

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SAINZ ENTERPRISES, LLC, a Colorado corporation; and
JOE P. SAINZ III, individually and as an officer of Sainz Enterprises,

Defendants.

STIPULATED FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6805(b), and Sections 505(a)(7) and 522(a) of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6805(a)(7) and § 6822(a), has filed a Complaint for injunctive relief, charging Defendants with violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); the Telemarketing Act, 15 U.S.C. §§ 6101-08; the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310; Title V of the GLB Act, 15 U.S.C. §§ 6801-09 and §§ 6821-27; and the FTC’s Privacy of Consumer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313.

The Commission, by and through its counsel, and Defendants Sainz Enterprises, LLC and Joe P. Sainz III, (“Defendants”) by and through their counsel, have agreed to the entry of this Stipulated Final Judgment and Order for Permanent Injunction and Order for Equitable Relief (“Final Judgment”) by this Court in order to resolve all matters arising out of the facts alleged in the Complaint and in dispute in this action. The Commission and Defendants have consented to entry of this Final Judgment without trial or adjudication of any issue of law or fact herein and without Defendants admitting any liability or wrongdoing for the offenses alleged in the Complaint.

NOW THEREFORE, the Commission and Defendants having requested this Court to enter this Final Judgment, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS

The Court has considered the Complaint and all other papers filed herein. It appears to the satisfaction of the Court that:

1. This Court has jurisdiction over the subject matter of this case, and all parties hereto;
2. The complaint states a claim upon which relief may be granted against Defendants under Sections 5, 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b; the Telemarketing Act, 15 U.S.C. §§ 6102(c) and 6105(b); and Title V of the GLB Act, 15 U.S.C. §§ 6801-09 and 6821-27.
3. Venue in the United States District Court for the District of Colorado is proper

under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c);

4. The activities of Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44; and

5. Entry of this Order is in the public interest.

DEFINITIONS

1. “Credit-related goods or services” means any good or service that is advertised, offered for sale, or sold to consumers as a method by which consumers may establish or obtain any credit or credit device including, but not limited to, credit cards, loans, or financing; or as a method to restore, repair, or improve derogatory information contained in consumers’ credit reporting files; or as a method to consolidate debt or liquidate assets.

2. “Customer information of a financial institution” means any information maintained by or for a financial institution that is derived from the relationship between the financial institution and a customer of the financial institution and is identified with the customer. See 15 U.S.C. § 6827(2).

3. “Defendants” mean Sainz Enterprises, LLC, and Joe P. Sainz III and each of them, and their officers, agents, servants, employees, independent contractors, corporations, directors, subsidiaries, affiliates, successors, assigns, and all persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

4. “Material” means likely to affect a person’s choice of, or conduct regarding, goods or services.

5. “Nonaffiliated third party” means any person except Defendants’ affiliate or a person employed jointly by Defendants and any company that is not Defendants’ affiliate. See 16 C.F.R. § 313.3(m).

6. “Nonpublic personal information” means personally identifiable financial information and any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable information that is not publicly available. See 16 C.F.R. § 313.3(n).

7. “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 a person in exchange for consideration. See 16 C.F.R. § 310.2(z).

8. “Telemarketer” means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor. See 16 C.F.R. § 310.2(bb).

9. “Telemarketing” means a plan, program, or campaign 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. See 16 C.F.R. § 310.2(cc).

I. PROHIBITED MISREPRESENTATIONS

IT IS THEREFORE ORDERED that, in connection with the offering of any credit-related goods or services, Defendants are hereby permanently restrained and enjoined from misrepresenting, either orally or in writing, directly or by implication:

- A. that any Defendant will provide consumers with, or arrange for consumers to receive, an unsecured major credit card, such as a VISA or MasterCard; or

- B. any fact material to a consumer's decision to pay a fee for an extension of credit, including a loan or a credit card.

II. PROHIBITED TELEMARKETING PRACTICES

IT IS FURTHER ORDERED that, in connection with telemarketing any goods or services to consumers, Defendants are hereby permanently restrained and enjoined from violating any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, by, including but not limited to:

- A. misrepresenting, directly or by implication, any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer, in violation of Section 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii);
- B. requesting or receiving payment of any fee or consideration in advance of obtaining or arranging an extension of credit when they have guaranteed or represented a high likelihood of success in obtaining or arranging an extension of credit in violation of Section 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4); and
- C. providing substantial assistance or support to any seller or telemarketer when any Defendant knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c), or (d), or 310.4 of the TSR, 16 C.F.R. §§ 310.3(a), (c), or (d), or 310.4, in violation of Section 310.3(b) of the TSR, 16 C.F.R. § 310.3(b). For purposes of this provision, any Defendant

shall be deemed to be consciously avoiding knowledge of a seller's or telemarketer's violation of the TSR if any Defendant fails to obtain and review sample scripts or direct mail pieces of any seller or telemarketer with whom any Defendant does business, directly or through a third party.

III. INJUNCTION AGAINST VIOLATIONS OF SUBTITLE A OF THE GLB ACT AND THE PRIVACY RULE

IT IS FURTHER ORDERED that, in connection with the offering of any credit-related goods or services, Defendants are hereby permanently restrained and enjoined from violating any provision of Subtitle A of Title V of the GLB Act, 15 U.S.C. §§ 6801-09, and the Privacy Rule, 16 C.F.R. Part 313, by, including but not limited to:

- A. failing to provide a privacy notice as required by Section 503 of the GLB Act, 15 U.S.C. § 6803, and Section 313.4 of the Privacy Rule, 16 C.F.R. § 313.4;
- B. disclosing to any nonaffiliated third party any nonpublic personal information about any of Defendants' consumers in a manner that violates Section 502 of the GLB Act, 15 U.S.C. § 6802, or Section 313.10 of the Privacy Rule, 16 C.F.R. § 313.10; and
- C. reusing or redisclosing nonpublic personal information received from a nonaffiliated financial institution in a manner that violates Section 502(c) of the GLB Act, 15 U.S.C. § 6802(c), or Section 313.11 of the Privacy Rule, 16 C.F.R. § 313.11.

IV. INJUNCTION AGAINST VIOLATIONS OF SUBTITLE B OF THE GLB ACT

IT IS FURTHER ORDERED that, in connection with the offer of any goods or services, Defendants are hereby permanently restrained and enjoined from violating Subtitle B of Title V of the GLB Act, 15 U.S.C. §§ 6821-27, by obtaining or attempting to obtain customer information of a financial institution (including consumers' personal bank account numbers) by making false, fictitious, or fraudulent statements or representations to consumers or financial institutions.

V. MONETARY RELIEF

IT IS FURTHER ORDERED that:

- A. Judgment in the amount of \$75,000 is entered against Defendants as restitution for consumer injury; provided, however, that this judgment shall be suspended until further order of the Court pursuant to Section VI of this order (Right to Reopen), and provided further that this judgment shall be subject to the conditions set forth in Section VI.
- B. If any funds are paid pursuant to this section and Section VI (Right to Reopen), those funds shall be deposited into a fund administered by the FTC or its designated agent to be used for equitable relief, including, but not limited to, restitution and any attendant expenses for the administration of any monetary fund. In the event that direct restitution for consumers is wholly or partially impracticable or funds remain after restitution is completed, the FTC may apply any remaining funds for any other equitable relief (including consumer information remedies) that it determines to be reasonably related to Defendants'

practices alleged in the complaint. Any funds not used for this equitable relief shall be deposited into the U.S. Treasury as disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies under this section.

- C. The FTC and Defendants acknowledge and agree that no portion of this judgment for equitable monetary relief shall be deemed a fine, penalty, punitive assessment, or forfeiture.
- D. Defendants agree that the facts as alleged in the complaint filed in this action shall be taken as true for the purpose of any non-dischargeability action in a bankruptcy proceeding.

VI. RIGHT TO REOPEN

IT IS FURTHER ORDERED that, by agreeing to this order, Defendants reaffirm and attest to the truthfulness, accuracy, and completeness of the financial statement that was prepared by Defendant Joe P. Sainz III on behalf of himself and Sainz Enterprises, LLC, and transmitted to the Commission on March 17, 2004 (hereinafter the "Financial Statement"). The Commission's agreement to and the Court's approval of this Order are expressly premised upon the truthfulness, accuracy, and completeness of the Financial Statement, which contains material information relied upon by the Commission in negotiating and agreeing to the terms of this Order. If, upon motion by Plaintiff, this Court finds that Defendant Joe P. Sainz III failed to disclosed any material asset, or materially misrepresented the value of any asset, or made any other material misrepresentation in or omission from the Financial Statement, the Court shall enter a judgment against Defendants in favor of the Commission in the amount of \$75,000, and

the entire amount shall become immediately due and payable. Provided, however, that in all other respects, this Order shall remain in full force and effect unless otherwise ordered by this Court, and provided further that proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings Plaintiff may initiate to enforce this Order.

VII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that, within five (5) business days after receipt by Defendants of this Order as entered by the Court, Defendants shall submit to the Commission a truthful sworn statement, in the form shown as Appendix A, that shall acknowledge receipt of this Order.

VIII. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall:

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

telemarketing; and

- B. Maintain for a period of three (3) years after creation and, upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Order, as required in Section VII of this Order.

IX. COMPLIANCE REPORTING BY DEFENDANTS

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

- A. Defendants shall, for a period of five (5) years from the date of entry of this Order, notify the Commission of any changes in corporate structure 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 corporation; 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 change, provided that, with respect to any proposed change in the corporation about which Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants shall notify the Commission as soon as is practicable after obtaining such knowledge.
- B. One hundred eighty (180) days after the date of entry of this Order, and thereafter within ten (10) days of receipt of written notice from a representative of the

Commission, Defendants shall each submit a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. any changes required to be reported pursuant to subparagraph (A) above;
2. a statement setting forth in detail the manner in which Defendants and/or their agents collect nonpublic personal information from consumers;
3. copies of each different privacy and opt-out notice provided to consumers by Defendants and/or their agents;
4. a statement setting forth in detail the manner in which any nonpublic personal information owned, collected, compiled or controlled by Defendants or their agents is used or disclosed to any nonaffiliated third parties; and
5. a record of each nonaffiliated third party to whom Defendants or their agents disclose any nonpublic personal information.

- C. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Regional Director
Federal Trade Commission
915 Second Avenue, Suite 2896
Seattle, WA 98174

Re: FTC v. Sainz Enterprises, LLC

X. PLAINTIFF'S AUTHORITY TO MONITOR COMPLIANCE

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

- A. The Commission is authorized, without further leave of Court, to obtain discovery from any person in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating Defendants' compliance with any provision of this Order; and
- B. The Commission is authorized to use representatives posing as consumers and suppliers to Defendants, Defendants' employees, or any other entity managed or controlled in whole or in part by Defendants, without the necessity of identification or prior notice;

Provided that nothing in this Order shall limit the Commission's lawful use of compulsory

process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to investigate whether Defendants have violated any provision of this Order or Section 5 of the FTC Act, 15 U.S.C. § 45.

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

XI. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants and their successors and assigns, are hereby restrained and enjoined from failing to create and retain for three (3) years the following records:

- A. All privacy and opt-out notices provided to consumers by or on behalf of Defendants;
- B. All opt-out requests received from consumers;
- C. All records related to the use or disclosure of any consumers' nonpublic personal information; and
- D. All sample scripts and direct mail pieces that Defendants are required to obtain and review, pursuant to Section II.C. of this Order.

XII. INDEPENDENCE OF OBLIGATIONS

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

XIII. COSTS AND ATTORNEY'S FEES

IT IS FURTHER ORDERED that each party to this Final Judgment and Order shall bear its own costs and attorney's fees.

XIV. 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.

SO ORDERED, this ____ day of _____, 2004.

United States District Judge

The parties hereby stipulate and agree to the terms and conditions set forth above and consent to entry of the foregoing Order, which shall constitute a final judgment in this action.

FOR PLAINTIFF:

Attorney for Plaintiff
Julie K. Brof (Washington Bar #34638)
Federal Trade Commission
915 Second Avenue, Suite 2896
Seattle, Washington 98174
(206) 220-4475 (telephone)
(206) 220-6366 (facsimile)

FOR DEFENDANTS:

Joe P. Sainz III
Individually and as President of Sainz Enterprises, LLC

Attorney for Defendants
Claude C. Wild III (Colorado Bar #7230)
Greenberg Traurig, LLP
The Tabor Center
1200 17th Street, Suite 2400
Denver, Colorado 80202
(303) 572-6564 (telephone)
(303) 572-6540 (facsimile)