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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission,) No. CV06-0078-PHX-ROS
)
Plaintiff,)
)
vs.) **FINAL JUDGMENT AND ORDER**
) **FOR PERMANENT INJUNCTION**
)
William Dugger, et al.,)
)
Defendants.)
_____)

For good cause shown, including that found in the Stipulation for Entry of Final Judgment and Order for Permanent Injunction, this Court hereby directs the Clerk of the Court to enter the following Order:

It is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and over all parties to this Order pursuant to 15 U.S.C. §§ 53(b), 57b, and 7706(a), and 28 U.S.C. §§ 1331, 1337(a), and 1345;
2. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).
3. The activities of defendants are in or affecting “commerce,” as that term is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The Complaint states a claim upon which relief may be granted against defendants under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b,

1 Sections 5(a), (b), and (d) of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a), (b), and (d), and
2 the FTC’s Adult Labeling Rule, 16 C.F.R. Part 316.4.

3 5. Defendants have entered into this Order freely and without coercion.
4 Defendants further acknowledge that they have read the provisions of this Order and are
5 prepared to abide by them.

6 6. The undersigned have agreed that the entry of this Order resolves all matters
7 of dispute between them arising from the Complaint in this action, up to the date of entry
8 of this Order.

9 7. Defendants waive all rights to seek appellate review or otherwise challenge
10 or contest the validity of this Order. Defendants further waive and release any claim they
11 may have against the Commission, its employees, representatives, or agents.

12 8. Defendants agree that this Order does not entitle defendants to seek or to
13 obtain attorneys’ fees as prevailing parties under the Equal Access to Justice Act, 28 U.S.C.
14 § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and defendants
15 further waive any right to attorneys’ fees that may arise under said provision of law.

16 9. This Order is in addition to, and not in lieu of, any other civil or criminal
17 remedies that may be provided by law.

18 10. No provision of this Order shall be construed as an admission or denial that
19 defendants have engaged in violations of the CAN-SPAM Act or the Adult Labeling Rule.

20 11. Entry of this Order is in the public interest, and there being no just reason for
21 delay, the Clerk is directed to enter judgment immediately.

22 DEFINITIONS

23 1. **“Affirmative consent”** to receipt of a commercial email message means
24 that:

25 a. The recipient expressly consented to receive the message, either in
26 response to a clear and conspicuous request for such consent or at the recipient’s
27 own initiative; and

28 b. If the message is from a party other than the party to which the

1 recipient communicated such consent, the recipient was given clear and conspicuous
2 notice at the time the consent was communicated that the recipient’s electronic mail
3 address could be transferred to the other party for the purpose of initiating
4 commercial electronic mail messages. 15 U.S.C. § 7702(1).

5 2. **“Assets”** mean any legal or equitable interest in, right to, or claim to, any
6 real and personal property, including without limitation, chattels, goods, instruments,
7 equipment, including computers, servers and related equipment, fixtures, general
8 intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits,
9 contracts, receivables, shares of stock, bonds, and all cash, wherever located, whether in the
10 United States or abroad.

11 3. **“Commercial electronic mail message”** (or **“commercial email”**) means
12 any electronic mail message the primary purpose of which is the commercial advertisement
13 or promotion of a commercial product or service (including the content on an Internet
14 website operated for commercial purposes). 15 U.S.C. § 7702(2).

15 4. **“Defendants”** means William G. Dugger, Angelina M. Johnson, and John
16 Peter Vitale.

17 5. **“Document”** is synonymous in meaning and equal in scope to the usage of
18 the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs,
19 charts, photographs, audio and video recordings, computer records including email, ICQ, or
20 other electronic communications, and other data compilations from which information can
21 be obtained and translated, if necessary, through detection devices into reasonably usable
22 form. A draft or non-identical copy is a separate document within the meaning of the term.
23 Any document provided by one party to another pursuant to this Order shall be provided in
24 a format that is accessible to the receiving party.

25 6. **“Electronic mail address”** (or **“email address”**) means a destination,
26 commonly expressed as a string of characters, consisting of a unique user name or mailbox
27 (commonly referred to as the “local part”) and a reference to an Internet domain
28 (commonly referred to as the “domain part”), whether or not displayed, to which an

1 electronic mail message can be sent or delivered. 15 U.S.C. § 7702(5).

2 7. **“Electronic mail message”** (or **“email”**) means a message sent to a unique
3 electronic mail address. 15 U.S.C. § 7702(6).

4 8. **“Header information”** means the source, destination, and routing
5 information attached to an electronic mail message, including the originating domain name
6 and originating electronic mail address, and any other information that appears in the line
7 identifying, or purporting to identify, a person initiating the message. 15 U.S.C. § 7702(8).

8 9. **“Initiate,”** when used with respect to a commercial email message, means to
9 originate or transmit such message or to procure the origination or transmission of such
10 message. 15 U.S.C. § 7702(9).

11 10. **“Person”** means a natural person, organization or other legal entity,
12 including a corporation, partnership, proprietorship, association, or cooperative, or any
13 other group or combination acting as an entity.

14 11. **“Procure,”** when used with respect to the initiation of a commercial email
15 message, means intentionally to pay or provide other consideration to, or induce, another
16 person to initiate such a message on one’s behalf. 15 U.S.C. § 7702(12).

17 12. **“Sexually oriented material”** means any material that depicts sexually-
18 explicit conduct as that term is defined in 18 U.S.C. § 2256, unless the depiction constitutes
19 a small and insignificant part of the whole, the remainder of which is not primarily devoted
20 to sexual matters. 15 U.S.C. § 7704(d)(4). Sexually-explicit conduct is defined by 18
21 U.S.C. § 2256 to mean actual or simulated: (a) sexual intercourse, including genital-genital,
22 oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite
23 sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious
24 exhibition of the genitals or pubic area of any person.

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1 **ORDER**

2 **I. PROHIBITIONS AGAINST UNLAWFUL USE OF**
3 **FALSE HEADERS AND RELAY COMPUTERS**

4 **IT IS THEREFORE ORDERED** that defendants and their agents, servants,
5 employees, and attorneys, and those persons in active concert or participation with them
6 who receive actual notice of this Order by personal service or otherwise, are hereby
7 permanently restrained and enjoined from violating the provisions contained in Sections 3,
8 5, and 6 of the CAN-SPAM Act, 15 U.S.C. §§ 7702, 7704 and 7705, as currently
9 promulgated or as it may hereafter be amended, by, among other things, initiating the
10 transmission of a commercial email:

11 A. That contains false or misleading header information;

12 B. That fails to identify accurately any computer that defendants use to initiate
13 or transmit the message and to include an accurate Internet Protocol address for each such
14 computer; or

15 C. That is relayed or retransmitted through a computer or computer network
16 without authorization.

17 **II. REQUIREMENTS FOR AUTHORIZATION**

18 **IT IS FURTHER ORDERED** that defendants and their agents, servants,
19 employees, and attorneys, and those persons in active concert or participation with them
20 who receive actual notice of this Order by personal service or otherwise, are hereby
21 permanently restrained and enjoined from initiating the transmission of a commercial email
22 that is relayed or retransmitted through a computer or computer network without either the
23 direct, written authorization of the owner of the computer or computer network, or the
24 indirect, written authorization of the owner of the computer or computer network given to a
25 third party who provides a copy of such written authorization to defendants. A written
26 authorization may be obtained electronically and shall include:

27 A. An express statement that the authorization may be reassigned if it is indirect;

28 B. A statement identifying the person giving the authorization and showing that

1 person's ownership of or authority to act on behalf of the owner of the computer or
2 computer network;

3 C. The email address of the person giving the authorization; and

4 D. The domain names or Internet Protocol addresses used to access such
5 computer or computer network, the method by which the computer or computer network
6 will be accessed, and the name of any computer program to be used for such access.

7 **III. PROHIBITION AGAINST VIOLATING THE ADULT LABELING RULE**

8 **IT IS FURTHER ORDERED** that defendants and their agents, servants,
9 employees, and attorneys, and those persons in active concert or participation with them
10 who receive actual notice of this Order by personal service or otherwise, are hereby
11 permanently restrained and enjoined from violating the Adult Labeling Rule, 16 C.F.R.
12 Part 316.4, as currently promulgated or as it may hereafter be amended, including, but not
13 limited to, initiating the transmission of a commercial email that includes sexually oriented
14 material:

15 A. That does not contain the phrase "SEXUALLY-EXPLICIT: " as the first
16 nineteen (19) characters at the beginning of the subject line of the message;

17 B. That includes sexually oriented materials within the subject line of the
18 message;

19 C. That includes sexually oriented materials within the content of the message
20 that is initially viewable by the recipient, when the message is opened by the recipient and
21 absent any further action by the recipient; and

22 D. That does not contain only the following information within the content of
23 the message that is initially viewable by the recipient, when the message is opened by the
24 recipient and absent any further action by the recipient:

25 1. The phrase "SEXUALLY-EXPLICIT: " in a clear and conspicuous
26 manner;

27 2. Clear and conspicuous notice that the message is an advertisement or
28 solicitation;

1 3. Clear and conspicuous notice of the opportunity of a recipient to
2 decline to receive further commercial email messages from the defendants;

3 4. A functioning return email address or other Internet-based
4 mechanism, clearly and conspicuously displayed, that (i) a recipient may use to
5 submit, in a manner specified in the message, a reply email message or other form
6 of Internet-based communication requesting not to receive future commercial email
7 messages from that sender at the email address where the message was received;
8 and (ii) that remains capable of receiving such messages or communications for no
9 less than 30 days after the transmission of the original message; and

10 5. Clear and conspicuous display of a valid physical postal address of the
11 sender.

12 **Provided, however,** that the requirements of this Paragraph do not apply to
13 commercial emails transmitted only to persons who have given prior affirmative consent to
14 receipt of the message.

15 **IV. REQUIREMENTS FOR AFFIRMATIVE CONSENT**

16 **IT IS FURTHER ORDERED** that defendants and their agents, servants,
17 employees, and attorneys, and those persons in active concert or participation with them
18 who receive actual notice of this Order by personal service or otherwise, are hereby
19 permanently restrained and enjoined from initiating the transmission of a commercial email
20 that includes sexually oriented material and does not comply with the requirements of
21 Paragraph III.A. to III.D. of this Order, unless defendants possess evidence that the
22 recipient has given prior affirmative consent to receipt of the message, including a copy of
23 any web page or other document on which such person indicated his or her consent. If the
24 web page or other document on which consent was obtained does not identify defendants
25 or their business by name, it shall be construed to give consent to the receipt of sexually
26 oriented material only if it expressly states that the consent authorizing the receipt of
27 sexually oriented material may be transferred to third parties.

28 **V . DISGORGEMENT**

1 **IT IS FURTHER ORDERED** that:

2 A. Defendants are liable to the Commission for Five Hundred Ninety-Seven
3 Thousand, One Hundred Sixty-Six Dollars (\$597,166), which Defendants agree is the
4 amount of unjust enrichment to be disgorged, and the FTC is awarded a monetary
5 judgment in this amount provided, however, that payment of all but Eight Thousand
6 Dollars (\$8,000) of this judgment, or the balance in the two bank accounts identified in the
7 following sentence, whichever is greater, shall be suspended. Within seven days after
8 entry of this Order, Defendants shall transfer all funds deposited in Bank Account #1 and
9 Bank Account #2, identified in the Reference List filed with the Court under seal, but in
10 any event no less than Eight Thousand Dollars (\$8,000), by wire transfer, into an account
11 to be designated by the Commission in accord with directions provided by the
12 Commission. In the event that defendants fail within seven days after entry of this Order
13 to transfer the balance in such bank accounts into an account to be designated by the
14 Federal Trade Commission, the banks holding Bank Account #1 and Bank Account #2,
15 identified in the Reference List filed with the Court under seal, shall transfer such monies
16 into an account to be designated by counsel for the Commission. All funds collected by
17 the Commission under this Order shall be deposited to the United States Treasury as
18 disgorgement.

19 B. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless
20 they have done so already, to furnish to the Commission their taxpayer identification
21 numbers (social security numbers and employer identification numbers) which shall be
22 used for purposes of collecting and reporting on any delinquent amount arising out of
23 Defendants' relationship with the government.

24 C. Defendants are further required, unless they have done so already, to provide
25 the Commission with clear, legible and full-size photocopies of all valid driver's licenses
26 they possess, which will be used for reporting and compliance purposes.

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1 **VI. RIGHT TO REOPEN**

2 A. The Commission’s agreement to this Final Order is expressly premised upon
3 the financial condition of Defendants as represented in the sworn financial statements and
4 supporting documents provided to the Commission by Defendant William Dugger, dated
5 February 3, 2006; Angelina M. Johnson, dated “1-3-06,” but actually signed on February
6 3, 2006; and John Peter Vitale, dated February 6, 2006; all of which include material
7 information upon which the Commission relied in negotiating and consenting to this Final
8 Order.

9 B. If, upon motion by the Commission, this Court finds that any Defendant
10 made a material misrepresentation or omitted material information concerning his or her
11 financial condition, then the Court shall lift the suspension of the judgment and direct the
12 Clerk to enter judgment against the Defendant and in favor of the Commission for the full
13 amount of Five Hundred Ninety-Seven Thousand, One Hundred Sixty-Six Dollars
14 (\$597,166). This amount shall be immediately due and payable, together with interest
15 from the date of this Order computed at the rate prescribed under 28 U.S.C. § 1961, as
16 amended. Any and all funds paid pursuant to this Paragraph IV shall be deposited into the
17 United States Treasury as disgorgement.

18 C. Any proceedings instituted under this Paragraph are in addition to, and not in
19 lieu of, any other civil or criminal remedies as may be provided by law, including any
20 other proceedings that the FTC may initiate to enforce this Final Order.

21 **VII. LIFTING OF THE ASSET FREEZE**

22 **IT IS FURTHER ORDERED** that the freeze of the defendants’ assets pursuant to
23 the Stipulated Preliminary Injunction entered by this Court dated February 3, 2006, shall
24 be lifted to the extent necessary to turn over assets for disgorgement as required by
25 Paragraph III.A of this Order, and upon completion of that transfer, shall be lifted
26 permanently.

1 **VIII. COMPLIANCE MONITORING**

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

4 A. Within ten (10) days of receipt of written notice from a representative of the
5 Commission, defendants shall submit additional written reports, sworn to
6 under penalty of perjury; produce documents for inspection and copying;
7 appear for deposition; and/or provide entry during normal business hours to
8 any business location in defendants' possession, or direct or indirect control,
9 to inspect the business operation;

10 B In addition, the Commission is authorized to monitor compliance with this
11 Order by all other lawful means, including but not limited to the following:

- 12 1. obtaining discovery from any person, without further leave of court,
13 using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36,
14 and 45; and
15 2. posing as consumers and suppliers to defendants, to any of
16 defendants' employees, or to any other entity managed or controlled
17 in whole or in part by defendants, without the necessity of
18 identification or prior notice; and

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

24 Provided, however, that nothing in this Order shall limit the Commission's lawful use of
25 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and
26 57b-1, to obtain any documentary material, tangible things, testimony, or information
27 relevant to unfair or deceptive acts or practices in or affecting commerce (within the
28 meaning of 15 U.S.C. § 45(a)(1)).

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IX. COMPLIANCE REPORTING BY DEFENDANTS

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 from the date of entry of this Order:

- A. Each defendant shall notify the Commission in writing of any of the following:
 - 1. any changes in residence, mailing addresses and telephone numbers of the defendant, within ten (10) days of the date of such change;
 - 2. any change in employment status (including self-employment) of the defendant, and any change in the ownership interest of the defendant in any business entity engaged in commercial email, within ten (10) days of such change. Such notice shall include the name and address of each business that the defendant is affiliated with, employed by, or performs services for, a statement of the nature of the business, and a statement of the defendant’s duties and responsibilities in connection with the business or employment;
 - 3. any changes in the defendant’s name, and any aliases or fictitious names adopted or used by the defendant; and
 - 4. the creation of any business entity and any changes in such a business entity that any defendant directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such

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change, provided that, with respect to any proposed change in the corporation about which the defendant(s) learns less than thirty (30) days prior to the date such action is to take place, defendant(s) shall notify the Commission as soon as is practicable after obtaining such knowledge.

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

1. a copy of each acknowledgment of receipt of this Order, obtained pursuant to Paragraph IX of this Order;
2. any changes required to be reported pursuant to Paragraph VII.A;
3. a list of all names under which the defendant has done or currently is doing business since the date of entry of this Order or the defendant's last such report; and
4. a list of all domain names and web page addresses the defendant has registered or used since the date of entry of the Order or the defendant's last such report;

C. For the purposes of this Order, defendants shall, unless otherwise directed by a representative of the Commission, mail all written notifications to the Commission to., and mail them to:

Associate Director for Enforcement
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, DC 20001
Re: FTC v. William Dugger, CV-06-0078-PHX-ROS;

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

1 **X. RECORD-KEEPING PROVISIONS**

2 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of
3 entry of this Order, defendants are hereby restrained and enjoined from failing to create
4 and retain the following records in connection with the marketing, advertising, promotion,
5 offering for sale, or sale of goods or services via commercial email messages or other
6 Internet-based mechanisms:

- 7 A. Accounting records that reflect the cost of goods or services sold, revenues
8 generated, and the disbursement of such revenues;
- 9 B. All documents relating to the use of computers or computer networks to
10 relay or retransmit commercial emails, including but not limited to: (1) all
11 contracts, communications, and payment records relating to the
12 identification of such computers or computer networks, or the sale or rental
13 of the right to such use; (2) all documents that evidence the authorization for
14 such use, including all documents identified in Paragraph I.C. of this Order;
15 and (3) a copy of each distinct email relayed or retransmitted through such
16 computer or computer network, the number of each distinct email relayed or
17 retransmitted on each day, and records that specify for each such distinct
18 email the header information of such email that identifies accurately the
19 computer used to initiate the message and send it to the relay or retransmittal
20 computer;
- 21 C. For each email that includes sexually oriented material: (1) an electronic
22 copy of such email, including all images that may be incorporated into the
23 email, whether by reference to an image source URL or by other means; (2)
24 all documents that evidence prior affirmative consent to receipt of any email
25 that does not comply with the requirements of Paragraph II.A - D of this
26 Order, including all documents identified in the “Provided, however”
27 provision of Paragraph II of this Order; and (3) a list of all domain names
28 included in the body of such email, including all hypertext reference URLs

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and image source URLs.

D. Records accurately reflecting: the name, physical address, and telephone number of each person employed in any capacity by such business, including as an independent contractor or affiliate; that person’s job title or position; the date upon which the person commenced work; and the date and reason for the person’s termination, if applicable;

E. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

F. Records that reflect, for every written or oral consumer complaint received by defendants, whether directly or indirectly or through any third party, including affiliates: (1) the consumer’s name, address, and telephone number; (2) the written complaint or request, if any; (3) the basis of the complaint or request; (4) the nature and result of any investigation conducted concerning the complaint or request; (5) each response and the date of such response to the complaint or request; (6) any final resolution of the complaint or request, and the date of such resolution; and (7) in the event of a denial of any resolution, the reason for the denial;

G. All other records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, all documents obtained, created, generated or which in any way relate to the requirements, provisions or terms of this Order, copies of signed and dated acknowledgments of receipt of this Order, required by Paragraph IX of this Order, and all reports submitted to the FTC pursuant to this Order.

1 **XI. DEFENDANTS' DUTY TO DISTRIBUTE THIS ORDER**

2 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of
3 entry of this Order, each defendant shall deliver copies of this Order as directed below:

- 4 A. **Defendant as Control Person:** For any business that a defendant controls,
5 directly or indirectly, or in which the defendant has a majority ownership
6 interest, the defendant must deliver a copy of this Order to all principals,
7 officers, directors, and managers of that business. The defendant must also
8 deliver copies of this Order to all employees, agents, and representatives of
9 that business who engage in conduct related to the subject matter of the
10 Order. For current personnel, delivery shall be within (5) days of service of
11 this Order upon defendant. For new personnel, delivery shall occur prior to
12 them assuming their responsibilities.
- 13 B. **Defendant As Employee or Non-Control Person:** For any business where
14 a defendant is not a controlling person of the business but otherwise engages
15 in conduct related to the subject matter of this Order, the defendant must
16 deliver a copy of this Order to all principals and managers of such business
17 before engaging in such conduct.
- 18 C. Each defendant must secure a signed and dated statement acknowledging
19 receipt of the Order, within thirty days of delivery, from all persons
20 receiving a copy of the Order pursuant to this Paragraph IX.

21 **XII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

22 **IT IS FURTHER ORDERED** that each Defendant, within five (5) business days
23 of receipt of this Order as entered by the Court, must submit to the Commission a truthful
24 sworn statement acknowledging receipt of this Order.

25 **XIII. FEES AND COSTS**

26 **IT IS FURTHER ORDERED** that each party to this Order hereby agrees to bear
27 his or its own costs and attorneys' fees incurred in connection with this action.

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XIV. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

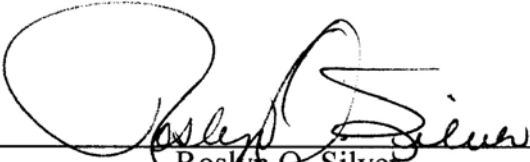
XV. RETENTION OF JURISDICTION

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

JUDGMENT IS THEREFORE ENTERED in favor of plaintiff and against defendants, pursuant to all the terms and conditions recited above.

IT IS SO ORDERED.

DATED this 31st day of July, 2006.



Roslyn O. Silver
United States District Judge