

1 COMMERCE

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

5 DEFENDANT’S BUSINESS ACTIVITIES

6 8. Since 2009, Defendant has used tactics that violate the FTC Act and
7 ROSCA to enroll consumers in membership programs for its nutritional
8 supplements and beauty products.

9 9. On its websites, Defendant purports to offer consumers “free” product
10 samples, but fails to disclose, or fails to disclose adequately, that by ordering a
11 sample consumers are enrolled in Defendant’s membership program and will incur
12 a monthly fee until they call Defendant to cancel their membership. The recurring
13 membership fee ranges from \$29.99 to \$79.99 depending on the product.
14 Consumers must cancel their membership within a 18-day trial period to avoid
15 future charges. Although Defendant’s websites contain statements about the
16 recurring charge, those statements are clear and conspicuous. Accordingly,
17 many consumers are led to believe that Defendant offers consumers “free” product
18 samples with no further payment obligation.

19 10. Defendant has caused tens of millions of dollars in injury to
20 consumers through the sale of its membership programs. At least 70,000
21 consumers have complained about Defendant’s business practices to their bank,
22 credit card company, a law enforcement agency, or the Better Business Bureau.

23 Defendant’s Products

24 11. Defendant sells a range of nutritional supplements and beauty
25 products, including Force Factor, Peak
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1 The page states, in bold and italicized, “FREE SAMPLE, PAY ONLY SHIPPING
2 AND HANDLING,” or similar language.

3 18. Step 3 – “Complete Your Sample Order”: Consumers who enter their
4 information on the Shipment Page are redirected to a page requesting their credit
5 card information (“Payments Page”). The top of the page states, in large type,
6 “YOU’RE ALMOST DONE [consumer’s name] Just pay for shipping and
7 handling below,” “Pay For S & H Below,” or similar language. The right side of
8 the page contains a box that has fields for consumers to enter their credit card
9 information. The left side of page contains photos of Defendant’s products and a
10 dense paragraph of terms and conditions

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1 showing Defendant's products, security logos, information about product
 2 availability in stores, and a box for consumers to enter their credit card
 3 information. The lower left-hand portion of the page also features a long
 4 paragraph in small type that describes Defendant's "Terms & Conditions."
 5 Approximately half-way through the terms and conditions paragraph Defendant
 6 describes the recurring charge and cancellation process. The terms and conditions
 7 paragraph is in small print and away from the credit card field. Consumers' eyes
 8 are not drawn to the dense type, but instead to the credit card field and large button
 9 below the credit card field that states, "RUSH MY SAMPLE."

10 22. In fall 2015, Defendant added two purported disclosures to the
 11 Payments Page. First, it included language near the top of the Payments Page that
 12 describes the recurring monthly charge and cancellation methods. However, this
 13 disclosure is next to a large seal that states "Money-Back Guarantee." The first
 14 two sentences of the disclosure relate to shipping and product satisfaction, not the
 15 recurring charge. The second disclosure Defendant added is a checkbox below the
 16 payment information that states "I understand and agree to the terms and
 17 conditions to the left." However, the check box does not contain any information
 18 about the recurring charge. Consumers who called Defendant's customer service
 19 center to cancel their membership told Defendant's agents that they did not see the
 20 new disclosures and did not know they were enrolled in a monthly membership
 21 program. Exhibit B is materially similar to the Payments Page that consumers saw
 22 after fall 2015.

VIOLATIONS OF THE FTC ACT

24 23. Section 5(a) of the FTC Act, 15 S.C. § 45(a), prohibits "unfair or
 25 deceptive acts or practices in affecting commerce."

26 24. Misrepresentations or deceptive omissions of material fact constitute
 27 deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

Count 1

Failure to Adequately Disclose Automatic Renewal Terms

25. Through the means described in Paragraphs 12 to 22 above, Defendant has represented expressly or by implication, that consumers could obtain free samples of its products for a nominal shipping and handling fee.

26. In numerous instances in which Defendant has made the representation set forth in Paragraph 25, above, Defendant has failed to disclose, or failed to disclose adequately, to consumers the material terms and conditions related to the offer, including:

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

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

1 VIOLATIONS OF THE RESTORE ONLINE SHOPPERS'
2 CONFIDENCE ACT

3 28. In 2010, Congress passed the Restore Online Shoppers' Confidence
4 Act, 15 U.S.C. §§ 8401 et seq. which became effective on December 29, 2010.
5 Congress passed ROSCA because consumer confidence is essential to the
6 growth of online commerce. To continue its development as a marketplace, the
7 Internet must provide consumers with clear accurate information and give sellers
8 an opportunity to fairly compete with one another for consumers' business."
9 Section 2 of ROSCA, 15 U.S.C. § 8401.

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

18 30. The TSR defines a negative option feature as: "in an offer or
19 agreement to sell or provide any goods or services, a provision under which the
20 consumer's silence or failure to take affirmative action to reject goods or
21 services or to cancel the agreement is interpreted by the seller as acceptance of the
22 offer." 16 C.F.R. § 310.2(w).

23 31. As described in Paragraphs 12-22 above, Defendant has advertised
24 and sold Defendant's membership program to consumers through a negative option
25 feature as defined by the TSR. See 16 C.F.R. § 310.2(w).

26 32. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, a violation of
27 ROSCA is a violation of a rule promulgated under Section 18 of the FTC Act, 15
28 U.S.C. § 57a.

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THIS COURT'S POWER TO GRANT