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12 FEDERAL TRADE COMMISSION

13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

15 FEDERAL TRADE COMMISSION,  
16 )

17 Plaintiff,  
18 )

19 v.  
20 )

21 AAFE Products Corp., a California corporation,  
22 )

23 JBE International, LLC, a California limited  
24 liability company,  
25 )

26 BSDC, Inc., a California corporation,  
27 )

28 KADC, Inc., a California corporation,  
)

Purestrike, Inc., a California corporation,  
)

BNRI Corp., fka Bernheim & Rice, Inc., a  
California corporation,  
)

Case No. '17CV575 AJB JMA

**Complaint For Permanent**  
**Injunction and Other Equitable**  
**Relief**

1 BRIAN BERNHEIM, individually, and as an )  
 1 owner and officer of BNRI Corp., )  
 2 )  
 2 JOSHUA BERNHEIM, individually and as an )  
 3 owner and officer of AAFE, JBEI, BSDC, )  
 3 KADC, and Purestrike, )  
 4 )  
 5 JARED COATES, individually and as an officer or )  
 5 managing member of AAFE, JBEI, and Purestrike, )  
 6 and )  
 7 )  
 8 ROBERT KOCH, individually and as an owner and )  
 8 officer of AAFE Products Corp., )  
 9 )  
 9 Defendants. )  
 10 )

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11  
 12 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

13 1. The FTC brings this action under Section 13(b) of the Federal Trade Commission  
 14 Act (“FTC Act”), 15 U.S.C. § 53(b), and Section 5 of the Restore Online Shoppers’ Confidence  
 15 Act (“ROSCA”), 15 U.S.C. § 8404, to obtain permanent injunctive relief, rescission or  
 16 reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten  
 17 monies, and other equitable relief for Defendants’ acts or practices in violation of Section 5(a) of  
 18 the FTC Act, 15 U.S.C. § 45(a), and Section 4 of ROSCA, 15 U.S.C. § 8403, in connection with  
 19 Defendants’ online marketing of cooking and golf-related products.  
 20

21 **JURISDICTION AND VENUE**

22  
 23 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a),  
 24 and 1345, 15 U.S.C. §§ 45(a), 53(b), and Section 5(a) of ROSCA, 15 U.S.C. § 8404(a).

25 3. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2), (b)(3), (c)(2), and  
 26 (c)(3), and 15 U.S.C. § 53(b).  
 27  
 28

**PLAINTIFF**

1  
1  
2  
2 4. The FTC is an independent agency of the United States Government created by  
3 statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),  
4 which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also  
5 enforces ROSCA, 15 U.S.C. §§ 8401-8405. ROSCA prohibits the sale of goods or services on  
6 the Internet through negative option marketing without meeting certain requirements to protect  
7 consumers. A negative option is an offer in which the seller treats a consumer's silence—their  
8 failure to reject an offer or cancel an agreement—as consent to be charged for goods or services.  
9

10  
11 5. The FTC is authorized to initiate federal district court proceedings, by its own  
12 attorneys, to enjoin violations of the FTC Act and ROSCA and to secure such equitable relief as  
13 may be appropriate in each case, including rescission or reformation of contracts, restitution, the  
14 refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b),  
15 56(a)(2)(A), and 8404.  
16

**DEFENDANTS**

17  
18 6. Defendant AAFE Products Corp. is a California corporation with its principal  
19 place of business at 929 Poinsettia Avenue, Suite 102, Vista, California. AAFE wholly owns  
20 Defendants JBE International ("JBEI"), BSDC, KADC, and Purestrike (collectively, the "AAFE  
21 Defendants"). AAFE transacts or has transacted business in this district and throughout the  
22 United States.  
23

24 7. Defendant JBEI is a California limited liability company with its principal place  
25 of business at 929 Poinsettia Avenue, Suite 102, Vista, California. JBEI transacts or has  
26 transacted business in this district and throughout the United States.  
27  
28

1           8. Defendant BSDC, Inc. is a California corporation with its principal place of  
2 business at 929 Poinsettia Avenue, Suite 102, Vista California. BSDC transacts or has transacted  
3 business in this district and throughout the United States.

4           9. Defendant KADC, Inc. is a California corporation with its principal place of  
5 business at 929 Poinsettia Avenue, Suite 102, Vista, California. KADC transacts or has  
6 transacted business in this district and throughout the United States.

7           10. Defendant Purestrike, Inc. is a California corporation with its principal place of  
8 business at 929 Poinsettia Avenue, Suite 102, Vista, California. Purestrike transacts or has  
9 transacted business in this district and throughout the United States.

10           11. Defendant BNRI Corp., formerly known as Bernheim & Rice, Inc., is a California  
11 corporation with its principal place of business at 170 Eucalyptus Avenue, Vista, California.  
12 BNRI and JBEI (collectively, the “BNRI Defendants”) have done business under the name  
13 Medicus and Medicus Golf. BNRI transacts or has transacted business in this district and  
14 throughout the United States.

15           12. Defendant Brian Bernheim is the owner and president of Defendant BNRI, and an  
16 owner of AAFE. At all times material to this Complaint, acting alone or in concert with others,  
17 he has formulated, directed, controlled, had the authority to control, or participated in the acts  
18 and practices of the BNRI Defendants and the AAFE Defendants, including the acts and practices  
19 set forth in this Complaint. Defendant Brian Bernheim, in connection with the matters alleged  
20 herein, transacts or has transacted business in this district and throughout the United States.

21           13. Defendant Joshua Bernheim is an owner and officer of each of the AAFE  
22 Defendants, and an officer of BNRI. He is the chief operating officer and vice president of sales  
23 and marketing for AAFE, and the chief operating officer of BNRI. At all times material to this  
24

1 Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the  
 2 authority to control, or participated in the acts and practices of the BNRI Defendants and the  
 3 AAFE Defendants, including the acts and practices set forth in this Complaint. Defendant  
 4 Joshua Bernheim, in connection with the matters alleged herein, transacts or has transacted  
 5 business in this district and throughout the United States.  
 6

7 14. Defendant Jared Coates is an owner of AAFE, was the owner of KADC and  
 8 Purestrike, and was an officer or managing member of AAFE, JBEI, and Purestrike. He was the  
 9 vice president of finance and administration for AAFE, managing member of JBEI, and president  
 10 of Purestrike. At all times material to this Complaint, acting alone or in concert with others, he  
 11 has formulated, directed, controlled, had the authority to control, or participated in the acts and  
 12 practices of the BNRI Defendants and the AAFE Defendants, including the acts and practices set  
 13 forth in this Complaint. Defendant Jared Coates, in connection with the matters alleged herein,  
 14 transacts or has transacted business in this district and throughout the United States.  
 15  
 16

17 15. Defendant Robert Koch is an owner and the chief executive officer of Defendant  
 18 AAFE. At all times material to this Complaint, acting alone or in concert with others, he has  
 19 formulated, directed, controlled, had the authority to control, or participated in the acts and  
 20 practices of the AAFE Defendants and BNRI, including the acts and practices set forth in this  
 21 Complaint. Defendant Robert Koch, in connection with the matters alleged herein, transacts or  
 22 has transacted business in this district and throughout the United States.  
 23

#### 24 **COMMON ENTERPRISE**

25 16. From 2010 through 2012, the BNRI Defendants conducted the business practices  
 26 described below through an interrelated network of companies that had common ownership,  
 27 officers, managers, business functions, employees, and office locations.  
 28

17. Since 2012, the AAFE Defendants –with AAFE as the holding company since 2013– have conducted the business practices described below through an interrelated network of companies that have common ownership, officers, managers, business functions, employees, and office locations. Further, the companies commingled funds, used the same sales techniques, and had a centralized recordkeeping system. Because the BNRI Defendants and the AAFE Defendants operated as common enterprises, each of them is jointly and severally liable for the acts and practices alleged below as to the BNRI Defendants and the AAFE Defendants, respectively.

### **COMMERCE**

18. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### **DEFENDANTS’ BUSINESS ACTIVITIES**

19. From 2010 to 2014, the BNRI Defendants sold golf-related products through negative option marketing under various names, including Tour Partner Rewards and Medicus Video. Since 2012, the AAFE Defendants have sold cooking and golf-related products through negative option marketing under various names, including: Kitchen Advance; Gourmet Cooking Online; Gourmet Cooking Rewards; Medicus Golf; Kick X Tour Z Golf Balls; Golf Online Academy; Golf Tour Partners; and Purestrike Swing Clinic.

20. Defendants have owned and operated numerous websites making negative option offers, including: shopcheftv.com; gourmetcookingonline.com; gourmetcookingrewards.com; shopmaxtv.com; golfonlineacademy.com; GolfTourPartners.com; getkickxballs.com; medicus.com; and TourPartnerRewards.com.

1 21. Defendants have advertised their websites through infomercials broadcast on  
 1 television and streamed on the Internet—including websites optimized for mobile, and bulk email  
 2 solicitations.  
 3

#### 4 **Defendants' Websites**

5 22. All of Defendants' websites referenced in ¶¶ 19-21 have similar layouts, user  
 6 interfaces, and other web design elements.  
 7

8 23. These websites contain two types of negative option offers: (a) continuity plans,  
 9 where Defendants bill a consumer's credit card for goods or services on a recurring basis until  
 10 the consumer cancels the plan; and (b) trial offers, where a consumer receives goods or services  
 11 for free—or for a nominal fee—for a trial period, and Defendants charge them when the trial period  
 12 ends if the consumer fails to return the product or cancel the plan. In numerous instances,  
 13 Defendants combine both negative option features by offering continuity plans on a trial basis.  
 14

15 24. Defendants represent that they offer a 100% money back guarantee, and that their  
 16 trial offers are risk-free.  
 17

18 25. In initial offers for single products on their websites, Defendants typically offer  
 19 goods or services for a 30 to 60 day trial period, either for free or for a nominal shipping and  
 20 handling charge. Consumers sign up by clicking an "Add to Cart" or similar button on the initial  
 21 web page, and then by clicking through a series of linked pages where they submit their shipping  
 22 and credit card billing information.  
 23

24 26. In numerous of these instances described in ¶ 25, Defendants include "bundled"  
 25 negative option offers in their websites, by packaging multiple products in a single offer.  
 26

27 27. In numerous instances, after consumers submit their billing information for an  
 28 initial purchase, the AAFE Defendants solicit a separate purchase of additional products through

1 negative option marketing (“upsell”). Consumers often must click through as many as 14 upsell  
2 web pages before reaching a final confirmation page for the initial purchase.

3 28. In numerous instances, Defendants: (1) fail to obtain consumers’ express  
4 informed consent before charging their credit card accounts for goods and services;  
5 (2) misrepresent that consumers can receive trial shipments for free or for a nominal shipping or  
6 handling fee;; (3) do not adequately disclose the terms of their offers; or (4) make it difficult to  
7 return trial products, cancel continuity plans, and obtain refunds.  
8

### 9 **Defendants’ Hidden Disclosures**

10 29. Defendants fail to disclose adequately the material terms of negative option offers  
11 in their websites, including initial offers for single products, bundled offers, and upsell offers.  
12 After touting “free” and “no risk” offers, Defendants do not disclose their material terms where  
13 consumers are likely to see them. Consumers who happen to see disclosures are unlikely to read  
14 and understand them.  
15

16 30. In numerous instances, Defendants place material disclosures: (a) outside the  
17 proximity to the “Add to Cart” button, or the billing information section where a consumer  
18 finishes checking out; (b) “below the fold,” *i.e.*, below the portion of a web page a user can see  
19 on a typical computer monitor without scrolling down the page; or (c) at the bottom of the last  
20 page of the online checkout process, far beneath the “Submit” button for consumers’ billing  
21 information.  
22

23 31. Even consumers who can locate Defendants’ disclosures are not likely to read and  
24 understand them because Defendants bury them in small print, at the bottom of a web page, and  
25 in densely worded hyperlinked web pages addressing other issues such as company privacy  
26 policies, product availability, and warranty terms.  
27  
28



1 32. Numerous consumers also would not see the disclosures because they are  
 2 surrounded by distracting graphics or advertising claims that are more prominent than the  
 3 disclosures.

#### 4 **Deceptive Initial Offers for Single Products**

5 33. Numerous of Defendants' initial offers for single products in their negative option  
 6 websites are substantially similar.

7 34. For example, the Tour Z Golf Balls website's first page makes a prominent claim  
 8 that consumers can try the product for "FREE!" Below this claim Defendants place a prominent  
 9 "Add to Cart" button. Exhibit A, p. 1 (attached). The trial offer, however, is not free if  
 10 consumers do not cancel and return the balls within a prescribed time. This requirement and  
 11 other material terms of the negative option offer are not disclosed in a manner that many  
 12 consumers would see, read, and understand.

13 35. The AAFE Defendants place material terms –such as the length of the trial period,  
 14 an initial shipping charge, and the charge for keeping the product after that period ends– “below  
 15 the fold” of the first page, and provide no visual cue to consumers to scroll down to look for  
 16 those material terms of the offer. *See* Exhibit A, pp. 1-2 (screen shots of first page). When  
 17 consumers click the “Add to Cart” button, their browser goes to a new webpage where they  
 18 continue the checkout process. Thus, consumers would not see this disclosure unless they scroll  
 19 to the bottom of the page, before clicking that button.

20 36. Moreover, the disclosures located below the fold are: (a) in small print; (b) at the  
 21 very bottom of the web page; (c) beneath another prominent banner ad (“Order Now”) and “Add  
 22 to Cart” button; and (d) obscured by advertising claims about the product, and other text  
 23 unrelated to the offer's material terms such as the webpage's copyright year. Exhibit A, p. 2.

1 37. When consumers click an “Add to Cart” button on the initial offer page, their  
2 browser goes to the website’s second page to continue the checkout process. This page provides  
3 shipping information. Defendants place an order form entirely on the right half of the page,  
4 below another prominent pitch to try the golf balls for “FREE!” The only disclosure on this page  
5 is a statement located beneath the “Submit” button in the order form, in small print, stating,  
6 “Other terms, conditions, and modifications may apply.” *See* Exhibit A, p. 3.  
7

8 38. When consumers click the “Submit” button on the shipping information page,  
9 their browser goes to a third page, where consumers complete the checkout process by providing  
10 their billing information. The order form is again located entirely on the right half of the page.  
11 The only disclosure near this section appears above the first field (“Card Type”) where the AAFE  
12 Defendants request entry of a card number to cover a nominal shipping charge for their “free”  
13 trial offer: “What card would you prefer for the \$.99 S&H today?” Exhibit A, p. 4.  
14

15 39. The AAFE Defendants place disclosures in two other locations on the billing  
16 information page. As illustrated in Exhibit A at p. 4, one set of disclosures is located “above the  
17 fold,” but on the left side of the web page, between graphics and advertising claims. Here the  
18 website states: “Try the TourZ balls FREE with \$0.99 S&H for 30 Days! Love it or you’ll never  
19 even be charged! Keep it and it’s just 39.95 with free S&H for the dozen premium balls!! You  
20 can cancel anytime and best of all each dozen balls has a 100%, 60 day money back guarantee!”  
21 This language appears under a headline touting the attributes of the golf balls. Consumers who  
22 have already decided to accept the “free” offer touted earlier would not expect to find the terms  
23 of a negative option offer here.  
24

25 40. The disclosure also states that the shipping and handling fee is \$0.99 and later  
26 states that shipping and handling is free. It also fails to disclose when or how the consumer will  
27  
28

1 be charged or how to avoid the charge. Finally, it seemingly refers to multiple shipments (“. . .  
 2 each dozen balls . . .”) without explaining their cost or how or when the consumer will be  
 3 charged for them, and refers to a right to cancel without indicating what it applies to, or how to  
 4 cancel. Exhibit A, p. 4.

5  
 6 41. As illustrated in Exhibit A at p. 5, another set of disclosures on the billing  
 7 information page appears both below the fold and far beneath the billing information section of  
 8 the order form, after a redundant shipping information section. When consumers click the  
 9 “Submit” button beneath the billing information section, their browser goes to the next linked  
 10 page in the AAFE Defendants’ website. Thus, consumers would not see those disclosures unless  
 11 they scrolled to the bottom of the web page before clicking the “Submit” button. However, they  
 12 have no reason to do so.  
 13

#### 14 **Deceptive Bundled Offers**

15 42. Defendants’ negative option websites often make “bundled” offers that include  
 16 one product combined with free trial offers for one or more continuity plans. Consumers who  
 17 accept the bundled offer receive the initial product and are automatically enrolled in at least one  
 18 continuity plan. For example, one website offers a free trial for five DVDs on how to play golf.  
 19 By accepting, Defendants sign up consumers for a continuity plan featuring online golf lessons.  
 20

21 43. From 2010 to 2012, the BNRI Defendants bundled offers to purchase golf-related  
 22 products with free trial offers for continuity plans known as Medicus Video, an online  
 23 subscription program for golf training videos, and Tour Partner Rewards, an online subscription  
 24 program for golf-related coupons and discounts.  
 25

26 44. Since 2012, the AAFE Defendants have bundled offers to purchase cooking-  
 27 related products with free trial offers for online subscription programs known as Gourmet  
 28

1 Cooking Online (recipes and instructional materials) and Gourmet Cooking Rewards (coupons  
2 and discounts). For example, as illustrated in Exhibit B (attached), in one website Defendants  
3 bundle an offer to sell their Culinary Torch product, with free trial offers for both of these online  
4 subscription programs. The AAFE Defendants have also bundled offers to purchase golf-related  
5 products with free trial offers for online subscription programs known as Golf Online Academy  
6 (training materials), Purestrike Swing Clinic (same), and Golf Tour Partners (coupons and  
7 discounts).

9 45. Without adequately disclosing the terms of the programs and obtaining the  
10 consumers' consent, Defendants typically enroll consumers in online subscription programs on a  
11 free trial basis for 30 to 60 days, and then charge consumers \$9.95 per program every 30 days  
12 until consumers cancel the programs. *See* Exhibit B, pp. 1-2, 5 (claiming programs are "Free  
13 Gifts!" on first page of website, burying trial period and monthly charge terms on last page of  
14 checkout process).

16 46. In numerous instances, as with their single product/continuity plan offers,  
17 Defendants fail to place material disclosures regarding their bundled offers where consumers are  
18 likely to see them. Specifically, Defendants: (a) fail to place them in proximity to the "Add to  
19 Cart" button a consumer clicks to begin checking out, or to the billing information section where  
20 a consumer finishes checking out, *see* Exhibit B, pp. 1-2, 3-5 ("Add to Cart" and billing  
21 information pages for bundled offer); (b) place them below "the fold," *i.e.*, in the portion of a  
22 web page a user cannot see on a typical computer monitor without scrolling down, and in a  
23 location where many consumers would not expect to find material terms of the offer due to the  
24 absence of visual cues or indicators; or (c) place them at the bottom of the last page of the online  
25  
26  
27  
28

1 checkout process, beneath the “Submit” button for consumers’ billing information. *See* Exhibit  
 2 B, pp. 3-5 (screen shots of last page of checkout process for bundled offer).

3 47. Even if consumers happen to see Defendants’ disclosures, they are unlikely to  
 4 read and understand them because Defendants bury them in small print, at the bottom of a web  
 5 page, and in densely worded hyperlinked web pages addressing other issues such as company  
 6 privacy policies, product availability, and warranty terms.

8 48. Defendants also reduce the likelihood that consumers will see the disclosures by  
 9 surrounding them with distracting graphics or advertising claims that are more prominent than  
 10 the disclosures.

### 11 **Deceptive Upsell Offers**

12 49. In numerous instances, after submitting their billing information for an initial  
 13 purchase on Defendants’ websites, consumers must click through as many as 14 upsell pages  
 14 making negative option offers before reaching the final confirmation page.

15 50. The upsell pages offer additional products or services on a negative option basis.  
 16 They have substantially similar offers and web design.

17 51. In numerous instances, Defendants’ upsell pages offer to let consumers try  
 18 additional products for \$1 on a trial basis. Depending on the offer, Defendants then bill  
 19 consumers for a single payment or 3-6 monthly installment payments after the trial period if the  
 20 consumer does not cancel and return the product(s).

21 52. In some instances, the upsell pages bundle one free item (*e.g.*, a free book, free  
 22 priority shipping) with one or two continuity plans.

23 53. Defendants obscure the terms of negative option offers and make it more difficult  
 24 to decline the offers in their upsell pages by: (a) requiring consumers to click either a prominent  
 25

1 “YES!” button to accept the offer, or a “No thanks” sentence in much smaller print to decline the  
 2 offer; (b) failing to place disclosures in proximity to the prominent “YES! I want it for \$1  
 3 NOW!” or “YES! I want it!” button; (c) placing the terms in dense paragraphs of text;  
 4 (d) burying the terms in small print, beneath the “Submit” button, at the bottom of an upsell page,  
 5 and in densely worded hyperlinked web pages; and (e) surrounding the terms by more distracting  
 6 graphics or more prominent advertising claims.  
 7

8 54. Defendants do not disclose the terms of their upsell pages’ negative option offers  
 9 before obtaining consumers’ billing information for upsell charges. Rather, they charge the same  
 10 credit card that consumers submitted for the initial transaction.  
 11

#### 12 **Websites More Deceptive When Viewed Using Mobile Devices**

13 55. Consumers who view Defendants’ offers on a mobile device are unlikely to see,  
 14 read, and understand their terms because such devices have a significantly smaller screen size  
 15 than the typical computer monitor.  
 16

17 56. For example, the negative option offers for golf products on the AAFE  
 18 Defendants’ shopmaxtv.com website appear to be optimized for viewing on mobile devices, with  
 19 the same content as the full size version. However, a consumer must scroll or click through more  
 20 than 15 screens before reaching the end of the checkout process. The “Add to Cart” buttons,  
 21 which jump to the checkout process pages when a consumer clicks on them, appear before any  
 22 disclosures regarding the terms of the offer appear on a different screen.  
 23

24 57. Moreover, like the full size version, the final checkout page is linked to a series of  
 25 upsell offer pages, but those pages are not optimized for mobile viewing. Consequently, a  
 26 consumer must repeatedly scroll up, down, and side to side to view those pages. To successfully  
 27  
 28

1 decline an upsell offer on a mobile device, a consumer must repeatedly stretch and zoom the  
 2 page to accurately press the “No thanks” text-only button.

### 3 **Defendants’ Cancellation and Refund Practices**

4 58. Defendants make it difficult for consumers to return a product, cancel recurring  
 5 charges, and obtain refunds.

6 59. Defendants’ return policy is contained within densely worded, hyperlinked web  
 7 pages, which are typically over two pages long when printed. The policy typically states: “If you  
 8 call us within thirty (30) days of receipt of shipment to obtain a return authorization, and return  
 9 the product per instructions, during that time, we will refund you the purchase price, minus  
 10 shipping and handling charges.” The text containing the hyperlink is buried in microprint at the  
 11 very bottom of Defendants’ web pages. The links have general titles such as “Terms and  
 12 Conditions” that many consumers are not likely to associate with material cancellation and  
 13 refund terms.

14 60. When consumers complete a transaction, the confirmation page does not disclose:  
 15 (a) the name of the seller; (b) the amount the consumer will be charged; (c) when the consumer  
 16 will be charged; (d) when applicable, the fact that the consumer has been enrolled in a continuity  
 17 program; and (e) the steps a consumer must take to return a product, cancel a continuity plan, and  
 18 obtain a refund. Defendants do not disclose this information either in confirmation emails or in  
 19 packing slips enclosed with products shipped to consumers.

20 61. In numerous instances, consumers are not aware that Defendants have billed them  
 21 until they detect charges on their credit card statements with cryptic billing descriptions such as  
 22 “JBEI,” “KAVI,” or “RMC,” and trace them to Defendants by contacting their card issuer.

1           62.     When consumers call Defendants' customer service numbers to return a product,  
 2 cancel recurring charges, or obtain refunds, Defendants' representatives initially make multiple  
 3 attempts to "save the sale" by offering free products and discounts and by extending trial periods.  
 4 In many instances, these attempts make the process more complex and substantially increase the  
 5 duration of the call and the consumers' cost to cancel.  
 6

7           63.     In numerous instances, until they call Defendants' customer service number,  
 8 consumers who have received products on a free trial basis do not learn that they must pay  
 9 substantial shipping costs if they want to return a product.  
 10

11           64.     For continuity plans, Defendants' policy is to limit refunds to charges from the  
 12 last 30 days. If consumers demand more, Defendants' policy is to limit refunds to charges from  
 13 the last 90 days.  
 14

#### **VIOLATIONS OF THE FTC ACT**

15           65.     Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts  
 16 or practices in or affecting commerce."  
 17

18           66.     Misrepresentations or deceptive omissions of material fact constitute deceptive  
 19 acts or practices prohibited by Section 5(a) of the FTC Act.  
 20

#### **COUNT I Misrepresentation of Trial Offers**

21           67.     In numerous instances, in connection with the advertising, marketing, promotion,  
 22 offering for sale, or sale of cooking and golf-related goods or services, Defendants represented,  
 23 directly or indirectly, expressly or by implication, that consumers who enter their billing  
 24 information into Defendants' websites will receive a risk-free trial shipment of Defendants'  
 25 products for free, or for a nominal shipping and handling fee.  
 26  
 27  
 28



1 68. In truth and in fact, consumers do not receive a risk-free trial shipment for free or  
 2 for a nominal shipping and handling fee because they must return the shipment at their own  
 3 expense before the trial period ends to avoid additional charges for the product.

4 69. Therefore, Defendants' representations described in Paragraph 67 are false, and  
 5 constitute a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.  
 6 § 45(a).  
 7

8 **COUNT II**  
 9 **Failure to Disclose Negative Option Offer Terms-**  
 10 **Free Trial Conversion Offers**

11 70. In numerous instances, in connection with the advertising, marketing, promotion,  
 12 offering for sale, or sale of cooking and golf-related goods or services, Defendants represented,  
 13 directly or indirectly, expressly or by implication, that consumers who enter their billing  
 14 information into Defendants' websites will receive a risk-free trial shipment of Defendants'  
 15 products for free, or for a nominal shipping and handling fee.  
 16

17 71. In numerous instances in which Defendants have made the representations set  
 18 forth in Paragraph 70, Defendants failed to disclose adequately to consumers the material terms  
 19 and conditions of the offer, including:

- 20 a. That the trial shipment is not free;
- 21 b. That consumers must call Defendants and return the product before the trial
- 22 period ends to avoid additional charges for the product; and
- 23 c. That consumers must pay substantial return shipping costs themselves.

24 72. Defendants' failure to disclose adequately the material information described in  
 25 Paragraph 71 above, in light of the representation described in Paragraph 70 above, constitutes a  
 26 deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).  
 27  
 28

**COUNT III**  
**Failure to Disclose Negative Option Offer Terms-**  
**Continuity or Subscription Plan Offers**

73. In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, or sale of cooking and golf-related goods or services, Defendants represented, directly or indirectly, expressly or by implication, that consumers who enter their billing information into Defendants' websites will receive a free trial for golf or cooking-related continuity plans.

74. In numerous instances in which Defendants have made the representations set forth in Paragraph 73, Defendants failed to disclose adequately to consumers the material terms and conditions of the offer, including:

- a. That Defendants would automatically enroll consumers in continuity plans with additional recurring charges;
- b. That consumers must affirmatively cancel the continuity plans before the end of a trial period to avoid additional charges;
- c. That Defendants would use consumers' credit card information to charge consumers monthly for the continuity plans;
- d. The costs associated with the continuity plans; and
- e. The steps consumers must take to cancel the continuity plans to avoid additional charges.

75. Defendants' failure to disclose adequately the material information described in Paragraph 74 above, in light of the representation described in Paragraph 73 above, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**COUNT IV**

**Failure to Disclose Terms of Return, Refund, and Cancellation Policy**

76. In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, or sale of cooking and golf-related goods or services, Defendants represented, directly or indirectly, expressly or by implication, that Defendants offer a 100% money back guarantee, and that their trial offers are risk-free.

77. In numerous instances in which Defendants have made the representations set forth in Paragraph 76, Defendants failed to disclose adequately to consumers the material terms and conditions of their refund and cancellation policy, including:

- a. That consumers must call Defendants before the end of a trial period to cancel continuity plans or return free trial products to avoid additional charges;
- b. That consumers must pay substantial return shipping costs themselves; and
- c. That for continuity plans, Defendants limit refunds to charges from the last 30 days, or if consumers demand more, charges from the last 90 days.

78. Defendants' failure to disclose or disclose adequately the material information described in Paragraph 77 above, in light of the representations described in Paragraph 76 above, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**VIOLATIONS OF THE RESTORE ONLINE SHOPPERS' CONFIDENCE ACT**

79. In 2010, Congress passed the Restore Online Shoppers' Confidence Act, 15 U.S.C. §§ 8401 *et seq.*, which became effective on December 29, 2010. Congress passed ROSCA because "[c]onsumer confidence is essential to the growth of online commerce. To continue its development as a marketplace, the Internet must provide consumers with clear,

1 accurate information and give sellers an opportunity to fairly compete with one another for  
 2 consumers' business." Section 2 of ROSCA, 15 U.S.C. § 8401.

3 80. Section 4 of ROSCA, 15 U.S.C. § 8403, generally prohibits charging consumers  
 4 for goods or services sold in transactions effected on the Internet through a negative option  
 5 feature, as that term is defined in the Commission's Telemarketing Sales Rule ("TSR"), 16  
 6 C.F.R. § 310.2(u), unless the seller (1) clearly and conspicuously discloses all material terms of  
 7 the transaction before obtaining the consumer's billing information, (2) obtains the consumer's  
 8 express informed consent before making the charge, and (3) provides a simple mechanism to stop  
 9 recurring charges. *See* 15 U.S.C. § 8403.  
 10

11 81. The TSR defines a negative option feature as a provision in an offer or agreement  
 12 to sell or provide any goods or services "under which the customer's silence or failure to take an  
 13 affirmative action to reject goods or services or to cancel the agreement is interpreted by the  
 14 seller as acceptance of the offer." 16 C.F.R. § 310.2(u).  
 15

16 82. As described in Paragraphs 6 to 64 above, Defendants have advertised and sold  
 17 cooking and golf-related goods and services through a negative option feature as defined by the  
 18 TSR. 16 C.F.R. § 310.2(u).  
 19

20 83. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, a violation of ROSCA is a  
 21 violation of a rule promulgated under Section 18 of the FTC Act, 15 U.S.C. § 57a.  
 22

## 23 **COUNT V**

### 24 **Illegal Negative Option Marketing**

25 84. In numerous instances, in connection with charging consumers for cooking and  
 26 golf-related goods or services sold in transactions effected on the Internet through a negative  
 27 option feature, Defendants failed to:  
 28

- a. clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information;
- b. obtain a consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for products or services through such transaction; and
- c. provide simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account.

85. Defendants' acts or practices, as described in Paragraph 84 above, violate Section 4 of ROSCA, 15 U.S.C. § 8403.

#### **CONSUMER INJURY**

86. Consumers have suffered and will continue to suffer substantial injury because of Defendants' violations of the FTC Act and ROSCA. In addition, Defendants have been unjustly enriched because of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

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

87. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

**PRAYER FOR RELIEF**

88. Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), Section 5 of ROSCA, 15 U.S.C. § 8404, and the Court's own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act and ROSCA by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and ROSCA, including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

C. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

DAVID C. SHONKA  
Acting General Counsel

Dated: March 23, 2017

s/Robert Frisby  
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ROBERT M. FRISBY  
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Attorneys for Plaintiff Federal Trade Commission

**TABLE OF EXHIBITS**


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2 - Kick X Balls Website 5.13.15

http://www.shopmaxtv.com/kickx/land02.php?sid=1035272&gclid=CLX\_s8q0v8UCFYsCaQodSIQATw - Internet Explorer

http://www.shopmaxtv.com/kickx/land02.php?sid=1035272&gclid=CLX\_s8q0v8UCFYsCaQodSIQATw

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THE LONGEST PREMIUM BALL

KICK X GOLF

TOUR Z PREMIUM BALLS

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**FREE!**

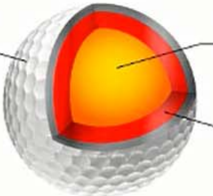
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Watch The Video



Mark Adams  
VP of Research and Development

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http://www.shopmaxtv.com/kicktourz/land02.php?sid=1035272&gclid=CLX\_s8q0v6UCFYsCaQodSIQATw - Internet Explorer

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**FREE!**

**STEP 1 - COMPLETE ORDER FORM**

First Name:

Last Name:

Address:

City:

State / Province:

Zip / Postal Code:

Country:

Phone:

Email:

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**LONGER | SOFTER | STRAIGHTER**

Try the TourZ Balls FREE with \$0.99 S&H for 30 Days! Love it or you'll never even be charged! Keep it and it's just 39.95 with FREE S&H for the dozen premium balls! You can cancel anytime and best of all each dozen balls has a 100%, 60 day money back guarantee!

The TourZ golf ball is designed to do it all. Gain more distance on drives and experience precision control on approach shots, chip shots and putting. The TourZ is built for optimal ball flight and maximum roll giving players the advantage under any conditions.

Conforms with USGA rules and regulations.

Last Name: [REDACTED]  
Address 1: [REDACTED]  
Address 2: [REDACTED]  
City: [REDACTED]  
Country: UNITED STATES  
State/Province: [REDACTED]  
Zip / Postal Code: [REDACTED]  
Phone: [REDACTED]  
Email: [REDACTED]

Which credit card would you prefer for the \$0.99 S&H today?

Card Type: [REDACTED]  
Card Number: [REDACTED]  
Expiration date: [REDACTED] [REDACTED]  
Security Code (Optional): [REDACTED]  
Submit

**Shipping Information**

First Name: [REDACTED]  
Last Name: [REDACTED]  
Address 1: [REDACTED]  
Address 2: [REDACTED]

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**Shipping Information**

(Optional):

Submit

First Name: [REDACTED]

Last Name: [REDACTED]

Address 1: [REDACTED]

Address 2: [REDACTED]

City: [REDACTED]

Country: UNITED STATES

State/Province: [REDACTED]

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Phone: [REDACTED]

Submit

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Shopping Cart	Today	Qty
Cooking Torch	\$9.95	1
Gourmet Cooking Online	\$0.00	1
Gourmet Cooking Rewards	\$0.00	1
<b>Subtotal: \$9.95</b>		
<b>Total: \$9.95</b>		

edit cart

**Billing Information:**

**First Name:**

**Last Name:**

**Shipping Address:**

**City:**

**State:**

**Zip:**

**Country:**

**Phone Number:**

**Email:**

Which credit card would you prefer to use for the \$9.96 charge today?

**Card Type:**

**Card Number:**

**Expiration Date:**

**Security Code: (optional)**

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**Shipping Address:**  
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**City:**  
[text box]

**State:**  
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**Zip:**  
[text box]

**Country:**  
UNITED STATES [dropdown menu]

**Phone Number:**  
[text box]

**Email:**  
[text box]

Which credit card would you prefer to use for the \$9.95 charge today?


**Card Type:**  
[dropdown menu]

**Card Number:**  
[text box]

**Expiration Date:**  
[dropdown menu] [dropdown menu]

**Security Code: (optional)**  
[text box]

**Submit**



**Shipping Information:**

**First Name:**  
[text box]

**Last Name:**  
[text box]

**Shipping Address:**  
[text box]  
[text box]

**City:**  
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