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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS, WACO DIVISION

FILED

Federal Trade Commission,

Plaintiff,

v.

Electronic Financial Group, Inc.,

EFG Card Services, Inc.,

Paul McClinton,

individually and as an officer of
Electronic Financial Group, Inc. and
EFG Card Services, Inc.

Jerry Federico,

individually and as an officer of
Electronic Financial Group, Inc. and
EFG Card Services, Inc. and

Randy Balusek.

individually and as an officer of
Electronic Financial Group, Inc.

Defendants.

JUL 08 2003

Civ. No.

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY WJ
DEPUTY CLERK

W-03-CA-211

TEMPORARY RESTRAINING
ORDER WITH APPOINTMENT
OF A TEMPORARY MONITOR
AND OTHER EQUITABLE RELIEF

A true copy of the original, I certify.
WILLIAM G. PUTNICKI
Clerk, U.S. District Court

By: [Signature] Deputy

Plaintiff, Federal Trade Commission ("Commission" or "FTC"), having filed its complaint for a permanent injunction and other relief in this matter, pursuant to Sections 13(b) and 19(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b(a), and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 et seq., charging that Defendants engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Commission Trade Regulation Rule entitled the "Telemarketing Sales Rule," 16 C.F.R. Part 310, and having moved for a Temporary Restraining Order including appointment of a Temporary Monitor and other equitable relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, and the Court having considered the complaint, declarations, exhibits, memoranda, and arguments of the parties finds that:

FINDINGS

1. This Court has jurisdiction of the subject matter of this case and there is good cause to believe that it will have jurisdiction over all parties pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345;
2. Venue is proper as to all parties in the Western District of Texas pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b), (c), and (d);
3. The activities of Defendants are in or affecting commerce, as 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 15 U.S.C. §§ 45(a), 53(b), and 57b;
5. There is good cause to believe that Defendants have engaged and are likely to engage in acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310, in connection with the marketing of advance-fee

debit cards or credit-related goods or services and the provision of Automated Clearing House ("ACH") processing services, and that the Commission is therefore likely to prevail on the merits of this action;

6. There is good cause to believe that, unless the Defendants are immediately restrained and enjoined by Order of this Court, consumer injury and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary redress will occur from Defendants' marketing, sale, or provision of debit cards and credit-related goods or services, or processing of ACH transactions concerning debit cards, credit-related goods or services, and any goods or services sold through telemarketing;

7. Weighing the equities and considering the Commission's likelihood of ultimate success, a Temporary Restraining Order with appointment of a Temporary Monitor related to the corporate Defendants' ACH processing, customer service and other business practices related to debit cards, credit-related goods or services, or any goods or services sold through telemarketing is in the public interest; and

8. No security is required of any agency of the United States for issuance of a Temporary Restraining Order. Fed. R. Civ. P. 65(c).

DEFINITIONS

For purposes of this Temporary Restraining Order, the following definitions shall apply:

1. "ACH network" shall mean the electronic funds transfer system governed by the NACHA Operating Rules that provides for the interbank clearing of credit and debits entries to accounts at financial institutions.

2. "ACH transaction" shall mean any completed or attempted debit or credit to a consumer's account at a financial institution that is processed electronically through the automated clearing house ("ACH") network.

3. "Corporate Defendants" shall mean EFG, Card Services, and each of them, whether acting directly or through any corporation, subsidiary, division, or other device.

4. "Credit-related goods or services" shall mean any: (a) credit card, or other device to defer the payment of debt or purchase goods or services and defer payment therefor; (b) device to provide consumers with grants, loans, financing, credit, or other extensions of credit; (c) device to improve a consumer's credit card record, credit history, or credit rating; (d) device to provide consumers with debt consolidation, debt relief, credit monitoring, or credit counseling; (e) good or service that is represented, directly or indirectly, to have a characteristic described in (a) to (d) above, even if the good or service fails to fulfill such representation in fact.

5. "Debit card" shall mean any debit card, pay-as-you-go card, ATM card, or proprietary card that purports to facilitate purchases drawn on a consumer deposit or asset account, including but not limited to the First Freedom, AmeriOne, United USA cards, and any good or service that is represented, directly or indirectly, to have the characteristics of a debit card, even if the good or service fails to fulfill such representation in fact.

6. "Defendants" shall mean Electronic Financial Group, Inc., ("EFG"), EFG Card Services, Inc., ("Card Services"), Paul F. McClinton, Jerry Federico, and Randy Balusek, and each of them, and their 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 or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device.

7. "Document" shall be 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.

8. "NACHA" shall mean the National Automated Clearing House Association.

9. ~~"Plaintiff" shall mean the Federal Trade Commission.~~

10. "Telemarketing" shall mean any business activity, whether or not covered by the Telemarketing Sales Rule, 16 C.F.R. Part 310, that involves attempts to induce consumers to purchase goods, services, or investments, by means of telephone sales presentations, either exclusively or in conjunction with the use of other forms of marketing.

CONDUCT PROHIBITIONS

I.

IT IS THEREFORE ORDERED that, in connection with the marketing or provision of processing or customer service for ACH transactions, debit cards, or credit-related goods or services, the Defendants are hereby temporarily restrained and enjoined from making, directly or through any intermediary, expressly or by implication, orally or in writing, any misrepresentation of material fact, including but not limited to:

- A. Any misrepresentation that a debit card is a credit card;
- B. Any misrepresentation that a debit card or credit-related good or service is affiliated with the MasterCard or other issuer or association brand logo; or

- C. Any misrepresentation that Defendants report information related to consumers' use of a debit card or credit-related good or service to a major credit bureau, or that consumers' acquisition or use of a debit card or credit-related good or service otherwise will improve or repair a consumer's credit rating.

II.

IT IS FURTHER ORDERED that the Defendants are hereby temporarily restrained and enjoined from processing any ACH transaction or causing the account of any consumer to be debited by any means, where:

- A. The consumer purportedly authorized the debit as a result of telemarketing;
- B. The consumer has received, or any person has represented that the consumer will or may receive, a debit card or credit-related good or service in connection with the transaction from which the debit originates;
- C. Any person has represented that any good or service that relates to the debit will improve the consumer's credit history, credit record or credit rating;
- D. The consumer has requested cancellation of the purchase to which the debit relates or discontinuance of any debits related to the purchase;
- E. Defendants fail to comply with any NACHA rule applicable to the ACH transaction;
- F. Defendants do not possess documents that demonstrate that the business practices of the originator or any other person who transmits the ACH transaction to Defendants comply with all applicable NACHA rules;
- G. Defendants receive information tending to show that the business practices of the originator or any other person who transmits the ACH transaction to Defendants

have not complied with the FTC's Telemarketing Sales Rule, applicable NACHA rules, or other applicable law, unless Defendants take reasonable steps to determine that such noncompliance did not occur or has been corrected.

III.

IT IS FURTHER ORDERED that Defendants are hereby temporarily restrained and enjoined from violating any provision of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, including any act which assists or facilitates a violation of the TSR as set forth in 16 C.F.R. ~~§ 310.3 (b), including but not limited to providing substantial assistance or support to any~~ telemarketer or seller who:

- A. induces consumers to pay for goods and services through the use of false or misleading statements in violation of Section 310.3(a)(4) of the Telemarketing Sales Rule;
- B. falsely represents that after paying an advance fee, consumers are guaranteed or highly likely to receive a credit card or obtain a loan in violation of Section 310.4(a)(4) of the Telemarketing Sales Rule; or
- C. requests or receives an advance fee or other consideration for goods or services represented to improve a person's credit history, credit record or credit rating in violation of Section 310.4(a)(2) of the Telemarketing Sales Rule.

APPOINTMENT OF TEMPORARY MONITOR

IV.

IT IS FURTHER ORDERED that Clark B. Will # ¹⁵ is appointed as

Temporary Monitor for the Corporate Defendants. The Temporary Monitor shall be the agent of

this Court, and solely the agent of this Court, in acting under this Order. The Temporary Monitor shall be accountable directly to this Court. The Temporary Monitor shall have the following authority:

- A. Monitor all activities, assets, and financial transactions of the Corporate Defendants, past, present, and future, related to the practices charged in the FTC complaint, including but not limited to:
 1. Reviewing all financial information pertaining to the Corporate Defendants and monitoring all future financial information, including but not limited to revenues and expenditures of the Corporate Defendants;
 2. Reviewing all information pertaining to Corporate Defendants' business activities, including but not limited to all ACH transactions, marketing, billing, collection, customer service, and provision of services; and
 3. Monitoring Corporate Defendants' compliance with this Order.
- B. The Temporary Monitor shall have immediate, unfettered access to all information the Temporary Monitor deems necessary to carry out duties pursuant to this Order, to the same extent as Corporate Defendants themselves are allowed by right, contract, or practice, including but not limited to:
 1. Access to all documents pertaining to Corporate Defendants' business activities and finances wherever located and in whomever's custody or control;
 2. Access to all property or premises in possession of, owned by, or under the control of the Corporate Defendants, wherever located;

3. The right to interview any current or former employee of any Corporate Defendant;
 4. The right to interview any current or former officer, independent contractor, subcontractor, financial institution, vendor, agent, service bureau, or other entity involved in the provision of any services from, to, or on behalf of the Corporate Defendants;
 5. The right to monitor and observe any officer, independent contractor, subcontractor, advertising agency, vendor, agent, service bureau, or other entity involved in the provision of any services from, to, or on behalf of the Corporate Defendants; and
 6. Access to all documents of any officer, independent contractor, employee or agent of the Corporate Defendants.
- C. The Temporary Monitor and the Federal Trade Commission shall have the right to designate any necessary law enforcement personnel to assist in carrying out the functions described in Paragraph IV.B. above.
- D. The Temporary Monitor shall have the right to conduct discovery in all forms pursuant to the Federal Rules of Civil Procedure as the Temporary Monitor deems necessary.
- E. The Temporary Monitor is authorized to choose, engage, and employ attorneys, accountants, appraisers, and other independent contractors and technical specialists, as the Temporary Monitor deems advisable or necessary in the performance of duties and responsibilities under the authority granted by this Order.

In order to ensure full compliance with the provisions of this Order, the Federal Trade Commission shall have the right to be present while the Temporary Monitor has access to the Corporate Defendants' premises and documents and to review and copy any documents subject to this Order.

TEMPORARY MONITOR'S DUTIES

V.

IT IS FURTHER ORDERED that the Temporary Monitor is authorized and directed to ~~prepare and submit a Report to this Court and to the parties, not less than two (2) days prior to~~ the scheduled Preliminary Injunction Hearing, describing the Corporate Defendant's business activities, including, but not limited to:

- A. An accounting of the Corporate Defendants' income and expenses since January 1, 1997, and current assets and liabilities;
- B. An accounting of all income and expenses that relate to the Corporate Defendants' sale or servicing of each of the following goods or services:
 1. The First Freedom card, the AmeriOne card, the United USA card, and any other debit card or credit related good or service that the Corporate Defendants sold or for which they provided customer service;
 2. Each separate product sold or serviced by 1263523 Ontario, Inc., including but not limited to products sold under the name Consumer Credit Services;
 3. Each separate product sold or serviced by Lotonet International, Ltd., or B.B.M. Investments, Inc.;
 4. Each separate product sold or serviced by Four Star Financial;
 5. Each separate product sold or serviced by the Tungsten Group;

6. Each separate product of a client referred or processed by agreement with ACH Commerce, LLC, including but not limited to products sold or serviced by Corporate Marketing Solutions, Inc., Medplan, and any other products related to ACH Commerce, LLC, for which the Corporate Defendants processed over \$500,000 in ACH transactions and had over 25% of the number of those transactions returned for any reason;
 7. Each separate product referred or processed by agreement with Global eTelecom, Inc., ~~including but not limited to American Credit Solutions,~~ Capital First Benefits, Enhancement Services, Inc., Household Protection Plan, ePhone Telecom, Lenox Capital, Millenium Communications and Fulfillment, Inc., Style Decor, National Wellness Network, Premier One Benefits, and any other products related to Global eTelecom, Inc., for which the Corporate Defendants processed over \$500,000 in ACH transactions and had over 25% of the number of those transactions returned for any reason;
 8. Any other product that evidence shows may have been sold or serviced through practices charged as unlawful in the FTC Complaint.
- C. To the extent feasible, an accounting for each product identified in Paragraph V.B. above that shows:
1. The number and dollar amount of debit entries to consumer accounts submitted to the Corporate Defendants by the merchant, originator, or third-party service provider;

2. The number and dollar amount of debit entries to consumer accounts transmitted to the ACH network by the Corporate Defendants;
 3. The number and dollar amount of debit entries to consumer accounts that cleared and were not returned;
 4. The number and dollar amount of attempted debit entries to consumer accounts that were returned, broken down by each NACHA-authorized return code (e.g., R07);
 5. ~~The number and dollar amount of attempted credit entries to consumer~~ accounts transmitted to the ACH network; the number and dollar amount of attempted credit entries that cleared; and the number and dollar amount of attempted credit entries that did not clear, broken down by each NACHA-authorized return code;
 6. The number and dollar amount of refunds made to consumers through any means other than ACH credits;
 7. The number of complaints received from consumers, Better Business Bureaus, or law enforcement agencies and any categorization of the nature of the complaints or their resolution made by the Corporate Defendants or their customer service department; and
 8. The number of affidavits alleging unauthorized debits (R07 or R10) received from financial institutions or NACHA.
- D. To the extent feasible, an accounting for the First Freedom card, the AmeriOne card, the United USA card, and any other debit card or credit related good or

service that the Corporate Defendants sold or for which they maintained customer accounts, that shows:

1. The number of consumers who purchased the card;
2. The number of cards that are currently active; and
3. The number of complaints by purchasers of the cards.

E. To the extent feasible, an accounting of all customer payments related to each card identified in Paragraph V.D. above that shows:

1. ~~The separate amounts paid in total by all consumers for each separate~~
category to which consumer payments were applied, such as setup fees, monthly maintenance fees, or consumer credits to the balances of their debit card accounts (whether by ACH transfer, direct deposit, check, money order, or cash);
2. The disposition of all consumer credits to the balances of their debit card accounts, including the current aggregate balance of all such accounts, the total amounts from such accounts wired to MasterCard or any other entity for settlement of consumer purchases, the amounts transferred to consumers as refunds of such accounts, and a total for each separate type of fee withdrawn from those accounts for any purpose;
3. The balances in any custodial accounts at financial institutions related to such cards, and an explanation of any difference between such custodial balances and the debit card balances due consumers in the aggregate.

The Temporary Monitor is also directed to facilitate access and discovery by Plaintiff of documents of the Corporate Defendants' business, including but not limited to financial,

customer service, email, and ACH data, and help ensure the accuracy of all data presented to the Court from the Corporate Defendants' business records.

COOPERATION WITH THE TEMPORARY MONITOR

VI.

IT IS FURTHER ORDERED that Defendants and all other persons or entities served with a copy of this Order shall fully cooperate with and assist the Temporary Monitor. This cooperation and assistance shall include, but not be limited to, providing information to the Temporary Monitor that the Temporary Monitor deems necessary in order to discharge the responsibilities of the Temporary Monitor under this Order; and providing any password required to access any computer, electronic file, or telephonic data in any medium. Defendants are hereby restrained and enjoined from directly or indirectly:

- A. Destroying, secreting, defacing, transferring, or otherwise altering or disposing of any documents of the Corporate Defendants; or
- B. Failing to provide any assistance or information requested by the Temporary Monitor in connection with the performance of the Temporary Monitor's duties under this Order.

COMPENSATION OF TEMPORARY MONITOR

VII.

IT IS FURTHER ORDERED that the temporary monitor and all personnel hired by the temporary monitor as herein authorized, including counsel to the Temporary Monitor and accountants, are entitled to reasonable compensation for the performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by them, from the assets of the Corporate Defendants. In order to pay for the costs of the Temporary Monitor, Defendants

shall immediately establish an escrow account in the amount of \$100,000 at a financial institution designated by the Temporary Monitor, in consultation with the parties. The Temporary Monitor shall file with the Court and serve on the parties a request for the payment of such reasonable compensation, following the Preliminary Injunction Hearing in this case.

STAY OF ACTIONS

VIII.

IT IS FURTHER ORDERED that Defendants are hereby temporarily restrained and ~~enjoined from doing any act or thing whatsoever to interfere with the actions and activities of the~~ Temporary Monitor for the Corporate Defendants, including but not limited to the filing of a voluntary petition in bankruptcy, without first obtaining leave of this Court.

IX.

IT IS FURTHER ORDERED that all creditors and other persons acting on behalf of any creditor or other person including sheriffs, marshals, other officers, deputies, servants, agents, employees, trustees in bankruptcy, receivers, and attorneys are hereby temporarily restrained and enjoined from:

- A. Commencing, prosecuting, continuing or enforcing any claim, suit, or proceeding, including, but not limited to, the commencement of an involuntary bankruptcy petition against the Corporate Defendants herein, except with leave of this Court;
- B. Exercising self-help or executing or issuing or causing the execution or issuance of any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession or interfering with or creating or enforcing a lien upon any property owned by or in the possession of the Corporate Defendants, wheresoever situated, without first obtaining leave of this Court;

- C. Attempting to modify, cancel, terminate, call, extinguish, revoke, or accelerate the due date of any lease, loan, mortgage, indebtedness, security arrangement, or other agreement with the Corporate Defendants, or any entity controlled by the Corporate Defendants, without first obtaining leave of this Court.

DISTRIBUTION OF ORDER BY DEFENDANTS

X.

IT IS FURTHER ORDERED that the Defendants shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, client company, agent, attorney, spouse and representative of the Defendants, and shall, within ten (10) days from the date of entry of this Order, provide the Commission with a sworn statement that the Defendants have complied with this provision of the Order, which statement shall include the names and addresses of each such person or entity who received a copy of the Order.

SERVICE OF ORDER

XI.

IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission, upon any financial institution or other entity or person that may be subject to any provision of this Order. Service upon any branch or office of any financial institution shall effect service upon the entire financial institution.

CONSUMER CREDIT REPORTS

XII.

IT IS FURTHER ORDERED that pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), any consumer reporting agency may furnish a consumer report concerning any Defendant to Plaintiff.

EXPEDITED DISCOVERY

XIII.

~~IT IS FURTHER ORDERED~~ that the Commission is granted leave at any time after service of this Order to (1) take the deposition of any person or entity for the purpose of discovering any matter, not privileged, that is relevant to the issuance or terms of a preliminary injunction, including the nature, status, extent, location or other relevant information relating to the Defendants' assets, income, personal or business financial records; and (2) demand the production of documents from any person or entity for the purpose of discovering any matter, not privileged, that is relevant to the issuance or terms of a preliminary injunction, including the nature, status, extent, location or other relevant information relating to the Defendants' assets, income, personal or business financial records. Forty-eight (48) hours notice shall be deemed sufficient for any such deposition and production of documents from the Defendants and any other person or entity, including but not limited to financial institutions, accountants, stock brokers and financial planners. The limitations and conditions set forth in Fed. R. Civ. P. 30(a)(2)(B) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Paragraph. The depositions shall also not be counted in calculating any limitation on the number of depositions that can be taken without the leave of the Court as set forth in the Federal Rules of Civil Procedure or the Local Rules. Additionally, the production of

documents submitted pursuant to this provision shall not in any way waive the Commission's rights to seek the production of additional documents. This provision shall be construed so as not to be inconsistent with the access provisions of Paragraphs IV and V of this Order.

SERVICE OF PLEADINGS

XIV.

IT IS FURTHER ORDERED that the Defendants shall serve on the Commission all memoranda, affidavits and other evidence on which the Defendants intend to rely at the preliminary injunction hearing set in this matter not later than 4:00 p.m. (Central time) on the third day prior to the hearing date.

ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

XV.

IT IS FURTHER ORDERED, pursuant to Federal Rule of Civil Procedure 65(b), that each of the Defendants shall appear before this Court on the 22nd day of July, 2003, at 10:00 o'clock a.m., to show cause, if there is any, why this Court should not enter a Preliminary Injunction, pending final ruling on the Complaint against Defendants, enjoining them from further violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the TSR, 16 C.F.R. Part 310, continuing the appointment of a monitor to oversee the practices of the corporate Defendants, and imposing such additional relief as may be appropriate.

SERVICE UPON PLAINTIFF AND NOTIFICATION

XVI.

IT IS FURTHER ORDERED that with regard to any correspondence, pleadings, notifications or reporting related to this case or under this Order, service on the Commission shall


be performed by personal, facsimile, or other means, as mutually agreed upon by the parties (but not delivery by U.S. Mail) to the Associate Director of the Division of Marketing Practices (Att: David R. Spiegel), Federal Trade Commission, Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW, Room H-238, Washington, DC 20580.

RETENTION OF JURISDICTION

XVII.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

SO ORDERED this 8th day of July, 2003.



WALTER S. SMITH, JR.
United States District Judge