

SEP 08 2004

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS, WACO DIVISION

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
*[Signature]*  
DEPUTY CLERK

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)  
**FEDERAL TRADE COMMISSION,** )  
)  
Plaintiff, )  
)  
vs. )  
)  
**ASSAIL, INC., ET AL.,** )  
)  
Defendants. )  
\_\_\_\_\_

Civ. No. W03CA007

**STIPULATED ORDER FOR  
PERMANENT INJUNCTION AND  
MONETARY JUDGMENT AS TO  
DEFENDANT JOEL BEST**

Plaintiff, the Federal Trade Commission ("Commission" or "FTC") filed its Second Amended Complaint for a permanent injunction and other relief in this matter, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b) and 57(b), the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et seq.*, and Section 522(a) of the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. § 6822(a), charging that Defendant Joel Best engaged in deceptive and unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, the FTC's Trade Regulation Rule, entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310, and Section 521 of the GLB Act, 15 U.S.C. § 6821. The Commission and Defendant Best, as hereinafter defined, hereby stipulate to the entry of this Stipulated Order for Permanent Injunction and Monetary Judgment ("Order") to resolve all matters of dispute between them in this action.

**IT IS THEREFORE STIPULATED, AGREED, AND ORDERED** as follows:

**FINDINGS**

1. This Court has jurisdiction over the subject matter of this case and the parties pursuant to 15 U.S.C. §§ 45(a), 53(b), 57(b), 6101(b), 6102(c), as well as 28 U.S.C. §§ 1331, 1337(a), and 1345.

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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 Defendant 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 Defendant under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57(b).
5. Defendant Best has entered into this Order freely and without coercion. Defendant Best further acknowledges that he has read the provisions of this Order and is prepared to abide by them.
6. The undersigned, individually and by and through their counsel, have agreed that the entry of this Order resolves all matters of dispute between them arising from the Complaint in this action, up to the date of entry of this Order.
7. Defendant waives all rights to seek appellate review or otherwise challenge or contest the validity of this Order. Defendant further waives and releases any claim he may have against the Commission, its employees, representatives or agents.
8. Defendant agrees that this Order does not entitle Defendant to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and Defendant further waives any right to attorneys' fees that may arise under said provision of law.
9. By entry of this Order, Defendant does not admit to the allegations of the Complaint other than the jurisdictional facts.
10. Entry of this Order is in the public interest, and there being no just reason for delay, the Clerk is directed to enter judgment immediately.

## DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Asset" means any legal or equitable interest in, right to, or claim to, any real or personal property, including but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, premises, contracts, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, funds, and all cash, wherever located.
2. Unless otherwise specified, "Defendant" and "Defendant Best" mean Joel Best.
3. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or non-identical copy is a separate document within the meaning of the term.
4. "Plaintiff" means the Federal Trade Commission.
5. "Receiver" means Robb Evans & Associates, LLC, the permanent receiver appointed by the Court in this matter.
6. "Telemarketing" means any plan, program or campaign (whether or not covered by the Telemarketing Sales Rule, 16 C.F.R. Part 310) that is conducted to induce the purchase of goods or services by means of the use of one or more telephones.

**ORDER**

**I. BAN ON FUTURE TELEMARKETING ACTIVITIES**

**IT IS HEREBY ORDERED** that Defendant Best is permanently restrained and enjoined from engaging or participating in telemarketing, directly or through an intermediary, including, but not limited to, by consulting, brokering, planning, investing, or advising.

**II. PROHIBITION AGAINST MISREPRESENTATIONS**

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering for sale, or sale of goods or services by any means whatsoever, Defendant Best and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, are hereby permanently restrained and enjoined from making, directly or by implication, orally or in writing, any false or misleading representation or assisting others in making any such false or misleading representation including any misrepresentation:

- A. Of an affiliation with MasterCard, any other credit card or debit card company, or a bank or other financial institution;
- B. That a consumer is being contacted in response to a credit application made by the consumer;
- C. That after a consumer pays a fee, the consumer is likely or is guaranteed to receive a credit card, debit card, or any other payment card or device of any kind;

- D. That the purchase of a credit card, debit card or other payment card or device increases the likelihood that a consumer's credit will improve and that the consumer will get other offers for unsecured credit cards in the future; and
- E. That after a consumer pays a fee, the consumer will receive, at no additional charge, any discounted products or services.

### **III. PROHIBITION AGAINST UNAUTHORIZED BILLING**

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering for sale, or sale of goods or services by any means whatsoever, Defendant Best and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, are hereby permanently restrained and enjoined from causing a consumer's credit or debit card to be charged or bank account to be debited:

- A. Without having previously obtained the consumer's express authorization for such charge or debit;
- B. Prior to receipt by the consumer of information about the product or service that the consumer will receive;
- C. Prior to the expiration of any free trial period;
- D. After the consumer has requested to cancel the purchase of such product or service, unless the Defendant can show the charge or debit occurred prior to receipt of the request to cancel; and
- E. After the consumer is denied the ability to cancel the product or service through the customer service number provided.

#### **IV. COMPLIANCE WITH THE GRAMM LEACH BLILEY ACT**

**IT IS FURTHER ORDERED** that in connection with the advertising, promotion, offering for sale, or sale of goods or services by any means whatsoever, Defendant Best and his successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, are hereby restrained and enjoined from violating any provision of Section 521 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6821, including but not limited to inducing consumers to divulge their personal financial information by misrepresenting, expressly or by implication:

- A. An affiliation with, or on behalf of, a bank, financial institution, or credit or debit card company; and
- B. Possession or verification of a consumer's bank account information.

#### **V. MONETARY JUDGMENT**

**IT IS FURTHER ORDERED** that:

- A. Defendant Best is liable for a \$30 million monetary judgment (less any amounts paid pursuant to this Order or any amounts paid by other defendants in this matter) in favor of the Plaintiff. This monetary judgement is suspended, but for delivery to the Receiver within ten (10) days of the entry of this Order title to the 2002 Cadillac Escalade listed in his sworn financial statement dated June 11, 2004, encumbered only by the security interest held by Wells Fargo Financial and by no other ownership interest, or in the alternative he shall transfer to the Receiver within ten (10) days of the entry of this Order \$53,000. Any assets transferred to the Receiver pursuant to this paragraph will become

part of the Receivership Estate as defined in this Court's September 22, 2003, Stipulated Order for Permanent Injunction for Defendants Kyle Kimoto and Assail, Inc. and shall be managed in accordance with the terms of that Order. The suspended portion of the judgment shall be subject to the conditions set forth in Subsection B of this Paragraph V.

B. The Commission's agreement to this Order with Defendant Best is expressly premised upon the truthfulness, accuracy and completeness of the sworn financial statements and supporting documents for Joel Best dated June 11, 2004, provided to the Commission by Defendant Best, the truthfulness, accuracy, and completeness of which was attested to by Defendant Best on that date. These documents contain material information upon which the Commission has relied in negotiating and agreeing to this Order. If, upon motion by the Commission, this Court finds that Defendant Best has failed to disclose any material asset or materially misstated the value of any asset in the financial documents described above, or has made any other material misstatement or omission in the financial documents described above, the Court shall execute the Order attached as Appendix A imposing the full suspended monetary judgment and executing the full disgorgement order set forth in Subsection A above against Defendant Best, make an express determination that there is no just reason for delay in the entry of the judgment, and provide that the judgment shall be immediately due and payable. Interest on the judgment executed in Appendix A shall be computed at the rate prescribed under 28 U.S.C. § 1969, as amended, which shall be due from the date of entry of this Order, and Plaintiff shall be permitted to execute upon the judgment immediately and engage in discovery in aid of execution.

- C. In accordance with 31 U.S.C. § 7701, Defendant Best is hereby required, unless he has done so already, to furnish to the Commission his taxpayer identifying numbers (social security numbers and employer identification numbers) which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendant's relationship with the government.
- D. Defendant Best is further required, unless he has done so already, to provide the Commission with clear, legible and full-size photocopies of all valid driver's licenses that he possesses, which will be used for reporting and compliance purposes.
- E. Defendant Best agrees that the facts as alleged in the Complaint filed in this action shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including, but not limited to, a non-dischargeability complaint filed in any bankruptcy proceeding.
- F. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this Order.
- G. The non-suspended judgment set forth herein may be used by the FTC and the Receiver for the purpose of taking all necessary or appropriate post-judgment collection steps, including but not limited to obtaining and levying writs of execution and creating, perfecting, and enforcing judgment liens on any real or personal property of Defendant. The Clerk of the Court is hereby directed to accept this Stipulated Order for Permanent Injunction and Monetary Judgment and the non-suspended judgment set forth herein for



the purpose of issuing writs of execution, abstracts of judgment and any other post-judgment process at the request of the FTC or the Receiver.

**VI. COMMISSION'S USE OF MONETARY JUDGMENT**

**IT IS FURTHER ORDERED** that all funds paid to the Commission or its agent pursuant to Paragraph V of this Order, may be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress fund. In the event that direct redress to consumers is wholly or partially impracticable or that funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendant's practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendant shall have no right to challenge the Commission's choice of remedies under this Paragraph.

**VII. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

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

**VIII. DISTRIBUTION OF ORDER BY DEFENDANT**

**IT IS FURTHER ORDERED** that, for a period of seven (7) years from the date of entry of this Order:

- A. For any business that Defendant Best controls, directly or indirectly, or in which Defendant Best has a majority ownership interest, Defendant Best must deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant

Best must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

- B. For any business where Defendant Best is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, Defendant Best must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.
- C. Defendant Best must secure a signed and dated statement acknowledging receipt of the Order, within thirty days of delivery, from all persons receiving a copy of the Order pursuant to this Part.

**IX. COMPLIANCE REPORTING BY DEFENDANT Best**

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

- A. For a period of seven (7) years from the date of entry of this Order:
  - 1. Defendant Best shall notify the Commission in writing of any of the following:
    - a. Any changes in residence, mailing addresses and telephone numbers of Defendant Best, within ten (10) days of the date of such change;
    - b. Any change in employment status (including self-employment) of Defendant Best, and any change in the ownership interest of Defendant Best in any business entity, within ten (10) days of such change. Such

notice shall include the name and address of each business that Defendant Best is affiliated with, employed by, or performs services for, a statement of the nature of the business, and a statement of Defendant Best's duties and responsibilities in connection with the business or employment; and

c. Any changes in Defendant Best's name or use of any aliases or fictitious names; and

2. Defendant Best shall notify the Commission of any changes in the structure of any business entity that he 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 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 business entity about which the Defendant learns less than thirty (30) days prior to the date such action is to take place, the Defendant 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 each year thereafter on the same date, through and including January 1, 2011, Defendant Best shall provide a written report to the Commission, sworn to under penalty of perjury, setting

forth in detail the manner and form in which Defendant Best has complied and is complying with this Order. This report shall include, but not be limited to:

1. The then-current residence address, mailing addresses and telephone numbers of Defendant Best;
  2. The then-current employment and business addresses and telephone numbers of Defendant Best, a description of all business activities of Defendant Best, including but not limited to the names and addresses of any businesses involved in such business activities, and the title and responsibilities of Defendant Best in connection with any such business activities;
  3. A statement of Defendant Best's then-current business income and expenses, including a copy of Defendant Best's income tax returns with returns for any corporations or businesses owned, controlled or operated by Defendant Best or on Defendant Best's behalf;
  4. A statement describing the manner in which Defendant Best has complied and is complying with Paragraphs I-XIV of this Order; and
  5. A copy of each acknowledgment of receipt of this Order obtained by Defendant Best pursuant to Paragraph IX of this Order;
- C. For the purposes of this Order, Defendant Best shall, unless otherwise directed by a representative of the Commission, identify all written notifications to the FTC as being in reference to FTC v. Assail et. al, United States District Court, Western District of Texas, Waco Division, Case No. W03CA007, and mail them to:

Associate Director  
Division of Marketing Practices  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. 238  
Washington, DC 20580

- D. For the purposes of this Paragraph, "employment" includes the performance of services as an employee, consultant, or independent contractor; and "employers" include any individual or entity for whom Defendant Best performs services as an employee, consultant, or independent contractor; and
- E. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate directly with Defendant Best, in writing, with a copy to counsel of record.

**X. MONITORING COMPLIANCE OF SALES PERSONNEL**

**IT IS FURTHER ORDERED** that, in connection with any business that Defendant Best directly or indirectly manages, controls or has a majority ownership interest in, Defendant Best is hereby restrained and enjoined from:

- A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and independent contractors engaged in sales or other customer service functions comply with Paragraphs II-IV and XIV of this Order. Such steps shall include monitoring of sales presentations with customers, and shall also include, at a minimum, the following: (1) random, blind testing of the oral representations made by persons engaged in sales or other customer service functions; (2) establishing a procedure for receiving and responding to consumer complaints; and (3) ascertaining the number and nature of

consumer complaints regarding transactions in which each employee or independent contractor is involved;

- B. Failing promptly to investigate fully any consumer complaint received by any business to which this Paragraph applies;
- C. Failing to take any corrective action with respect to any sales person whom Defendant Best determines is not complying with this Order, which may include training, disciplining, and/or terminating such sales person; and
- D. Failing to keep records of consumer complaints and the monitoring of consumer complaints.

#### **XI. RECORD-KEEPING PROVISIONS**

**IT IS FURTHER ORDERED** that, for a period of ten (10) years from the date of entry of this Order, in connection with any business that Defendant Best directly or indirectly manages, controls, or has a majority ownership interest in, Defendant and his agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; 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;

- C. 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;
- D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;
- E. Copies of all sales scripts, training materials, advertisements, or other marketing materials, including e-mail and Internet websites or web pages, regarding any good, service, company or web site disseminated by the Defendant to any person; and
- F. All records and documents necessary to demonstrate full compliance with each provision of this Order.

## **XII. ACCESS TO BUSINESS PREMISES**

**IT IS FURTHER ORDERED** that, for a period of seven (7) years from the date of entry of this Order, for the purposes of determining or securing compliance with its provisions, Defendant Best and his agents, employees, officers, corporations, successors, and assigns, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile or otherwise, shall permit representatives of the Commission, within three (3) business days of receipt of written notice from the Commission, access during normal business hours to any office or facility storing documents of any business that Defendant directly or indirectly manages, controls or has a majority interest in. In providing such access, Defendant shall permit representatives of the Commission to inspect and copy all documents relevant to any matter contained in this Order, and shall permit representatives of the Commission to remove such documents for a period not to exceed ten (10) business days so that the documents may be inspected, inventoried, and copied.

**XIII. COMMISSION'S AUTHORITY TO MONITOR AND INVESTIGATE**

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

- A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendant Best shall submit additional written reports, sworn to under penalty of perjury, produce documents for inspection and copying, and appear for deposition.
- B. In addition, the Commission is authorized to monitor and investigate by all other lawful means, including but not limited to the following:
  - 1. Obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45; and
  - 2. Posing as consumers and suppliers to: Defendant, Defendant's employees, or any other entity managed or controlled in whole or in part by Defendant, without the necessity of identification or prior notice; and
- C. Defendant shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, officer, 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.

*Provided, however,* 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, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).



**XIV. PROHIBITIONS INVOLVING CONSUMER LISTS**

**IT IS FURTHER ORDERED** that Defendant Best, and his officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, are hereby permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person, which was obtained by any Defendant at any time prior to entry of this Order, in connection with the advertising, promotion, marketing, offering for sale, or sale of any good or service; *provided, however*, that Defendant may disclose such identifying information to a law enforcement agency, or as required by any law, regulation or court order.

**XV. FEES AND COSTS**

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

**XVI. 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.

**XVII. SEVERABILITY**

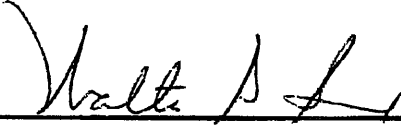
**IT IS FURTHER ORDERED** that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

**XXIV. COMPLETE SETTLEMENT**

The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing order shall constitute a full, complete, and final settlement of this action.

**IT IS SO ORDERED:**

DATE: 9/18/04

  
\_\_\_\_\_  
WALTER S. SMITH JR.  
UNITED STATES DISTRICT JUDGE

**APPENDIX A  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS, WACO DIVISION**

<b>FEDERAL TRADE COMMISSION,</b> Plaintiff,	)	Civ. No. W03CA007
vs.	)	<b>FINAL MONETARY JUDGMENT AS  TO DEFENDANT JOEL BEST</b>
<b>ASSAIL, INC., ET AL.,</b> Defendants	)	
	)	

After consideration of the evidence presented by the Commission in its Motion to Impose Suspended Judgment and the Response, if any, of Defendant Joel Best thereto:

**IT IS ORDERED,** that the suspended portion of the previously ordered \$30 million monetary judgment, in the amount of \$\_\_\_\_\_ million is hereby imposed as a judgment against Joel Best, and the Plaintiff may execute upon such judgment immediately and engage in discovery in aid of execution, and

**IT IS FURTHER ORDERED;** pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay and the Clerk of the Court shall immediately enter this Order as a final order.

**IT IS SO ORDERED,** this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

\_\_\_\_\_  
WALTER S. SMITH JR.  
UNITED STATES DISTRICT JUDGE