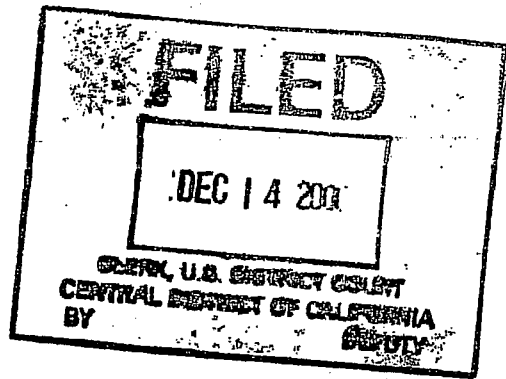


1 DEBRA A. VALENTINE
General Counsel
2 Federal Trade Commission

3 JOHN D. JACOBS (CA Bar No. 134154)
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4 Federal Trade Commission
10877 Wilshire Boulevard, Suite 700
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(310) 824-4360 or 824-4343 (ph.)
6 (310) 824-4380 (fax)
Attorneys for Plaintiff



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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11
12
13 FEDERAL TRADE COMMISSION,)
14 Plaintiff,)
15 v.)
16 DAVID MORENO,)
an individual doing)
17 business as Continental)
Business Systems, and)
18 doing business as United)
Products,)
19 Defendant.)
20

Case No. CV-99-12837 R (AIJx)

STIPULATED FINAL JUDGMENT AND
ORDER

X00000 db

21
22 Plaintiff, the Federal Trade Commission ("FTC" or
23 "Commission"), commenced this action by filing a Complaint
24 pursuant to Sections 13(b) and 19 of the Federal Trade Commission
25 Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing
26 and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 et
27 seq., charging Defendant Moreno with engaging in unfair or
28 deceptive acts or practices in connection with the sale, offering

1 for sale, or distribution of nondurable office supplies, including
2 photocopier toner, in violation of Section 5 of the FTC Act, 15
3 U.S.C. § 45, and the FTC's Telemarketing Sales Rule, 16 C.F.R.
4 Part 310.

5 Now the Commission and Defendant Moreno agree to a settlement
6 of this action without trial or adjudication of any issue of law
7 or fact herein and without Defendant Moreno admitting liability
8 for any of the violations alleged in the Complaint or for any
9 wrongdoing whatsoever. The Commission and Defendant Moreno
10 consent to entry of this Stipulated Final Judgment and Order
11 ("Order") without trial or adjudication of any issue of law or
12 fact herein.

14 FINDINGS

15 1. This is an action by the Commission instituted under
16 Sections 13(b) and 19 of the Federal Trade Commission Act, 15
17 U.S.C. §§ 53(b), and 57b, and the Telemarketing and Consumer Fraud
18 and Abuse Prevention Act, 15 U.S.C. § 6101 et seq. The Complaint
19 seeks permanent injunctive relief against Defendant Moreno in
20 connection with the sale of nondurable office supplies.

21 2. This Court has jurisdiction over the subject matter of
22 this case and over Defendant Moreno. Venue in the Central
23 District of California is proper.

24 3. The Complaint states a claim upon which relief may be
25 granted against Defendant Moreno under Sections 5(a), 13(b) and 19
26 of the FTC Act, 15 U.S.C. §§ 45(a) 53(b) and 57b, and the
27 Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310.

28

1 4. The Commission has the authority under Sections 13 (b)
2 and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and the
3 Telemarketing and Consumer Fraud and Abuse Prevention Act, 15
4 U.S.C. § 6101 *et seq.*, to seek the relief it has requested.

5 5. The activities of Defendant Moreno charged in the
6 Complaint are in or affecting commerce, as defined in Section 4 of
7 the FTC Act, 15 U.S.C. § 44.

8 6. By stipulating and consenting to the entry of this
9 Order, Defendant Moreno does not admit any of the allegations in
10 the Complaint, except those contained in Paragraphs 1 through 5
11 herein. Likewise, by executing this Order, the FTC does not admit
12 that any defense to the Complaint is valid.

13 7. This action and the relief awarded herein is in addition
14 to, and not in lieu of, other remedies as may be provided by law,
15 including both civil and criminal remedies.

16 8. Defendant Moreno enters into this Order freely and
17 without coercion, and acknowledges that he understands the
18 provisions of this Order and is prepared to abide by its terms.
19 At all times, the defendant has been represented by counsel,
20 including the negotiations that led to this Order.

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

22
23 **ORDER**

24 **Definitions**

25 1. "Document" is synonymous in meaning and equal in scope
26 to the usage of the term in Federal Rule of Civil Procedure 34(a),
27 and includes writings, drawings, graphs, charts, photographs,
28 audio and video recordings, computer records, and other data

1 compilations from which information can be obtained and
2 translated, if necessary, through detection devices into
3 reasonably usable form. A draft or non-identical copy is a
4 separate document within the meaning of the term.

5 2. "Defendant" means Defendant David Moreno and his agents,
6 servants, employees, attorneys, and all persons or entities
7 directly or indirectly under his control, and all other persons or
8 entities in active concert or participation with him who receive
9 actual notice of this Order by personal service or otherwise, and
10 each such person.

11 3. "Consumer" means any person, including any individual,
12 group, unincorporated association, limited or general partnership,
13 corporation or other business entity.

14 4. "Receivership defendant" means the business assets and
15 operations of any and every business owned by Defendant Moreno
16 that has been operated under the name Continental Business
17 Systems, United Products or United Products, Inc.

18 5. The terms "and" and "or" have both conjunctive and
19 disjunctive meanings.

20 6. "Assisting others" means knowingly providing any of the
21 following goods or services to another entity: (1) performing
22 customer service functions, including, but not limited to,
23 receiving or responding to consumer complaints; (2) formulating or
24 providing, or arranging for the formulation or provision of, any
25 telephone sales script or any other marketing material;
26 (3) providing names of, or assisting in the generation of,
27 potential customers; or (4) performing marketing services of any
28 kind.

1 I. RESTRICTIONS ON SALE OF OFFICE SUPPLIES AND TELEMARKETING

2 IT IS HEREBY ORDERED that Defendant Moreno, whether acting
3 directly or through any corporation, limited liability company,
4 subsidiary, division or other device, is hereby permanently
5 restrained and enjoined from either:

6 A. Engaging or participating in the advertising, offering
7 for sale, sale or distribution of nondurable office supplies, or
8 assisting others who are engaging or participating in the
9 advertising, offering for sale, sale or distribution of nondurable
10 office supplies, unless the transactions are completed after a
11 face-to-face contact between the seller or solicitor and the
12 consumers solicited; or

13 B. Engaging or participating, or assisting others who are
14 engaging or participating, in any business activity (including but
15 not limited to (i) initiating or receiving telephone calls;
16 (ii) managing others who initiate or receive telephone calls;
17 (iii) operating an enterprise that initiates or receives telephone
18 calls; (iv) owning or serving as an officer or director of an
19 enterprise that initiates or receives telephone calls; or
20 (v) otherwise working as an employee or independent contractor
21 with a unit or division of an enterprise that initiates or
22 receives telephone calls) that involves attempts to induce
23 consumers to purchase any item, good, service, partnership
24 interest, trust interest or other beneficial interest, or to enter
25 a contest for a prize, by means of telephone sales presentations,
26 either exclusively or in conjunction with the use of other forms
27 of marketing, unless such transaction is not completed until after
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1 a face-to-face contact between the seller or solicitor and the
2 consumers solicited.

3 **II. PROHIBITED BUSINESS ACTIVITIES**

4 A. IT IS FURTHER ORDERED that, in connection with the
5 advertising, marketing, promoting, offering for sale, or sale of
6 any good or service, Defendant Moreno, and his agents, servants,
7 employees, attorneys, and all persons or entities directly or
8 indirectly under his control, and all other persons or entities in
9 active concert or participation with him who receive actual notice
10 of this Order by personal service or otherwise, and each such
11 person, whether acting directly or through any corporation,
12 limited liability company, subsidiary, division or other device,
13 are hereby permanently restrained and enjoined from:

14 1. Misrepresenting, expressly or by implication, that
15 any consumer, or any consumer's employee or other representative,
16 ordered any good or service that was shipped, provided, and/or
17 billed to the consumer by Defendant;

18 2. Misrepresenting, expressly or by implication, that
19 Defendant is, or is associated with, a consumer's regular supplier
20 or provider of the good or service, or is associated with the
21 manufacturer of any product or equipment used by the consumer in
22 conjunction with the good or service;

23 3. Misrepresenting to any consumer, or any consumer's
24 employee or representative, expressly or by implication, that
25 Defendant has previously transacted business with the consumer;

26 4. Making any misrepresentation, expressly or by
27 implication, regarding a consumer's obligation to make payment; or
28

1 5. Making any misrepresentation, expressly or by
2 implication, regarding the price of the product or service.

3 B. **IT IS FURTHER ORDERED** that, in connection with the
4 advertising, marketing, promoting, offering for sale, or sale of
5 any good or service, Defendant Moreno, and his agents, servants,
6 employees, attorneys, and all persons or entities directly or
7 indirectly under his control, and all other persons or entities in
8 active concert or participation with him who receive actual notice
9 of this Order by personal service or otherwise, and each such
10 person, whether acting directly or through any corporation,
11 limited liability company, subsidiary, division or other device,
12 are hereby permanently restrained and enjoined from
13 misrepresenting, expressly or by implication, any other fact
14 material to a consumer's decision to buy or accept the good or
15 service from Defendant.

16 C. **IT IS FURTHER ORDERED** that Defendant Moreno, and his
17 agents, servants, employees, attorneys, and all persons or
18 entities directly or indirectly under his control, and all other
19 persons or entities in active concert or participation with him
20 who receive actual notice of this Order by personal service or
21 otherwise, and each such person, whether acting directly or
22 through any corporation, limited liability company, subsidiary,
23 division or other device, are hereby permanently restrained and
24 enjoined from:

25 1. Violating Section 310.3(a)(4) of the Telemarketing
26 Sales Rule, 16 C.F.R. § 310.3(a)(4), by making false or misleading
27 statements to induce a consumer to pay for any product or service,
28 including, but not limited to, misrepresenting directly or by

1 implication that (a) Defendant is, or is associated with, a
2 consumer's regular supplier or provider of the good or service, or
3 is associated with the manufacturer of any product or equipment
4 used by the consumer in conjunction with the good or service, or
5 (b) the consumer ordered any good or service that was shipped,
6 provided, and/or billed to the consumer by Defendant;

7 2. Violating Section 310.4(d)(2) of the Telemarketing
8 Sales Rule, 16 C.F.R. § 310.4(d)(2), by failing to disclose
9 promptly and in a clear and conspicuous manner to the person
10 receiving the call, in "outbound telephone calls," as that term is
11 defined in the Telemarketing Sales Rule, 16 C.F.R. § 310.2(n),
12 that the purpose of the call is to sell goods;

13 3. Violating Section 310.4(d)(1) of the Telemarketing
14 Sales Rule, 16 C.F.R. § 310.4(d)(1), by failing to disclose the
15 identity of the seller to the person receiving the call, promptly
16 and in a clear and conspicuous manner, in "outbound telephone
17 calls," as that term is defined in the Telemarketing Sales Rule,
18 16 C.F.R. § 310.2(n);

19 4. Violating Section 310.3(b) of the Telemarketing
20 Sales Rule, 16 C.F.R. § 310.3(b), by providing substantial
21 assistance or support to any seller or telemarketer when Defendant
22 Moreno knows or consciously avoids knowing that the seller or
23 telemarketer is engaged in any act or practice that violates
24 Section 310.3(a), 310.3(c), or Section 310.4, of the Telemarketing
25 Sales Rule, 16 C.F.R §§ 310.3(a), 310.3(c) or 310.4; or

26 5. Violating or assisting others in violating any
27 other provision of the Telemarketing Sales Rule, 16 C.F.R. Part
28 310.

1 *Provided, however,* that nothing in this Section shall be construed
2 to nullify the prohibitions set forth in Section I above.

3 A copy of the Telemarketing Sales Rule is appended to this
4 Order as Attachment A and is incorporated herein as if fully
5 rewritten. In the event that the Telemarketing Sales Rule is
6 amended by the Commission in a manner which would create a new or
7 different standard applicable to Defendant's obligations under
8 this Order, Defendant's compliance with the Telemarketing Sales
9 Rule as so amended shall not be deemed a violation of this Order.

10 **III. PROHIBITIONS AGAINST DISTRIBUTION OF CUSTOMER LISTS**

11 **IT IS FURTHER ORDERED** that Defendant Moreno, and his agents,
12 servants, employees, attorneys, and all persons or entities
13 directly or indirectly under his control, and all other persons or
14 entities in active concert or participation with him who receive
15 actual notice of this Order by personal service or otherwise, and
16 each such person, whether acting directly or through any
17 corporation, limited liability company, subsidiary, division or
18 other device, are permanently restrained and enjoined from
19 selling, renting, leasing, transferring or otherwise disclosing
20 the name, address, telephone number, credit card number, bank
21 account number or other identifying information of any person who
22 paid any money to Defendant Moreno doing business as Continental
23 Business Systems, United Products, or United Products, Inc., at
24 any time, in connection with the offering for sale or sale of any
25 good or service; *provided, however,* that Defendant may disclose
26 such identifying information to a law enforcement agency or as
27 required by any law, regulation or court order, and shall disclose

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1 such identifying information to the Commission pursuant to this
2 Order.

3 **IV. PROHIBITION ON TRANSFERRING BUSINESS INFORMATION**

4 **IT IS FURTHER ORDERED** that Defendant Moreno, and his agents,
5 servants, employees, attorneys, and all persons or entities
6 directly or indirectly under his control, and all other persons or
7 entities in active concert or participation with him who receive
8 actual notice of this Order by personal service or otherwise, and
9 each such person, whether acting directly or through any
10 corporation, limited liability company, subsidiary, division or
11 other device, are hereby restrained and enjoined from transferring
12 or in any other way providing to any person (other than a federal,
13 state or local law enforcement agency or pursuant to a court
14 order), directly or indirectly, any books, records, tapes, disks,
15 accounting data, manuals, electronically stored data, banking
16 records, invoices, telephone records, ledgers, payroll records, or
17 other documents of any kind, including information stored in
18 computer-maintained form, in the possession, custody or control of
19 Defendant Moreno, or any trade secrets or knowledge, whether
20 recorded or otherwise, that are in any way related to Continental
21 Business Systems, United Products, or United Products, Inc., or
22 any business Defendant Moreno has owned or controlled individually
23 or jointly that has sold any nondurable office supplies.

24 **V. SUSPENDED JUDGMENT**

25 **IT IS FURTHER ORDERED** that judgment is hereby entered against
26 Defendant Moreno in the amount of \$2,500,000 (TWO MILLION FIVE
27 HUNDRED THOUSAND DOLLARS); provided, however, that this judgment
28

1 shall be suspended subject to the conditions set forth in Section
2 VI of this Order.

3 **VI. RIGHT TO REOPEN AND TERMINATE SUSPENSION**

4 **IT IS FURTHER ORDERED** that the Commission's agreement to this
5 Order is expressly premised upon the truthfulness, accuracy and
6 completeness of Defendant Moreno's December 14, 1999 financial
7 statement and testimony he provided in his February 16, 2000
8 deposition. Said financial statement and testimony contain
9 material information upon which the FTC has relied in negotiating
10 and agreeing to the terms of this Order. If, upon motion by the
11 Commission to the Court, the Court finds that Defendant Moreno
12 failed to disclose any material asset with a value exceeding
13 \$1,000, or materially misrepresented the value of any asset, or
14 made any other material misrepresentation in or omission from his
15 financial statement or deposition testimony, the suspension of the
16 monetary judgment will be terminated and the entire judgment
17 amount of \$2,500,000 (TWO MILLION FIVE HUNDRED THOUSAND DOLLARS),
18 less any amounts paid to the Commission by the Receiver pursuant
19 to Section IX of this Order, will be immediately due and payable.
20 For purposes of this Section, and any subsequent proceedings to
21 enforce payment, including but not limited to a non-
22 dischargeability complaint filed in a bankruptcy proceeding,
23 Defendant Moreno stipulates to all of the allegations in the
24 Commission's Complaint.

25 **VII. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

26 **IT IS FURTHER ORDERED** that, within five (5) business days
27 after entry of this Order, Defendant Moreno shall submit to the
28

1 Commission a truthful sworn and notarized statement, in the form
2 shown on Appendix 1, that shall acknowledge receipt of this Order
3 as entered.

4 **VIII. LIFT OF ASSET FREEZE**

5 **IT IS FURTHER ORDERED** that the freeze of Defendant Moreno's
6 assets, imposed in the Preliminary Injunction entered in this
7 proceeding, shall be lifted upon the entry of this Order.

8 **IX. RECEIVERSHIP**

9 **IT IS FURTHER ORDERED** that the receivership imposed in the
10 Preliminary Injunction entered in this proceeding shall be
11 continued until such time as the Receiver has taken the necessary
12 steps to wind down the business of the receivership defendant.
13 Such necessary steps shall include canceling the receivership
14 defendant's contracts, liquidating the receivership defendant's
15 assets, and taking such other steps as may be necessary to
16 terminate the receivership defendant efficiently. The Receiver
17 shall also seek and carry out the Court's instructions as to
18 disposition of checks received by the receivership defendant on or
19 after the date on which the Receiver took control of the
20 receivership defendant. The Receiver is directed, promptly upon
21 completion of the steps taken to wind down the business of the
22 receivership defendant, to provide a report to the Court which
23 details the steps taken to dissolve the receivership estate. The
24 report shall include an inventory of the receivership estates and
25 an accounting of the receivership estate's finances. Upon
26 completion of the requirements of this Section, the Receiver shall
27 move that this Court order termination of this receivership. At
28 such time, the Receiver shall make a final request for payment of

1 compensation for the performance of duties pursuant to the
2 Preliminary Injunction entered in this proceeding and pursuant to
3 this Section and for the cost of actual out-of-pocket expenses
4 incurred. Once the Receiver has been compensated in an amount
5 approved by the Court, the Receiver shall transfer all remaining
6 funds of the receivership defendant to the Commission for consumer
7 redress or disgorgement as provided for in Section X of this
8 Order. The Receiver shall promptly return all other records of
9 the receivership defendant in his possession relating to its
10 financial operation to Defendant Moreno so that he may prepare and
11 file all necessary income tax returns.

12 **X. USE OF CONSUMER REDRESS AND DISGORGEMENT FUNDS**

13 **IT IS FURTHER ORDERED** that:

14 A. The Commission shall deposit funds received from the
15 Receiver pursuant to this Order in an interest-bearing account.
16 The funds shall be used to provide redress to injured consumers
17 and to pay expenses of administering the redress fund, or in
18 accordance with Paragraph B of this Section;

19 B. If the Commission determines, in its sole discretion,
20 that redress to consumers is wholly or partially impracticable,
21 any funds not so used shall be deposited into the United States
22 Treasury, or may be used to educate consumers affected by the
23 practices set forth in the Commission's Complaint in this matter.
24 Defendant Moreno shall have no right to contest the manner of
25 distribution chosen by the Commission;

26 C. If the Commission determines that payment of redress to
27 consumers is not impracticable, the Commission shall submit a plan
28 for the disbursement of funds to the Court for review and

1 approval. In establishing this plan, the Commission shall have
2 full and sole discretion to determine the criteria and parameters
3 for participation by injured consumers in a redress program, and
4 may delegate any and all tasks connected with such redress program
5 to any individuals, partnerships, or corporations, and pay the
6 fees, salaries, and expenses incurred thereby in carrying out said
7 tasks from the funds received pursuant to this Order.

8 **XI. RECORD KEEPING PROVISIONS**

9 **IT IS FURTHER ORDERED** that, for a period of five (5) years
10 from the date of entry of this Order, Defendant Moreno, in
11 connection with any and every business entity of which he is a
12 majority owner, or which he otherwise manages or controls, is
13 hereby restrained and enjoined from failing to create, and to
14 retain, in a location under his control, for a period of three (3)
15 years following the date of such creation, unless otherwise
16 specified:

17 A. Books, records and accounts that, in reasonable detail,
18 accurately and fairly reflect the cost of goods or services sold,
19 revenues generated, and the disbursement of such revenues;

20 B. Records accurately reflecting: the name, address, and
21 telephone number of each person employed in any capacity by such
22 business, including as an independent contractor; that person's
23 job title or position; the date upon which the person commenced
24 work; and the date and reason for the person's termination, if
25 applicable. The businesses subject to this Paragraph shall retain
26 such records for any terminated employee for a period of three (3)
27 years following the date of termination;

28

1 C. Records containing the names, addresses, phone numbers,
2 dollar amounts paid, quantity of items or services purchased, and
3 description of items or services purchased, for all consumers to
4 whom such business has sold, invoiced or shipped any goods or
5 services, or from whom such business accepted money or other items
6 of value;

7 D. Records that reflect, for every consumer complaint or
8 refund request, whether received directly or indirectly or through
9 any third party:

10 (1) the consumer's name, address, telephone number and the
11 dollar amount paid by the consumer;

12 (2) the written complaint or refund request, if any, and the
13 date of the complaint or refund request;

14 (3) the basis of the complaint, including the name of any
15 salesperson complained against, and the nature and
16 result of any investigation conducted concerning any
17 complaint;

18 (4) each response and the date of the response;

19 (5) any final resolution and the date of the resolution; and

20 (6) in the event of a denial of a refund request, the reason
21 for the denial; and

22 E. Copies of all sales scripts, training materials,
23 advertisements, or other marketing materials utilized; *provided*
24 that copies of all sales scripts, training materials,
25 advertisements, or other marketing materials utilized shall be
26 retained for three (3) years after the last date of dissemination
27 of any such materials.

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XII. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored, for a period of five (5) years commencing with the date of entry of this Order, Defendant Moreno shall notify the Commission of the following:

6 A. Any change of residence, mailing address or telephone number—within ten (10) days of the date of such change;

8 B. Any change in employment status—including self-employment—within ten (10) business days of such change; such notice shall include the name and address of each business with which Defendant Moreno is affiliated or employed, a statement of the nature of the business, and a statement of Defendant Moreno's duties and responsibilities in connection with the business; and

14 C. Any proposed change in the structure of any business entity owned or controlled by Defendant Moreno, such as creation, incorporation, dissolution, assignment, sale, creation or dissolution of subsidiaries, or any other changes that may affect compliance obligations arising out of this Order—within thirty (30) days prior to the effective date of any proposed change; *provided, however,* that with respect to any proposed change in structure of such business about which Defendant Moreno learns less than thirty (30) days prior to the date such action is to take place, he shall notify the Commission as soon as practicable after learning of such proposed change.

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XIII. ACCESS TO BUSINESS PREMISES

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, for the purpose of further determining compliance with this Order, Defendant Moreno shall

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

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

13 B. To interview the officers, directors, and employees,
14 including all personnel involved in responding to consumer
15 complaints or inquiries, and all sales personnel, whether
16 designated as employees, consultants, independent contractors or
17 otherwise, of any business to which Paragraph A of this Section
18 applies, concerning matters relating to compliance with the terms
19 of this Order. The person interviewed may have counsel present.
20 *Provided that*, upon application of the Commission and for good
21 cause shown, the Court may enter an *ex parte* order granting
22 immediate access to all premises at which Defendant Moreno
23 conducts business or stores documents, for the purposes of
24 inspecting and copying all documents relevant to any matter
25 contained in this Order.

1 **XIV. FTC'S AUTHORITY TO MONITOR COMPLIANCE**

2 **IT IS FURTHER ORDERED** that the Commission is authorized to
3 monitor Defendant's compliance with this Order by all lawful
4 means—including, but not limited to, the following:

5 A. The Commission is authorized—without further leave of
6 this Court, but on notice to counsel for Defendant Moreno as
7 required by the Federal Rules of Civil Procedure—to obtain
8 discovery from any person in the manner provided by Chapter V of
9 the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37,
10 including the use of compulsory process pursuant to Federal R.
11 Civ. P. 45, for the purpose of investigating compliance with any
12 provision of this Order;

13 B. The Commission is authorized—without the necessity of
14 prior notice—to use representatives posing as consumers to
15 Defendant Moreno, his employees, or any other entity managed or
16 controlled in whole or in part by Defendant Moreno;

17 C. Nothing in this Order shall limit the Commission's
18 lawful use of compulsory process, pursuant to Sections 9 and 20 of
19 the FTC Act, 15 U.S.C. §§ 49, 57b-1, for the purpose of
20 investigation compliance with this Order or Section 5 of the FTC
21 Act, 15 U.S.C. § 45.

22 **XV. ORDER DISTRIBUTION**

23 **IT IS FURTHER ORDERED** that, for a period of five (5) years
24 from the date of entry of this Order, Defendant Moreno shall:

25 A. Immediately provide a copy of this Order to, and obtain
26 a signed and dated acknowledgment of receipt of the same, from
27 each officer, director and managing agent in any company or other
28

1 business entity directly or indirectly owned, operated or
2 controlled by Defendant Moreno; and

3 B. Maintain, and upon reasonable notice make available to
4 the FTC's representatives, the original and dated acknowledgments
5 of the receipts required by this Section of this Order.

6 **XVI. NOTICES**

7 **IT IS FURTHER ORDERED** that for purposes of this Order,
8 Defendant Moreno shall, unless otherwise directed by the
9 Commission's authorized representatives, mail all written
10 notifications to the Commission to:

11 ASSISTANT REGIONAL DIRECTOR
12 Federal Trade Commission
13 Western Region-Los Angeles
14 10877 Wilshire Blvd., Ste. 700
15 Los Angeles, CA 90024
16 Re: FTC v. Moreno

17 **XVII. WAIVER OF CLAIMS**

18 **IT IS FURTHER ORDERED** that Defendant Moreno waives all claims
19 under the Equal Access to Justice Act, 28 U.S.C. § 2412, as
20 amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and all
21 rights to seek appellate review or otherwise challenge or contest
22 the validity of this Order, or the temporary or preliminary orders
23 entered in this proceeding, and further waives and releases any
24 claim he may have against the FTC, the Receiver, or their
25 employees, agents, or representatives, and the Receiver waives all
26 claims against Defendant Moreno.

27 **XVIII. INDEPENDENCE OF OBLIGATIONS**

28 **IT IS FURTHER ORDERED** that the expiration of any requirements
imposed by this Order shall not affect any other obligation
arising under this Order.

1 XIX. COSTS AND ATTORNEYS FEES

2 IT IS FURTHER ORDERED that each party to this Order bear its
3 own costs and attorneys fees incurred in connection with this
4 action.

5 XX. CONTINUED JURISDICTION

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

8 XXI. ENTRY BY CLERK

9 There being no just reason for delay, the Clerk of the Court
10 is hereby directed to enter this Order.

11
12 SO STIPULATED:

13 Dated: Dec. 12, 2000

FEDERAL TRADE COMMISSION

John B. Jacobs
John B. Jacobs
Jennifer Larabee
Attorneys for Plaintiff

14
15
16
17 Dated: 12/07/00, 2000

David Moreno
David Moreno
Defendant

18
19
20 APPROVED AS TO FORM

21 Dated: 12/07/00, 2000

Alan B. Pick
Alan B. Pick
Pick & Boydston, LLP
Attorney for
Defendant David Moreno

22
23
24
25 IT IS SO ORDERED.

26 Dated: DEC 14 2000

MANUEL L. REAL

United States District Judge

1 [APPENDIX 1]

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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12	_____)	Case No. CV-99-12837 R (AIJx)
13	FEDERAL TRADE COMMISSION,)	
14	Plaintiff,)	AFFIDAVIT OF DEFENDANT DAVID
15	v.)	MORENO ACKNOWLEDGING RECEIPT OF
16	DAVID MORENO,)	STIPULATED FINAL JUDGMENT AND
17	an individual doing)	ORDER
18	business as Continental)	
19	Business Systems, and)	
20	doing business as United)	
	Products,)	
	Defendant.)	

21 I, David Moreno, hereby declare as follows:

22 1. I am a defendant in the action FTC v. Moreno (United
23 States District Court, Central District of California, CV-99-12837
24 R (AIJx)). My current residence address is
25 _____

26 I am a citizen of the United States and over the age of eighteen.
27 I have personal knowledge of the facts set forth in this
28 Affidavit.

[APPENDIX 1]

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2 2. I agreed to entry of a Stipulated Final Judgment and
3 Order ("Stipulated Order") against me to settle the charges in the
4 Commission's Complaint. I read the provisions of the Stipulated
5 Order, including Attachment A (the Telemarketing Sales Rule, 16
6 C.F.R. Part 310) before signing it. I understand all the
7 provisions of the Stipulated Order. By signing the Stipulated
8 Order I agreed to be bound by those provisions.

9 3. On _____, 20____, I received a copy of the
10 Stipulated Order which was signed by a United States District
11 Judge and entered by the Court on _____, 20____.
12 A true and correct copy of the Stipulated Order that I received,
13 including Attachment A (the Telemarketing Sales Rule), is appended
14 to this affidavit. The Stipulated Order, including Attachment A
15 (the Telemarketing Sales Rule), was _____ pages in length. I

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[APPENDIX 1]

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2 reviewed the document and confirmed it was the document I had
3 previously signed.

4 I declare under penalty of perjury under the laws of the
5 United States that the foregoing is true and correct. Executed on
6 _____, 20____, at _____, California.

7
8 _____
9 David Moreno

10 State of _____, City of _____

11 Subscribed and sworn to before me

12 this _____ day of _____, 20____.

13
14 _____
15 Notary Public
16 My Commission Expires:
17 _____
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(c) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(d) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(e) *Credit card sales draft* means any record or evidence of a credit card transaction.

(f) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(g) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(h) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(i) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services.

(j) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services.

(k) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services.

(l) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services.

(m) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(n) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the

offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(o) *Price promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(p) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(q) *State* means any State of United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(r) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.

(s) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller, includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term *further solicitation* does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

PART 310—TELEMARKETING SALES RULE

- 310.1 Scope of regulations in this part.
- 310.2 Definition.
- 310.3 Deceptive telemarketing acts or practices.
- 310.4 Abusive telemarketing acts or practices.
- 310.5 Recordkeeping requirements.
- 310.6 Exemptions.
- 310.7 Actions by States and private persons.
- 310.8 Severability.

Authority: 16 U.S.C. 6001-6108.

Source: 60 FR 40661, Aug. 29, 1995, unless otherwise noted.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a State.

(c) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(d) *Commission* means the Federal Trade Commission.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing act or practice.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(i) Before a customer pays for goods or services offered, failing to disclose, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy, or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and if the odds are not calculable in advance, the factors used in calculating the odds, that no purchase or payment is required to win a prize or to participate in a prize promotion; and the no purchase no payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll free telephone number to which customers may write or call for information on how to participate; and

(v) When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

(b) For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226, compliance with the disclosure requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.3(a) of this Rule.

(vi) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(2) Misrepresenting, directly or by implication, any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficiency, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability; or

(vii) A seller's or telemarketer's affiliation with, or endorsement by, any government or third party organization;

(3) Obtaining or submitting for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account, without that person's express verifiable authorization. Such authorization shall be deemed verifiable if any of the following means are employed:

(i) Express written authorization by the customer, which may include the customer's signature on the negotiable instrument; or

(ii) Express oral authorization which is tape recorded and made available upon request to the customer's bank and which evidences clearly both the customer's authorization of payment for the goods and services that are the subject of the sales offer and the customer's receipt of all of the following information:

Federal Trade Commission

(A) The date of the draft(s);

(B) The amount of the draft(s);

(C) The payor's name;

(D) The number of draft payments (if more than one);

(E) A telephone number for customer inquiry that is answered during normal business hours; and

(F) The date of the customer's oral authorization; or

(iii) Written confirmation of the transaction, sent to the customer prior to submission for payment of the customer's check, draft, or other form of negotiable paper, that includes:

(A) All of the information contained in §§ 310.3(a)(3)(iii)(A) (F); and

(B) The procedures by which the customer can obtain a refund from the seller or telemarketer in the event the confirmation is inaccurate; and

(4) Making a false or misleading statement to induce any person to pay for goods or services.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3 (a) or (c), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved such report having been issued more than six months after the results were achieved. Nothing in this Rule shall be construed to affect the requirements in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person, for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, the person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney; or

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success;

securing or arranging a loan or other extension of credit for a person.

(b) *Pattern of calls.* (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or causing any person in telephone communication, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number, or

(ii) Initiating an outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.

(2) A seller or telemarketer will not be liable for violating §310.5(b)(1) if:

(i) It has established and implemented written procedures to comply with §310.5(b)(1);

(ii) It has trained its personnel in the procedures established pursuant to §310.5(b)(1);

(iii) The seller, or the telemarketer calling on behalf of the seller, has maintained and recorded lists of persons who may not be contacted, in compliance with §310.4(h)(1)(ii), and

(iv) Any subsequent call is the result of error.

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location.

(d) *Required oral disclosures.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call to fail to disclose promptly and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or

participate in a prize promotion if a prize promotion is offered. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase-no-payment entry method for the prize promotion.

§310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are presented, directly or by implication, to have a value of \$25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

(4) The name, any fictitious name used, the last known home address and telephone number, and the job titles for all current and former employees directly involved in telephone sales, provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by §310.5(a) in any form, and in the manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by §310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by

For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with §310.5(a) of this Rule.

written agreement, allocate responsibility between themselves for the recordkeeping required by this section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required records, or if no such agreement exists, the seller shall be responsible for complying with §§310.5(a)(1) (3) and (5), the telemarketer shall be responsible for complying with §310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§310.6 Exemptions.

The following acts or practices are exempt from this Rule.

(a) The sale of pay per call services subject to the Commission's "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR part 308;

(b) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 CFR part 436;

(c) Telephone calls in which the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the seller;

(d) Telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer;

(e) Telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations; provided, however, that this exemption does not apply to calls initiated by a customer in response to an advertisement relating to investment opportunities, goods or services described in §§310.4(a) (2) or

(3), or advertisements that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit;

(f) Telephone calls initiated by a customer in response to a direct mail solicitation that clearly, conspicuously and truthfully discloses all material information listed in §310.3(a)(1) of this Rule for any item offered in the direct mail solicitation; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, goods or services described in §§310.4(a) (2) or (3), or direct mail solicitations that guarantee or represent a high likelihood of success in obtaining or arranging for extensions of credit, if payment of a fee is required in advance of obtaining the extension of credit; and

(g) Telephone calls between a telemarketer and any business, except calls involving the retail sale of non-durable office or cleaning supplies, provided, however, that §310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§310.7 Actions by States and private persons.

(a) Any attorney general or other officer of a State authorized by the State to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under the Act, shall serve written notice of an action on the Commission, if feasible prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, and shall include a copy of the State's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this section shall prohibit any attorney general or

§ 310.8

other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

§ 310.8 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.