurate, and complete on \_\_\_\_\_.

14 I hereby declare under penalty of perjury that the foregoing is true and correct.  
15

16 Dated: \_\_\_\_\_  
17  
18  
19  
20  
21  
22

23 I hereby attest and certify on October 1, 1998  
24 that the foregoing document is a full, true and correct  
25 copy of the original on file in my office, and in my  
26 legal custody.

CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA

By She M. Luster Deputy

Stipulated Order