Pleadings #80 and Compliance

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-21050-CIV-UNGARO-BENAGES

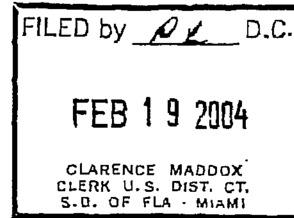
FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CAPITAL CHOICE CONSUMER CREDIT, INC., et al.,

Defendants.
_______________________________/



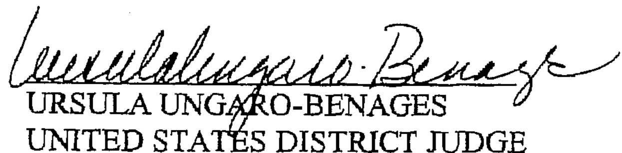
FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 54 and 58, this Court's Amended Findings of Fact and Conclusions of Law, issued February 19, 2004, and for good cause shown, it is hereby

ORDERED AND ADJUDGED that a final judgment is entered against Defendants, and in favor of Plaintiff, upon Plaintiff's Second Amended Complaint herein.

This Court retains jurisdiction over attorney's fees and costs issues associated with the above-styled cause.

DONE AND ORDERED in Chambers at Miami, Florida, this 18 day of February, 2004.



URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

412

Pleadings #80 and Compliance

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-21050-CIV-UNGARO-BENAGES

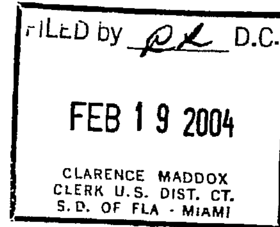
FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

CAPITAL CHOICE CONSUMER CREDIT, INC., *et al.*,

Defendants.


FILED by D.C.
FEB 19 2004
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA - MIAMI

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried before the Court between June 30, 2003 and July 10, 2003.

THE COURT has considered the pertinent portions of the record and is otherwise fully advised in the premises.

FINDINGS OF FACT

I. Procedural History

1. On April 8, 2002, Plaintiff filed its Complaint for Injunctive and Other Equitable Relief against Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., E-Credit Solutions, Inc., Ricardo E. Martinez, and Scott A. Burley, and its Application for an *Ex Parte* Temporary Restraining Order as to those Defendants.

2. On April 9, 2002, the Court entered an *Ex Parte* Temporary Restraining order (TRO) and a show cause order against Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., E-Credit Solutions, Inc., Ricardo E. Martinez, and Scott

410

A. Burley, which froze Defendants' assets and appointed Judith Korchin, Esq., as Receiver for the corporate Defendants. The TRO was served on the Defendants on April 11, 2002.

3. On April 19, 2002, Plaintiff filed its Amended Complaint adding Ecommex Corp. as a defendant.

4. On April 19-23, 2002, a preliminary injunction hearing was held before the undersigned on the show cause order of April 9, 2002.

5. On April 23, 2002, the Court entered a Consent Order *Pendente Lite* as to Corporate Defendants Capital Choice, Millennium, Ecommex Corp., and Individual Defendant Ricardo Martinez. Pursuant to the Consent Order, Defendants discontinued the sale of their Capital Choice and National Credit Shopper credit card programs, but were permitted to continue marketing their other products and services. The Order directed the Receiver to transfer $2.25 million from the frozen bank accounts of the Corporate Defendants to the Court's depository account, and $1.25 million to a Receiver's escrow account. Individual Defendant Martinez was ordered to place $450,000 to the trust account of Gregg J. Ormond, P.A. The Order appointed J. Michael Jones monitor to oversee tasks that needed to be done to discontinue the Capital Choice and National Credit Shopper credit card programs.

6. On April 25, 2002, the Court entered a Stipulated Preliminary Injunction as to Corporate Defendant E-Credit Solutions, and Individual Defendant Scott Burley. The Order continued the receivership and asset freeze with respect to the Corporate Defendant.

7. On August 8, 2002, Plaintiff filed its Second Amended Complaint for Injunctive and Other Equitable Relief, adding Zentel Enterprises, Inc., Hartford Auto Club, Inc., Johnnie Smith, and Wilfredo Lugo, as defendants, and alleging additional violations of Section 5 of the

FTC Act and the Telemarketing Sales Rule, 16 C.F.R. Part 310. (The Second Amended Complaint alleges violations of the Telemarketing Sales Rule in effect on April 8, 2002. The Rule was amended in 2003, and the amendments have been codified at 16 C.F.R. Part 310. References to the provisions of the Telemarketing Sales Rule contained in the Second Amended Complaint and in these Findings of Fact and Conclusions of Law are to the Rule as it appeared in the Code of Federal Regulations in April 2002.)

8. On September 13, 2002, Plaintiff filed a motion for a preliminary injunction against Corporate Defendants Capital Choice, Millennium, Ecommex, Hartford Auto Club, and Individual Defendants Ricardo Martinez, Johnnie Smith, and Wilfredo Lugo relating to legal violations alleged in the Second Amended Complaint.

9. On October 15-16, 2002, there was an evidentiary hearing before Magistrate Judge Brown on Plaintiff's motion for a preliminary injunction.

10. On January 30, 2003, Judge Brown denied Plaintiff's motion for a preliminary injunction and issued his Findings of Fact and Conclusions of Law. The undersigned issued an Order affirming those findings on February 23, 2003.

11. On January 27, 2003, Plaintiff filed a Motion for Partial Summary Judgment Against Defendants Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., and Ecommex Corp.

12. On June 2, 2003, the undersigned issued an Order granting in part and denying in part Plaintiff's Motion for Partial Summary Judgment against Defendants Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment. Inc., and Ecommex Corp. Plaintiff was granted summary judgment on Count I of the Second Amended Complaint regarding

the Defendants' so-called Approval Certificate and granted summary judgment as to Count III of the Second Amended Complaint. Plaintiff's motion for summary judgment on Counts II and IV of the Second Amended Complaint was denied.

13. On May 21, 2003, the Court issued a Stipulated Final Judgment and Order as to Defendants E-Credit Solutions, Inc., Scott A. Burley, and Zentel Enterprises, Inc.

14. Commencing June 30, 2003, a trial was held as to the remaining Defendants and complaint allegations.

15. On July 21, 2003, Defendants moved to dismiss and/or for Judgment as a Matter of Law on Counts II and VI of the Second Amended Complaint.

16. On September 29, 2003, the Court issued an Order Denying Defendants' Motion For Judgment as a Matter of Law on Count II and Granting Defendants' Motion for Judgment as a Matter of Law on Count VI.

17. By Order dated October 3, 2003, the undersigned denied Defendants' Motion for Judgment on Partial Findings as to Plaintiff's Claim for Individual Liability on the Approval Certificate.

II. The Parties

A. Plaintiff Federal Trade Commission

18. Plaintiff Federal Trade Commission (Commission or FTC) is an independent agency of the United States Government created by statute. (15 U.S.C. §§ 41-58, as amended) The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. §45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Telemarketing Sales Rule (TSR or the Rule), 16 C.F.R. Part 310, which prohibits deceptive or

abusive telemarketing practices. The FTC promulgated the TSR at the direction of Congress to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§6101-08. The Commission may initiate federal district court proceedings by its own attorneys to enjoin violations of the FTC Act and the TSR to secure such equitable relief as may be appropriate in each case, including restitution for injured consumers. (15 U.S.C. §§53(b), 57b, and 6105(b))

B. The Defendants

19. Defendant Capital Choice Consumer Credit, Inc. (Capital Choice), is a Florida corporation with its offices and principal place of business located at 9590 NW 25th Street, Miami, Florida. Capital Choice transacts business in the Southern District of Florida. Capital Choice also does business as National Credit Shopper and NCS. (Def.'s Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., Ecommex Corp., Hartford Auto Club, Inc., Ricardo E. Martinez and Wilfredo Lugo's Answer to Second Amended Compl. ¶ 5 (September 5, 2002) [hereinafter CCCC Ans.])

20. Defendant Millennium Communications and Fulfillment, Inc. (Millennium), is Florida corporation with its principal office and place of business at 9590 NW 25th Street, Miami, Florida. Millennium transacts business in the Southern District of Florida. Millennium also does business as National Research Group. (CCCC Ans. ¶ 6.)

21. Defendant Ecommex Corporation (Ecommex) is a Florida corporation with its office and principal place of business at 9590 NW 25th St., Miami, Florida. Ecommex transacts business in the Southern District of Florida. Ecommex was formerly known as Millennium Express Group, Inc. (CCCC Ans. ¶ 9.)

22. Defendant Hartford Auto Club, Inc., (Hartford) is a Florida corporation, and it does business in the Southern District of Florida. (CCCC Ans. ¶ 10.) Hartford is a shell corporation with no employees or place of business. (1 R. at 180; PX 296, ¶ 8.)[1]

23. Defendant Ricardo E. Martinez is the owner, officer, and director of Defendants Capital Choice, Millennium, Ecommex, and Hartford. Martinez resides in Miami, Florida, and transacts business in the Southern District of Florida. (CCCC Ans. ¶ 11.)

24. Defendant Johnnie Smith is the Chief Executive Officer of Defendant Millennium. Although he is not an officer of Defendants Capital Choice, and Ecommex, he has responsibilities with respect to the business activities of these other corporate defendants, as explained at paragraph 129, *infra.* (Smith Test., 1 R. at 144; PX 402 at Tr.135).

25. Wilfredo Lugo is the General Manager of Defendant Millennium. Lugo oversees the operations of Millennium's call center. He is responsible for, among other things, monitoring sales representatives to assure that they follow Defendants' scripts and handling customer service, including consumer complaints. (*See* Findings of Fact, *infra* at ¶ 146).

26. Before discontinuing sales of credit cards, Defendants marketed credit card programs two ways: (1) through a direct mail approval certificate (the Approval Certificate program), and (2) through direct mail postcard solicitations asking consumers to dial an "800"

---

[1] The trial record appears in separate transcripts, not sequentially page numbered, for each of the eight days of the trial and one day of closing argument. For convenience, the Court will refer to the record with an R. preceded by the number corresponding to the day of the trial. The record is thus cited as follows:

1 R. (June 30, 2003)	4 R. (July 3, 2003)	7 R. (July 9, 2003)
2 R. (July 1, 2003)	5 R. (July 7, 2003)	8 R. (July 10, 2003)
3 R. (July 2, 2003)	6 R. (July 8, 2003)	9 R. (October 16, 2003).

number (the Earn-a-Bankcard program). (Joint Pretrial Stipulation at 12-13, Uncontested Fact 4 (March 7, 2003) [hereinafter Stipulation]) Defendants also sold secondary products as "upsales" after making a sale on a primary product, such as a credit card program. (As used in these Findings,"Defendants" refers to collectively to Defendants Capital Choice, Millennium Communications, Ecommex, Hartford Auto, Ricardo Martinez, Johnnie Smith, and Wilfredo Lugo. Where appropriate, a more specific reference will be given.)

III. Count One: Whether Defendants Misrepresented That Consumers Would Receive a Major Unsecured Credit Card (Section 5(a) FTC Act)

A. The Approval Certificate Program

27. Under the Approval Certificate program, Defendant Capital Choice offered a credit card to consumers through a direct mail solicitation. In granting partial summary judgment, the Court has already ruled that the Approval Certificate was deceptive on its face. Specifically, while buyers of the Approval Certificate program received a credit card they could only use to buy merchandise from a merchandise catalog, the Court found that "[a]fter careful consideration of the record, this Court agrees with Plaintiff that the net impression created by Defendants' certificate is that consumers who paid the required fee would receive a general purpose credit card and, therefore, that the certificate is deceptive." (Order Grant. in Part and Den. in Part Pl's. Mot. Summ. J. at 8 (June 2, 2003) [hereinafter S.J. Order].)

28. By order dated October 3, 2003, the undersigned denied Defendants' Motion For Judgment on Partial Findings as to Plaintiff's Claim for Individual Liability on the Approval Certificate. In denying Defendants' motion, the Court noted that, corporate liability for the Approval Certificate program having been established by summary judgment, "[i]t remained for

Plaintiff to prove, at trial, that the Individual Defendants had the requisite knowledge and "participated directly in the practices or acts or had authority to control them.' " (Order Den. Defendants Ricardo Martinez, Johnnie Smith and Wilfredo Lugo's Mot. for J. on Partial Findings as to Pl's. Claim for Individual Liability on the Approval Certificate at 4 (Oct. 3, 2003) (*quoting FTC v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996)).

29. Evidence demonstrating that Individual Defendants Martinez and Smith are liable for violations of the FTC Act in the sale of the Approval Certificate program is contained in Findings of Fact at paragraphs 127-128, 137-141, *infra.*

B. The Earn-a-Bankcard Program.

30. The Capital Choice Defendants[2] sold the Earn-a-Bankcard program from February 2000 to the commencement of this action in April 2002. At first, from February 2000 to November 2001, the Capital Choice Defendants sold the program directly through their own call centers (Joint Exh. 1 (chart submitted to the Court on October 16, 2003)) and from June 2001, through April 2002, the Capital Choice Defendants sold the program indirectly through Zentel Enterprises, Inc. (Zentel), and E-Credit Solutions, Inc. (E-Credit), whom Defendants had established as their sales agents or representatives. (PX 58 (Call Center Agreement); Joint Exh. 1), pursuant to the Call Center Agreement of May 29, 2001 between Millennium and Zentel. (PX 58)

31. Under the terms of the representation agreement between the Capital Choice Defendants and Zentel and the E-Credit Defendants, Defendant Millennium was required to

---

[2] The Court refers to "Capital Choice Defendants" collectively for the reasons stated in paragraphs 115-123, *infra.*

provide leads of potential customers, (PX 58 at ¶ 2.3.2) mail the initial postcards, (*Id.* at ¶ 2.3.3; Smith Test., 3 R. at 20, *ll.* 6-9) and provide the sales scripts. (PX 58 at ¶ 2.3.6) While Zentel was to make the actual sales, Zentel was required in making the sales to strictly adhere to the sales presentation scripts and materials prepared or approved by Defendant Millennium and to maintain daily communication with Millennium. (*Id.* at ¶ 2.3.4, 2.3.6) Zentel was required to pay Defendant Millennium $25 per sale for its fulfillment services. (*Id.* at ¶ 2.3.7) Zentel was also to pay Defendants a consulting fee of $1.45 million. (*Id.* at ¶ 4.1).

32. Under the Earn-a-Bankcard program, the Defendants sent postcards to potential customers, who were selected because their credit reports contained derogatory information or a meager credit history. (Smith Test., 5 R. at 148, *ll.* 17-19) The postcards then invited recipients to call an "800" number if they were interested in obtaining the credit card. (PX 320; PX 326; PX 348) The postcards that the Capital Choice Defendants used were substantively the same for both its direct sales from their own call centers, and for the sales made by the Defendants Zentel and E-Credit Solutions, differing only with respect to the return address appearing on the card and the identifying company name. (Smith Test., 3 R. at 20, *ll.* 6-20)

33. Between 2/2000 and 10/2000 consumers wishing to accept Defendants' credit card offer paid a fee of $189 and thereafter a fee of $199.95. (PX 51 at 03-01735-37; PXs 286-92) (Stipulation at 13, Uncontested Fact 9) Consumers then received in return, not a major, unsecured credit card, but rather, what Defendants called a Diamond Select card or a Platinum Plus card and the "right" to "earn" a Visa or Mastercard. The Diamond Select or Platinum Plus cards did not allow consumers to make purchases from merchants like an ordinary credit card, but only allowed consumers to purchase merchandise partially on credit from the Capital Choice

Defendants' catalogs. (*See, e.g.*, 1R. at 32-33; 2 R. at 233) Moreover, in order to be eligible to obtain a Visa or Mastercard, consumers had to buy merchandise from the catalogs by paying 35% down plus 15% for shipping and handling, carry a credit balance with Defendants of at least $99, and repay it in three monthly payments of at least $33 each. (Stipulation at 15, Uncontested Fact 18) Thus, a consumer had to buy at least $152.30 in merchandise and pay $22.85 in shipping and handling charges, for a total of $175.15 in addition to the initial $199.95 fee (for a grand total of $375.10), to be eligible to receive the Visa or Mastercard. Assuming they surmounted these hurdles, consumers then received an application for a secured Visa card with a $240 limit and a $219 money order to be sent to the issuing bank.

34. In order to deliver the promised credit card to the few customers who completed the "program," Defendants did not issue the cards themselves but contracted with an outside financial institution. Sterling Bank issued the secured credit cards to Earn-a-Bankcard customers until the end of November 2001, when Sterling decided to terminate its relationship with Defendants. (Smith Test., 5 R. at 176 *l.* 18 – 177 *l.* 12) While Defendant Johnnie Smith did seek another financial institution to replace Sterling Bank, no other financial institution issued secured credit cards to Earn-a-Bankcard customers after November 2001. Nonetheless, Defendants continued selling the program until April 2002, (Smith Test., 5 R. at 176 *l.* 1 – 179 *l.* 7), and during that time continued to promise consumers they would receive their Visa cards within 18-21 days from making their final payments. (PX 52) Defendants were able to do so with confidence because they knew that few, if any, customers would complete the program and apply for the credit card.

C. Defendants' Earn-a-Bankcard Program Misled Consumers Into Believing That

They Would Receive a Major, Unsecured Credit Card.

1. Defendants' sales materials

35. The Earn-a-Bankcard sales transaction began when the consumer received a postcard in the mail. One side of the postcard stated "**THIS MAY BE YOUR FINAL NOTIFICATION,**" and showed an "approved credit limit" of $4,000, thereby suggesting that what was being offered was an unsecured credit card with a credit limit of $4,000. It also had boxes to indicate membership type, including boxes for Platinum, Diamond, Unsecured, and Secured. The postcard arrived with the boxes for Diamond and Unsecured checked, indicating that the type of card for which the consumer had been pre-approved. (PXs 326, 348). Additionally, in order to add an aura of legitimacy to the solicitation, the postcard instructed the consumer to call an "800" number for "activation," provided a "confirmation number," and contained the initials of the person who "approved" the extension of credit.

36. The other side of the postcard had the heading "Credit Approval Notification." It went on to state:

> We are notifying you that your credit card has not been activated. Our records show this card to have an approved line of credit of $4,000.00. **THIS MAY BE YOUR FINAL NOTIFICATION[.]**

(*Id.* (original emphasis)).

In fact, this is the only notification consumers received.

37. In addition, the card made no reference to a catalog, nor did it provide any indication that the card could be used only to purchase merchandise from Defendants. Importantly, there was also no mention of a secured card with a credit limit of only $240. On the other hand, terms such as Platinum, Diamond, unsecured, and activated, which did appear in the

text of the postcard, are terms commonly associated with credit cards and credit-card applications.

38. An earlier version of the postcard, sent to consumers until October 2000, told consumers: "[y]ou have been identified and confirmed to receive your very own Credit Card regardless of your past credit history with a credit limit of **$4,000 Guaranteed**." (PX 320 (original emphasis)) The postcard had boxes marked "secured" and "unsecured." The "unsecured" box was marked with an "x". The postcard described the credit card as a "platinum" membership. (*Id.*) The reverse side of the postcard informed the consumer: "you are approved to receive a **CREDIT CARD** with a personal credit limit of **$4,000 to $7,500 GUARANTEED!**" (*Id.*)

39. The postcards reflect that the Defendants anticipated that consumers dialing the 800 number would not be able to reach sales representatives. PX 326 ("Due to overwhelming response toll free lines may be busy during peak hours."). Consumers who were placed on hold heard a pre-recorded "on-hold" message that reinforced Defendants' credit-card theme. (PX 234 (transcript); Lugo Test., 4 R. at 104, *ll.* 8-11; *id.* at 107 *l.* 25 – 108 *l.* 2). The on-hold message referred several times to major bank cards and the ability of the consumer to qualify for a major bank card, but it omitted anything about a catalog or a $240 Visa card. It stated, for instance:

a. "Thank you for calling National Credit, your doorway to credit relief and financial freedom. Is this your first time calling to apply for a credit card?" (PX 234 at 3, *ll.* 5-8 (page numbers refer to transcript pages));

b. "Did you know that there are over 60 million people who suffer from negative credit ratings or the inability to qualify for a *major bank card?*" Through

our Earn-a-Bank-Card Program, you'll get the things you need with credit you qualify for regardless of bad credit, no credit or low income." (*Id.* at 3, *ll.* 19-24 (emphasis added));

c. "This is truly the easiest way to receive a *major bank card.* If you're 18 years of age or older and have a valid savings or checking account, you're qualified." (*Id.* at 4, *ll.* 4-7 (emphasis added));

d. "We're proud to offer a low introductory rate on your Diamond Select card of only 6 percent, *the lowest in the country* with no annual renewal fee." (*Id.* at 4, *ll.* 12-13 (emphasis added));

e. "Our research has confirmed that there are only three ways to obtain a *major bank card* without rejection for negative credit ratings. You've tried applying at your local bank and were turned down for poor credit or lack of credit. You've applied for a secured credit card, but you had to put up your own money and pay interest on it. Don't be discouraged. Your representative will explain the benefits of the Earn-A-Bank-Card Program, proven to be the simplest and most effective route to credit card approval." (*Id.* at 4 *l.* 21 – 5 *l.* 5 (emphasis added));

f. "You'll be happy to know that there is a solution for people seeking a *major bank credit card,* even if they've been turned down in the past. . . . Find out in advance if you qualify by answering these two simple questions: Are you 18 years of age or older? Do you have a valid checking or savings account? By answering yes you'll certainly qualify." (*Id.* at 5, *ll.* 7-16 (emphasis added))

40. The Defendants' on-hold message used the phrase "major bank card" four times

(b, c, e and f), "credit card" two times (a and e), otherwise referred to credit four times (a, b, e), and made comparisons to conventional credit cards by referring to efforts of applying "at your local bank" (e) and having "the lowest [rates] in the country with no annual fee." (d) At the same time, it made no mention of any catalog or buying-club program, no mention of any card with a limit of only $240, and referred to a secured credit card only by making a disparaging comparison, reinforcing the impression that the bank card Defendants were offering was unsecured. (e)

41. Consumers also were subjected to the sales pitch for the Earn-a-Bankcard program, as reflected in Defendants' sales scripts. (Smith Test., 5 R. at 247-250) While the scripts mentioned two credit cards as part of the program, they did not explain that the consumer could only hope to get a Visa card with a $240 limit, or clearly explain that the Visa card could be obtained only after participating in Defendants' program for several months. (PX 51 at 03-01735-37; *see also,* PXs 286-92 (nearly identical scripts))

42. In a typical script, the sales representative started by answering the phone "National Credit authorization and processing center," and then asked "are you calling to obtain a credit card?" After asking consumers a series of "qualifying" questions, sales representatives were instructed to "wait 10-15 seconds" and then begin the sales pitch by stating:

> **Great!** Based on the answers you have given me you have been approved for a credit limit of $4,000 dollars. [sic] **OK?** Now through our **"Earn a Bankcard" Program,** there are 2 credit cards <u>when</u> you complete the program. There's a Diamond Select merchandise card which is not a Visa® or MasterCard® and there's a <u>Visa® bankcard. The first card you'll receive is the Diamond Select Credit card issued by National Credit Shopper. Your card does not require a security deposit, there are no annual renewal fees and the 6% interest rate is among the lowest in the country. Also, your card will remain interest-free until the year 2002.</u>

(*Id.* (original emphasis)). The telemarketer began by stating that the consumer had been approved for a $4,000 credit limit. The consumer was then told that there would be two cards, both of which could be expected "when you complete the program," but the consumer was given no explanation of what each one was, or whether the credit limit applied to both.

43. In the second paragraph of a typical script, the telemarketer continued by giving the consumer an explanation of cardholder benefits, including a free credit-improvement booklet and a certificate for a mobile phone. (*Id.*) Again, there was no further explanation of what the two cards were.

44. In the third paragraph, the telemarketer mentioned two cards again, but failed to clearly state that the Diamond Select credit card was exclusively for catalog purchases. More importantly, this paragraph suggested that the consumer would receive an unsecured Visa card with a "guaranteed" credit limit of $7,500 "to be used worldwide..." when, in fact, the consumer was eligible to receive only a secured credit card with a $240 limit and then only if the consumer made both three on time payments of $33 each and maintained a $99 credit balance:

> Now with your new **Diamond Select Credit Card,** you can charge hundreds of high quality products through our attractive catalogs. Initially, your charge purchases will include a 35% down payment with a standard 15% shipping and handling, however, once you receive your Visa credit card through our **"Earn a Bankcard" Program,** no down payment will be necessary. (*Mr./Mrs.*) (*Last name only*) it works like this: Simply charge $99.00 and make three on time monthly payments of $33.00 and two important things will happen: Once your first payment is received on time, your $4,000 credit line will be reported to Equifax, which is one of the largest credit bureaus in the United States. Secondly, once all 3 payments are received, your credit line is guaranteed to be increased to $7,500.00; but most importantly you are guaranteed to receive your Visa credit card to be used worldwide, even if you've had problems with your credit in the past. It's that simple!

(*Id.* (original emphasis)) While Defendants argue that this paragraph tells consumers everything they needed to know about what was being offered, in fact, the paragraph was misleading in what it implied and what it omitted.

45. Defendants' own documents show that they knew that the contents of the sales scripts were not sufficient to overcome the net impression created that the consumer was going to get an ordinary, unsecured Visa card. Defendants developed the "Pull Tape Script," which they used when customers called in to challenge a transaction (Lugo Test., 4 R. at 119, *ll.* 14-17), in anticipation that consumers would understand that they would be receiving an unsecured Visa card with a substantial credit limit. After explaining that all calls are recorded, the customer service representative was instructed to state:

> I'm also positive that the program was fully explained to you. It is a lot of information and your attention could have concentrated to the Major Visa Bankcard. You **WILL** receive one; just that . . . it is the second step of the program.

(PX 51 at 03-01750 (original emphasis and ellipses)). The customer service representative was then required to repeat that the program is a "two-step" program. (*Id.*)

46. Per the sales script, the customer service representative then went on to discuss the bank-to-bank transfer for the initial $199.95 deposit, had the customer verify the authorization, and then included additional sales pitches for "up-sale" products. Nothing in the entire script informed the consumer that the Visa Card that could eventually be earned through the Earn-a-Bankcard program had a credit line of just $240. (*Id.* at 03-01735-37) In fact, by confirming that the consumer could expect to use the card "worldwide," (*id.* at 03-01736) the script gave the opposite impression.

47. Defendants then continued to obscure the fact that the Visa card was a secured credit card with a $240 credit limit in the "Bankcard Qualification Manual" they sent to consumers when they signed up for the program. It too failed to disclose that the credit limit on the Visa card was just $240, stating only cryptically that Defendants would "assume the first $240.00 in credit on your new major bank card in the form of a Preferred Customer Rebate Bonus paid to the card issuing bank on your behalf." (PX 322 at 9; PX 328 at 10)

48. In sum, an examination of Defendants' sales materials shows that they were likely to mislead reasonable consumers.

2. ***Consumer Witnesses***

49. Not surprisingly, consumer witnesses testified that they were, in fact, misled by Defendants' Earn-a-Bankcard presentation. Rebecca Rose testified, for instance, that she participated in the Earn-a-Bankcard program, thinking that the postcard she received, which appears in the record as PX 348, "was offering me a credit card with the approved credit of $4,000." (4 R. at 80, *ll.* 5-8) This impression was confirmed when she called in and heard the sales script. According to Rose, the telemarketer told her she had been approved for a $4,000 line of credit and that all she had to do was to pay the $199 activation fee. (4 R. at 80. *ll.* 22-25) The telemarketer confirmed that she would get a credit card after paying this activation fee, and never made any mention of the fact that there would only be a $240 line of credit on any Visa card she would receive. (4 R. at 81, *ll.* 11-13) She thus expected to receive in her initial package a Visa card with a $4,000 line of credit, based on both what the postcard said and on what the telemarketer said. (4 R. at 81, *ll.* 5-10)

50. Rose's expectations were disappointed, however, when she received instead of a

Visa or MasterCard, Defendants' packet of materials. (4 R. at 81 *l.* 19 – 82 *l.* 4) After reading through those materials, she called again and heard for the first time that in order to get a Visa card, she would first have to order merchandise from Defendants' catalog. (4 R. at 82, *ll.* 12-25) At that point she decided to complete the program, since she already had $200 invested in it. (4 R. at 83, *ll.* 1-6) Rose never completed the program, however, and did not get a Visa card. Although she ordered over $200 in merchandise, some of the items she ordered never came, while the merchandise she did receive was cheap and of poor quality. (4 R. at 84 *l.* 23 – 86 *l.* 7) Despite repeated attempts, Rose was unable to obtain a resolution of the unshipped items. (4 R. at 86 *l.* 8 – 87 *l.* 1)

51. Similarly, Marguerette Eubanks Lindsay testified that she thought the postcard she received, admitted as PX 320, offered her a Visa or MasterCard with a $4,000 line of credit. (2 R. at 187 *l.* 23 – 188 *l.* 4) That conclusion was based on the use of the term "Platinum," which Lindsay associated with Visa and MasterCard. (2 R. at 188, *ll.* 5-10) She then called the 800 number and was told that she would get a Visa card, which she noted on the postcard during the sales presentation. (2. R at 189, *ll.* 10-24) At no time did the telemarketer say that the limit on any Visa card she would get from Defendants would be $240. (2 R. at 191, *ll.* 2-4) Instead, she thought, based on the postcard and the script, that she would get a Visa with a $4,000 line of credit in her initial package. (2 R. at 191, *ll.* 5-12) She thus accepted Defendants' offer and agreed to the $199.95 charge. (2 R. at 191 *l.* 24 – 192 *l.* 3) When she received her package and there was no Visa or MasterCard included, Lindsay called to complain. (2 R. at 196, *ll.* 7-11) During that conversation she was told that Defendants would review a recording of her initial sales transaction, which would demonstrate, the telemarketer claimed, that the program had been

fully explained to her. (2 R. at 197 *l.* 24 – 198 *l.* 6) Even during this second conversation, Lindsay testified, no mention was ever made that the Visa card she could ultimately get would have a limit of only $240. (2 R. at 197, *ll.* 1-3) Although Lindsay agreed to set up an appointment to listen to the recording, Defendants never arranged to have it played. (2 R. at 198, *ll.* 11-15)

52. Similarly, Mary Witt thought she was being offered a $4,000 Visa card, based on what the postcard said, (2 R. at 230, *ll.* 15-17) and on what the telemarketer told her in the sales presentation. (2 R. at 232, *ll.* 6-16; *see also id.* at 240 *l.* 23 – 241 *l.* 10) Witt agreed to the $199 charges, and when she received Defendants' Diamond Select card, she even tried to use it at a children's store. (2 R. at 233, *ll.* 6-11) Witt completed the program, and Defendants sent her an application and money order payable to Sterling for the Sterling Visa card. (2 R. at 238 *l.* 5 – 239 *l.* 21) She did not follow through by sending these items on to Sterling, however, since she thought she was being deceived and would "end up giving more money to them and I would never get a Visa." (2 R. at 240 *ll.* 8-22) Moreover, Witt testified that one of the things she relied on in making her purchase was Defendants' claims that they would report her favorable credit to a credit bureau. Although she completed the program, she testified she ordered her credit report and was able to find no evidence that Defendants had made any favorable reports on her behalf. (2 R. at 241 *l.* 13 – 243 *l.* 16)

53. Even Defendants' own consumer witness testified that he was confused as to Defendants' offer. Defendants billed Willie McCray as their "star witness." (5 R. at 187, *ll.* 20-21; *id.* at 188 *ll.* 9-12 (witness to be called to testify that Defendants put his life back together because he can now get credit)). Furthermore, even though Defendants admit that they did

nothing prior to trial to determine whether their services ever improved anybody's credit (*id.* at 195, *ll.* 9-14), as their sales materials claimed (*see, e.g.*, PX 51 at 03-01736), Defendants assured the Court that McCray would be at least one example of a consumer whose credit was improved. According to counsel:

> He's our success story, Judge. He's the one who dotted all the I's, crossed all the T's, got his Visa card, was thrilled that he got it. It put him back on his feet. It helped him when he was applying for subsequent credit to be able to say that he had complied with all of the conditions, he had a payment history, and it was helpful to him when he was applying for a home loan, when he was applying for other financing in his life. That's all he's going to testify, exactly what I indicated yesterday in my proffer.

(6 R. at 87)

54. In fact, while nothing in McCray's testimony shows that his credit was improved because of Capital Choice, his testimony does demonstrate that he was misled. McCray testified that he's 46 years old, (7 R. at 47, *ll.* 9-11) and that in years past he had bad credit because when he was 19 or 20 he ran up about $800 or $900 in credit, and then became delinquent on the amount. (7 R. at 49, *ll.* 11-20) He further testified that he had negative credit for about 15 years after that, until 2001, when he was solicited for Defendants' National Credit Shopper Earn-a-Bankcard program. (7 R. at 48, *ll.* 2-11) McCray further testified that for the last nine years he has held a steady job as an educational assistant with his local school district (7 R. at 46 *l.* 20 – 47 *l.* 2), has been taking college classes (7 R. at 47, *ll.* 5-6), and is now putting a daughter through college. (7 R. at 47, *ll.* 12-19)

55. Although there is no evidence that McCray actually had impaired credit, McCray testified that, because of his poor credit, he went without credit until 2001, when, in March of that

year, he received Defendants' National Credit Shopper postcard offering him a credit card. (7 R. at 47 *l.* 23 – 48, *l.* 11) McCray testified that he jumped at the chance. He called the 800 number and signed up for the program after listening to the offer. (7 R. at 50, *ll.* 12-17; *id.* at *ll.* 20-25; *id.* at 51, *ll.* 20-23) McCray completed the program by making his three payments, and he then received his Sterling credit card. (7 R. at 57, *l.* 24 – 58, *l.* 3) At roughly the same time, other credit cards came in the mail, which McCray never asked for or applied for (7 R. at 60, *ll.* 8-12), and which McCray says might have come from "fate." (7 R. at 59, *ll.* 23-25 ("faith," according to the transcript))

56. While McCray eventually got a Sterling Visa card, McCray's testimony shows that he was mistaken about what he was going to get from Defendants' program. In the first place, when asked what he thought he was going to be getting, McCray never once mentioned the privilege of buying from a catalog, but stated repeatedly that he would have his credit improved and receive a credit card, such as a Visa or MasterCard:

> THE COURT: Well, first of all, what did you think you were being offered when you saw the postcard?
>
> THE WITNESS: When I saw — well, I looked at it this way. I haven't had a credit card in probably 14, 15 years. So to establish me some credit, I thought I'd just jump towards the opportunity.
>
> THE COURT: So you saw on the postcard it said —
>
> THE WITNESS: I saw the postcard and it said you can earn a credit — whatever it was, it was a credit card. So I called the 800 number, like Mr. Srebnick said.
>
> THE COURT: So you thought this was something that would help you to reestablish —
>
> THE WITNESS: Would help me, right, reestablish my credit,

that's correct.

* * *

THE COURT: Did you understand anything about what, if any, credit cards would be issued to you to begin with?

THE WITNESS: No. I just looked — no, I really can't say that. I just looked at it that a credit card was going to be issued to me after I made a — I had to make a down deposit and I had to make three payments, and that deposit was kind of steep, and I questioned it, but I said, you know what? The way my history was in the past, I could never receive a credit card. I wasn't gonna sit there and complain.

THE COURT: Okay. And at the time you had this initial conversation, what kind of a credit card did you think you would get if you finished the program?

THE WITNESS: I didn't really know if it would be a Visa or Master. I really didn't know which one it was at the time. I knew I was gonna get a credit card to use, so I didn't know it was gonna be a Master or Visa. I just knew it was gonna be a credit card.

(7 R. at 50 *l.* 20 – 52 *l.* 25)

57. McCray, moreover, denied the importance of the catalog or the Diamond Select card, denying, in fact, that he even viewed the Diamond Select card as a credit card:

THE COURT: So, would it be fair to say you weren't particularly concerned about the Diamond Select card? You're issue [sic] was the credit card at the end of the day?

THE WITNESS: My issue was mostly the credit card.

THE COURT: Okay. So you didn't — did you think of the Diamond Select card as a credit card or did you —

THE WITNESS: I didn't really know. No, I didn't look at it like that. I just —

THE COURT: You thought the bank card was the credit card, the

bank card — remember, on the postcard it said Earn-A-Bank card.

THE WITNESS: Yeah, it said a bank card.

THE COURT: So that's what you were really focused on.

THE WITNESS: And the three payments. Regardless, I was just trying to establish my credit again.

(*Id.* at 55 *l.* 15 – 56 *l.* 5; *compare* PX 51 at 03-01750 ("your attention could have concentrated to the Major Visa Bankcard.")).

58. Thus, while McCray was not clear on what he thought he would be getting at each stage of the transaction, he joined the Earn-a-Bankcard program, not to purchase from Defendants' catalog, but to improve his credit rating and obtain a real credit card.

59. Not only did McCray focus on the credit card and credit repair to the exclusion of the catalog program, he was grossly mistaken as to the credit limit on the credit card we would receive:

> THE COURT: And did you have any understanding from this original conversation, this original interaction, what the credit limit would be on the credit card?
>
> THE WITNESS: Well, the credit limit was on the postcard itself.
>
> THE COURT: And what did the postcard say?
>
> THE WITNESS: It was like $4,000 to $7,000.
>
> THE COURT: And is that what you thought?
>
> THE WITNESS: Yes. By looking at the credit card, it said it had $4,000 to $7,000. But the bottom line is I really wanted the credit card.

(*Id.* at 53, *ll.* 1-11)

60. Indeed, McCray was still unaware, *at the time of his testimony*, that his Sterling Visa card had a credit limit of just $240. (7 R. at 60 *l.* 20 – 61 *l.* 7) McCray's confusion is even further demonstrated by his apparent ignorance of the secured nature of the Visa card. When asked about the money order that came along with his Sterling Bankcard application, McCray testified that he could not recall any such money order. (7 R. at 58, *ll.* 21-25) Thus, McCray apparently is also unaware that he could have asked Sterling Bank to return the $219 that secured his Visa card.

61. Thus, McCray (1) thought he was being offered a credit card, which was not the Diamond Select card, (2) was uninterested in signing up for Defendants' catalog program, and (3) was only interested in establishing credit and getting a Visa or MasterCard with a $4,000 to $7,000 limit. In fact, Defendants admit that the Sterling Bank card had only a $240, secured, limit. (5 R. at 133-35)

62. Moreover, contrary to Defendants' claims that their services helped people restore credit, nothing in McCray's testimony, or anything else in the record, supports that conclusion. There is no evidence that Defendants reported anything to any reporting agencies on McCray's behalf, and no evidence of what McCray's creditors, who remain nameless, relied on in extending him credit. While it would be wildly speculative to conclude that Defendants had anything to do with McCray's new-found credit, it is unremarkable that credit was extended to a person who has held a steady job for about seven years and has incurred no negative information for about fifteen years. McCray testified, in fact, that he now has 5 or 6 credit cards. (7 R. at 69, *ll.* 2-3)

63. In addition to McCray, at trial, in lieu of live testimony, Defendants proffered that they would call consumer witnesses to testify that they understood that there would be two credit

cards, but conceded that none of the witnesses could recall being told that the credit limit on the Visa card would be only $240. (5 R. at 132 *l.* 23 – 133 *l.* 19; *see also id.* at 186, *ll.* 16-23 (establishing that 12 consumers would have testified))

64. Thus, consumer testimony shows that consumers were, in fact, misled by Defendants' deceptive sales pitch.

3. *Customer Service Scripts and Sales Training Materials*

65. Defendants' customer-service scripts also show that Defendants knew that their sales pitch was misleading many consumers into believing they would receive a Visa card in the initial package. Defendants' Pull-Tape Script was drafted to respond to consumers who called to complain that a Visa card was not in their initial package:

> I'm also positive that the program was fully explained to you. It is a lot of information and your attention could have concentrated to the Major Visa Bankcard. You **WILL** receive one; just that . . . it is the <u>second</u> step of the program.

(PX 51 at 03-01750) (original emphasis and ellipses) This script was posted at numerous workstations in the Customer Service department (Lugo Test., 4 R. at 120, *ll.* 3-9), showing that customer complaints about not receiving a Visa card in the initial package must have been among the most frequent, if not the most frequent, complaint consumers had.

66. Similarly, Defendants' sales-training materials show that Defendants instructed their sales representatives to purposely withhold important information that potential customers asked about, such as the fact that the Visa would have a credit line of only $240, that the consumer would receive an application for a Visa card (as opposed to a Visa card), and that the application would be sent only if in addition to making three on time payments of $33 the

consumer also maintained a credit balance of $99. Their National Credit Shopper Sales Quiz, for instance, which Defendant Lugo testified was used to train new employees, (4 R. at 131 *l.* 10 – 132 *l.* 10) shows that Defendants instructed their sales representatives to withhold the fact that the credit line on the Visa card would have only be $240 and that it would be secured:

> How would you answer the following:
>
> ***<u>I would like to place an order, but:</u>***
>
> * * *
>
> 5. What will be my visa or MasterCard credit line? ***(That will be determined by the issuing bank)***

(PX 240 at 2 (original emphasis); *see also* PX 52 at 04-00001.1 (rebuttal script containing same question and response)).

67. The only reasonable explanation for these scripted omissions is that the Defendants knew that even the small percentage of consumers solicited by Defendants who bought into the Earn-A-Bankcard program (*see* paragraph 68, *infra*) would not have done so had they known the Visa card would have a credit line of only $240, that the credit line was secured and that in order to receive it they would have to advance $375.10 to the Defendants. Defendants made numerous sales by withholding this information. Further, by concealing the low, $240 credit limit, Defendants reinforced the mis-impression created by their sales materials that consumers would receive an unsecured Visa card with a high credit limit that could be used "worldwide."

4. *Defendants' Admissions Regarding Customer Performance*

68. Defendants' admissions regarding customer performance reflect that the Earn-A-Bankcard program was intentionally designed to mislead consumers and that Defendants knew

that consumers were being misled by their sales presentations. Defendants stipulate that only a small percentage of their Earn-a-Bankcard customers ever completed the program. While a total 199,846 consumers purchased the program, only 700, or less than one half of one percent of the purchasers, ever completed it and qualified for a Visa card. (Stipulation at 15-16, Uncontested Fact 21.) The number of consumers who actually received a Visa card is even smaller, since 235 of those who qualified never cashed the money orders Defendants supposedly sent to them. (*Id.*) While it would be normal to expect that some consumers would fall behind in making some monthly payments and thus not complete the program, surely more than one half of one percent of the purchasers would have completed the program had they understood its requirements and limitations before paying the $189 or $199.95 fee.

69. In fact, so few customers ever qualified for the Visa card that Defendants and/or their distributors sold the Earn-A-Bankcard program from the end of November 2001 to April 2002, without a financial institution that would provide credit cards to their customers. (Smith Test., 5 R. at 176, *l.* 18 – 179, *l.* 7; 244, *ll.* 16-19) Indeed, Defendant Smith testified that when he was assigned the task of finding a new credit card provider in late 2001, he did not view it as a desperate situation. (5 R. at 178, *l.* 9-10)

70. Further, of the 445,761 consumers who paid for the Approval Certificate Program and the Earn-A-Bankcard Program between February 2000 and April 2002, only 12,900 ever purchased an item from one of their catalogs. (Stipulation at 14, Uncontested Facts 15-16.) That is less than 3% of all consumers who bought one of Defendants credit card programs, and would be just 6.4% of the 199,846 Earn-a-Bankcard program buyers. Even if all consumers who purchased from a catalog were Earn-a-Bankcard customers, it simply is not logical to believe that

nearly 94% of Earn-a-Bankcard purchasers would not have bought a single item from Defendants' catalog had they known they were paying $189 or $199.95 for a catalog card.

71. Finally, despite Defendants' claims that consumers were able to improve their credit ratings by participating in the Earn-A-Bankcard program, there is no evidence in the record showing that Defendants ever improved anybody's credit rating. In fact, the record is void of any evidence of any substantial consumer benefit, other than the meager number of cards issued though Defendants' Earn-a-Bankcard program. The fact that the overwhelming majority of Defendants' customers received no benefit from the fees they paid provides strong evidence of fraud.

72. In sum, the overall net impression that Defendants' sales presentation created for their Earn-a-Bankcard program was that consumers would get major, unsecured credit card, such as a Visa or MasterCard and that impression was knowingly created by the Defendants.

IV. <u>Count Two</u>: Whether Defendants Unfairly Debited Consumer Bank Accounts for "Upsales" (Section 5(a) of the FTC Act)

73. In addition to credit cards, the Defendants marketed, and continue to market, "upsale" products and services, such as the Nations Safe Drivers automobile club (Nations Safe), the Hartford Auto Club (Hartford Auto), the Continental Auto Rescue automobile club (CAR), the 1,000 Minute Mesa Saver phone card (MMS), the Premium Mega Saver phone card (PMS), and others. Defendants market these upsales both directly to consumers using their own telemarketer employees and through outside telemarketing agents.

74. For instance, the Capital Choice Defendants contracted with Defendant Zentel, Kyle Kimoto's company, to market the upsales and the Capital Choice Defendants hired Kyle

Kimoto to broker Hartford Auto and PMS to outside telemarketing call centers. These call centers sold the upsales supplied by the Capital Choice Defendants after pitching their own products to consumers. (Deposition of Kyle Kimoto at 36, *ll.* 6-22; 54, *l.* 17 – 55, *l.* 2 (filed July 9, 2003)) Kimoto brokered the Hartford Auto upsale to approximately 20 call centers. The call centers were required to pitch Defendants' upsales by computer and record the calls. (*Id.* at 53, *ll.* 6-23) Kimoto also brokered PMS to the same call centers. (*Id.* at 54, *l* 21 – 55, *l.* 2)

75. The Capital Choice Defendants debited consumer accounts for all upsales regardless of what company made the sale. Then, as explained by Kyle Kimoto, Millenium would remit a commission to the company that made the sale either directly or, if applicable, through the broker who sold the upsale to the company. (Kimoto at 36-37)

76. The FTC called Carmen Cala, a consumer witness to testify at trial on the issue of unauthorized debiting for the upsales.[3] On direct examination, Ms. Cala denied giving authorization for the debiting of her account for the PMS phone card and the Hartford Auto Club. On cross examination, the Defendants confronted her with a tape recording which consisted of a computer generated sales pitch, computer generated questions directed to Ms. Cala, and Ms. Cala's responses, in which, at a literal level, she appeared to have agreed to accept an offer of a "gift" consisting of a free trial membership in one of Defendants' upsale programs. Moreover, the recorded sales pitch and questions did not explain in express terms that her bank account would

---

[3] The FTC also called Ms. Melanie Foster to testify as to unauthorized debiting regarding the upsales. Ms. Foster testified that she did not recall–but she did not dispute that she may have been advised–that her account would be debited for the Nation's Safe program if she failed to cancel after the free trial period. (3 R. at 76). Additionally, she testified that the welcoming materials, which she failed to read until after her account was debited, "did say" that she would be billed $99 per year unless she cancelled prior to the expiration of the free trial period. (*Id.* at 74).

be debited, electronically or otherwise, if she did not cancel at the end of the applicable trial periods, and were so rapid fire as to be nearly unintelligible. Defendants agreed at trial that the recording was played in real time.

77. The company that pitched Ms. Cala was "Advantage Capital" and the FTC did not offer any direct evidence of a connection between the Capital Choice Defendants and Advantage Capital. However, according to Defendant Smith, the Capital Choice Defendants had a relationship with a company named "Advantage" that sold Hartford Auto Club and PMS. (PX 402 at Tr. 156) Also, according to the testimony of Kyle Kimoto, the Capital Choice Defendants required call centers to which the Hartford Auto Club had been brokered to pitch the upsales using the same method that appeared to have been utilized by Advantage Capital in its transactions with Ms. Cala, *i.e.* by pitching the sales through an IRV system. (Kimoto Dep. at 53) Additionally, the sales script used to pitch Ms. Cala appeared to be virtually identical to those utilized by the Defendants to pitch the Hartford Auto Club. Therefore, there is strong evidence that the Capital Choice Defendants directly or through an intermediary brokered the Hartford Auto Club and PMS upsale programs to Advantage Capital.

78. Whether sold by employees or outside telemarketers, the Capital Choice Defendants' upsale programs were offered on a free-trial, negative-option basis, meaning that the consumer had to call Defendants and cancel their memberships within the free-trial period in order to avoid being charged for the program. If consumers failed to cancel before the end of the trial period, charges for upsales were debited from consumers' bank accounts. (*See,* PXs 289-90, 292, 51 at 03-01735-37, and DX 23).

79. Electronic debits from consumers' bank accounts are processed through the

automated clearing house network. The National Automated Clearing House Association, or NACHA, is an industry organization that writes and maintains rules governing network transactions (Larimer Test., 3 R. at 81, *ll.* 9-13). In September 2001, NACHA began permitting oral authorization of debit transactions by telephone. (*Id.* at 86, *l.* 20 – 87, *l.* 4). Jane Larimer, general counsel of NACHA, testified that, beginning in the second quarter of 2002, the rate of unauthorized for telephone, or TEL, transactions began to "skyrocket." (*Id.* at 87, *ll.* 23-25). In the third quarter of 2002, the unauthorized rate for TEL transactions reached 1.27% compared with an unauthorized rate of .05% for direct deposit payments. (*Id.* at 88, *ll.* 7-9) In response, NACHA changed its rules with respect to merchants with an unauthorized rate of 2.5% or higher to require that the merchant's bank provide certain information, explain why the merchant's unauthorized rate is so high and explain what will be done to bring the unauthorized rate down. (*Id.* at 89, *ll.* 11-22). Thereafter, because Defendant Martinez knew the Capital Choice Defendants could not reduce their unauthorized rate, they ceased debiting electronically. (Martinez Test. 4R. at 8, *ll.* 7-10).

80. Global E-Telecom (Global) processed debits for Defendants' upsales beginning in March 2002. (Villarreal Test., 4 R. at 60, *ll.* 14-21) Eduardo Villarreal testified that Global debited consumers' bank accounts for Hartford Auto and PMS pursuant to contracts with Millennium, (*Id.* at 60, *l.* 4 – 61, *l.* 2) and with Style Decor (*Id.* at 62, *ll.* 8-11), a company used by Defendant Martinez to debit consumers for upsales after entry of the TRO in April 2002. (*Id.* at 63, *ll.* 7-15) In all, Global processed approximately 690,000 transactions for Defendants, totaling $55 million. (*Id.* at 65, *ll.* 3-9)

81. Approximately 55,000 debit transactions, or 8% of all transactions processed by

Global, were charged back as unauthorized by consumers. (*Id.* at 66, *ll.* 19-24) The rate of unauthorized debits ranged from 4% to 13% depending on which upsale program Global was debiting for. (*Id.* at 67, *ll.* 18-24).

82. In addition, 207,000, or about 30% of the 690,000 transactions processed by Global were returned for insufficient funds, or NSF. (*Id.* at 67, *ll.* 2-3) Mr. Villarreal testified that, in his opinion, there is a correlation between high NSF rates and high unauthorized rates in the ACH industry because if those transactions that were returned NSF were actually debited from consumers accounts, more consumers would challenge the debits as being unauthorized. (8 R. at 27, *ll.* 9-17) Ms. Larimer of NACHA also testified that where there is a high NSF rate, the unauthorized rate is likely to be somewhat higher had the debits returned for insufficient funds been allowed to post. (3 R. at 90, *ll.* 11-13)

83. Mr. Villarreal testified that one of Global's ODFI's, or originating banks, contacted Global about Millennium's debit return rates. Villarreal understood the ODFI to mean that Millennium's return rates were higher than any other merchant in doing TEL transactions. (8 R. at 39, *ll.* 3-21) Global discontinued processing debit transactions for Defendants because of the ODFI's concerns. (*Id.* at 39, *ll.* 22-25)

84. ACH Direct processed debits for Millennium's credit card products, a phone card, and two auto clubs — Hartford Auto and CAR. (Thorness Test., 8R. at 90, *ll.*11) When NACHA revised its rules and began scrutinizing unauthorized rates of 2.5% or more, ACH Direct terminated several telemarketers, including Defendants. Further, Defendant Smith received daily reports from ACH Direct that contained figures showing the number of transactions charged-back as unauthorized. (Thorness Test., 8 R. at 92, *l.* 15–93, *l.* 2) Smith testified that he reviewed

these reports. (6 R. at 140, *ll.* 5-23) Smith also testified that he believed the unauthorized rate for debits processed by ACH Direct was 6 or 7%. (6 R. at 137, *ll.* 6-17)

85. Between January 2002, and May 6, 2002, Defendants sold MMS and Hartford Auto in outbound telemarketing calls using the script that appears in PX 51 at 03-01738. (Stipulation at 16, Uncontested Fact 22) The Court has already found that this script violates Section 5 of the Federal Trade Commission Act by failing to disclose that the "account on record" referred to in the script is the consumer's bank account and not their new Capital Choice credit card. (S.J. Order at 17)

86. Although consumers who purchased the Approval Certificate program made their checks payable to Capital Choice, the outbound upsale script directed telemarketers to say they were calling from Millennium Communications, a company consumers had never heard of before. (PX 51 at 03-01738; Smith Test., 3 R. at 31, *ll.* 1-6) Consumers had no reason to believe that Millennium had their bank account information. (Smith Test., 3 R. at 31, *l.* 9 – 32, *l.* 8)

87. Defendants' telemarketers congratulated consumers on their "new Platinum credit card[s] from Capital Choice Consumer Credit," (PX 51 at 03-01738) and went on to state that, because they were new cardholders, Millennium was sending them a "gift" of an MMS phone card for a 10-day trial. Consumers were told that after the trial period, the charge would be $39 "*billed*" to their "account on record." (*Id.* (emphasis added)) The script continued with a similar presentation for Hartford Auto. Telemarketers were to tell consumers that, after the trial period, the program was "just $8.25 a month *charged* annually in advance to your account on record with Capital Choice Consumer Credit." (*Id.* (emphasis added))

88. The script never mentioned the consumer's bank account or anything about

debiting. (*Id.*) Under these circumstances, consumers did not authorize Defendants to debit their bank accounts for Hartford Auto or MMS. Indeed, Defendant Smith admited that in April 2002, Defendant Lugo told him that consumers were complaining that they thought fees for Hartford Auto and MMS would be charged to their new credit cards, and that they had not authorized Defendants to debit their bank accounts. (3 R. at 34, *ll.* 2-14.)

89. The totality of the evidence summarized in paragraphs 73 through 88, *supra*, suggests strongly that while Defendants may be able to produce tape recordings which contain statements by consumers accepting Defendants' free trial offers, the customers did not authorize, and were not given an opportunity to decline to authorize, the Defendants to debit their bank accounts.[4] In this regard, the undersigned is particularly persuaded that the 30% rate of transactions returned for insufficient funds reflects that individuals were not knowingly authorizing the debiting of their bank accounts. Further, the likelihood that the high rate of transactions returned for insufficient funds resulted from customers who did not authorize the debits is reinforced by the fact that numerous customers whose "authorizations" were obtained using the script that employed the "account on record" language complained to the Capital Choice Defendants that they believed their "credit card" would be charged for the upsales rather

---

[4] The FTC also contends that it proved at trial that the Defendants violated Section 5 by debiting customer bank accounts for renewals of their auto club memberships without obtaining authorizations to do so. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 34. The Capital Choice Defendants objected to the presentation of the evidence relating to this claim at trial, *see* R. 5 at 209, and now object, arguing that this claim is outside the scope of the Second Amended Complaint. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 31-32. The Court agrees and, therefore, declines to deem the Second Amended Complaint amended to conform to the evidence. *See, e.g., Borden, Inc. v. Fla. East Coast Railway*, 772 F.2d 750 (11th Cir. 1985); *Sun-Fun Products, Inc. v. Suntan Research & Dev., Inc.*, 656 F.2d 186 (5th Cir. 1981); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552 (Fed. Cir. 1984).

than their bank accounts debited; the undersigned has already found that the script which referred to the "account on record" violated Section 5 of the FTC Act. This conclusion is further buttressed by the evidence respecting the manner in which Ms. Cala's agreement to the "free trial offers" was obtained.

V. Count Three: Whether Defendants Deceptively Sold Upsale Products by Telling Consumers They Would be Billed on Their Account on Record Without Disclosing that Account on Record Meant Their Bank Accounts (Section 5(a) of the FTC Act).

90. The Court granted Plaintiff's motion for summary judgment on Count Three. (S.J. Ord. at 19.)

91. Evidence relating to liability of the Individual Defendants is discussed at Findings of Fact, paragraphs 127 through 153, *infra.*

VI. Count Four: Whether Defendants Misrepresented That Consumers Would Receive a Major Unsecured Credit Card (Telemarketing Sales Rule "TSR" Section 310.3(a)(2)(iii)).

92. Plaintiff alleged in Count Four of the Second Amended Complaint that Defendants violated the Telemarketing Sale Rule by misrepresenting their Earn-a-Bankcard program. The facts set forth *supra* in Findings of Facts, paragraphs 30 through 72 establish misrepresentations in violation of the Telemarketing Sales Rule.

VII. Count Five: Whether Defendants Requested and Accepted a Fee in Advance After Representing that Consumers Were Guaranteed or Highly Likely to Receive an Unsecured, Major Credit Card (Section 310.4(a)(4) of the TSR).

93. The TSR prohibits any telemarketer or seller from requesting or receiving a payment in advance of obtaining any extension of credit, including an unsecured major credit card, when the telemarketer or seller has guaranteed or represented a high likelihood of success in obtaining or arranging such extension of credit. (16 C.F.R. § 310.4(a)(4))

94. The Capital Choice Defendants like to characterize themselves as a catalog company. (9 R. at 85, *ll.* 20-23.) It is, however, clear that the Capital Choice Defendants, as part of the Earn-A-Bankcard program, asked for and received advance payments from consumers after guaranteeing them a Visa card.

95. First, Defendants' sales materials, including the initial postcard and subsequent telephone sales pitch, were likely to lead reasonable consumers to believe that Defendants were offering an unsecured, major credit card. (*See* Findings of Fact, *supra* at ¶¶ 35-48). Indeed, Defendants' Earn-a-Bankcard script told consumers that "most importantly you are guaranteed to receive your Visa credit card to be used worldwide, even if you've had problems with your credit in the past," and implied that the credit limit was guaranteed to be $7,500. (PXs 51 at 03-01735-37; 286-92.)

96. Second, five consumers, including Defendants' own witness, testified that they paid Defendants for the Earn-a-Bankcard program because they thought they were promised a Visa card. (Eubanks-Lindsay Test., 2 R. at 188, *ll.* 2-4; 192, *ll.* 15-24; Witt Test., 2 R. at 233, *ll.* 2-5; Rose Test., at 4 R. at 82, *ll.* 1-4; Foster 3 R. at 66, *ll.* 5-13; McCray Test., 7 R. at 55, *ll.* 1-18) Indeed, Defendants' own witness acknowledged, in response to the Court's inquiry, that the "bottom line is I really wanted the credit card." (7 R. 53, *ll.* 9-11)

97. Third, Defendants' assertion that what they sell is a catalog card is disproved by their admission that less than 3% of all their customers have ever ordered a single item from their catalog. (*See* Findings of Fact, *supra* at ¶ 70) Obviously, if consumers thought they were buying a catalog card, most would have bought from the catalog after sending in their $189 or $199.95 fee.

98. Finally, counsel for the Corporate Defendants, nowhere contradicted in the record, stated that "[t]he big difference in the Earn-A-Bank card program that comes in under these defendants, corporate defendants' program, is that the visa was indeed guaranteed." (1 R. at 30, *ll.* 14-16) Counsel furthermore reaffirmed what was set out as the most important part in Defendants' Earn-a-Bankcard pitch, that you are guaranteed to receive a Visa card:

> [M]ost importantly you're guaranteed to receive your Visa card, and so forth, even if you had credit problems in the past. That's true. It say it's that simple and that's exactly true.

(1 R. at 33, *ll.* 18-21)

99. Thus, Defendants, in their Earn-a-Bankcard program, promised a major, unsecured credit card, and asked for and accepted fees in advance of those promised credit cards.

100. Defendants maintain that Section 310.4(a)(4) of the TSR applies only to the offering of advance-fee loans, not credit cards, and that it is inapplicable to "firm offers." These arguments fail for the reasons set forth in the Conclusions of Law at paragraphs 46 through 47, *infra.*

VIII. <u>Count Six</u>: Unauthorized Debiting Under the Telemarketing Sales Rule

101. The Court granted Defendants Judgment as a Matter of Law on Count Six. (Ord. Sept. 29, 2003.)

IX. <u>Count Seven</u>: Whether the Upsale Scripts Used by the Defendants and Provided to Other Telemarketers to Sell Defendants' Upsales Failed to Disclose the Identity of the Seller (Section 310.4(d) of the TSR).

102. The TSR requires that telemarketers, in outbound telemarketing calls, disclose promptly and in a clear and conspicuous manner to the person receiving the call: (1) the identity of the seller; (2) that the purpose of the call is to sell goods or services; and (3) the nature of the

goods or services. (16 C.F.R. § 310.4(d).)

103. The script Defendants used between January and May 6, 2002, to offer upsales to consumers who paid for the Approval Certificate states that the telemarketer is calling from "Millennium Communications," a company consumers had never heard of before. (PX 51 at 03-01738; Smith Test., 3 R. at 31, *ll.* 1-6.) The FTC contends that because these consumers had already done business with Defendants under the name Capital Choice Consumer Credit, the Capital Choice Defendants' identification of Defendant Millennium as the maker of the call was an abusive telemarketing practice. While the Court agrees with the FTC that there was no reason for consumers to know that Millennium was affiliated with Capital Choice, the FTC has not offered any convincing evidence that Defendant Millennium was not a person that was itself providing or arranging with others to provide the upsale program.[5]

104. Defendants introduced into evidence as DX 23 and DX 24 two undated "upsale scripts" for Hartford Auto Club and Premium Mega Saver (8 R. at 81) stating that they were used after April 11, 2002. Neither of these scripts identifies the seller as Millennium Communications and Fulfillment. However, as the Capital Choice Defendants point out, a reading of these scripts indicate that they do not stand alone, without being attached to, or following another primary script or sale. *See* Capital Choice Defendants' Response to Plaintiff's Second Correction and Revised Second Correction to Proposed Findings of Fact and Conclusions of Law at 2. Plaintiff has offered no convincing evidence showing that the "seller" was not identified in the primary script or sale during the "outbound telephone call." 16 C.F.R. 310.4(d). As a result, the

---

[5] "Seller" is defined at 16 C.F.R. §310.1(r) as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services in exchange for consideration."

undersigned is unable to agree with the Plaintiff that DX 23 and DX 24 establish that the Capital Choice Defendants engaged in abusive telemarketing practices, thereby violating 16 C.F.R. §310.4(d).

X. Count Eight: Whether Corporate Defendants Ecommex, Millennium, Capital Choice, and Hartford, and Individual Defendant Martinez Assisted and Facilitated E-Credit Solutions, Inc. and Zentel Enterprises, Inc., in Telemarketing the Earn-a-Bankcard Program (Section 310.3(b) of the TSR).

105. Defendant Millennium operated call centers in Tampa, Lakeland, and Miami, Florida. In May 2001, it agreed to sell the Tampa and Lakeland call center operations and equipment to Zentel Enterprises, Inc. The sales agreement between Millennium and Zentel ("the Agreement") appears as PX 58. (Stipulation at 17, Uncontested Fact 28.)

106. Under the terms of the Agreement, Zentel was required to use and occupy the call centers solely to sell the Earn-a-Bankcard program and the Capital Choice Defendants' "upsales," with the exception of one of Zentel's own upsales. (Stipulation at 17-18, Uncontested Fact 29; PX 58 at ¶ 2.3.1.) Defendant Millennium reserved the right to set the prices to be charged for the bankcard program and the upsales.

107. The Agreement permitted Zentel to market the Earn-a-Bankcard program under a "private label" name. (PX 58 at ¶ 2.3.17.) Zentel telemarketed Defendants' Earn-a-Bankcard program under the name E-Credit Solutions from the Tampa and Lakeland call centers purchased from Defendant Millennium. (Kimoto Dep. at 16.) Zentel sold Defendants' Earn-a-Bankcard program under the name E-Credit Solutions from mid-June 2001, until April 11, 2002. (Kimoto Dep. at 34, 66; Joint Exh. 1) Other than lending its name to Defendant Zentel's bankcard program, Defendant E-Credit Solutions handled call center back office operations, such as

bookkeeping, paying vendors, and interacting with Defendant Millennium.

108. The Agreement required Defendant Millennium to provide "leads," or the names of potential customers for Zentel, which would, in turn, "rent" the leads from Millennium. (Stipulation at 18, Uncontested Fact 30) The target audience of potential customers for the Earn-a-Bankcard program was consumers with bad credit or no credit. (5 R. at 148, *ll.* 17-19)

109. Pursuant to the agreement, Defendant Millennium retained the exclusive right to mail postcard solicitations on behalf of Zentel and to fulfill Zentel's sales of the National Credit Shopper Earn-a-Bankcard program and Defendant Millennium's upsale programs. (Stipulation at 18, Uncontested Fact 31) Additionally, Millennium retained the exclusive right to fulfill "after sale requirements," meaning the printing, mailing, personalizing and processing of mail ready packages and catalogs, for which Zentel was charged $25.00 per package.

110. Defendants designed the direct mail postcard solicitation used by E-Credit and Zentel (Kimoto Dep. at 49, *l.* 22 – 50, *l.* 2) That postcard solicitation was the same in all substantive respects as the postcard Defendants used to solicit consumers when they were selling the Earn-a-Bankcard program with their own employee telemarketers. (3 R. at 20, *ll.* 10-20)

111. When consumers called Zentel's call centers, the E-Credit Defendants used a script provided by the Capital Choice Defendants to sell them the Earn-a-Bankcard program, as they were required to do by the Agreement. (Stipulation at 20, Uncontested Fact 7; 3 R. at 18, *l.* 18 – 20, *l.* 5) Defendants used the same script when they were selling the Earn-a-Bankcard program under the name National Credit Shopper using employee telemarketers. (3 R. at 20)

112. Defendant Zentel had the ability under the Agreement to contract with its own ACH house for the purpose of debiting the accounts of customers who bought the Earn-A-

Bankcard program and it did its own debiting. (PX 58 at ¶ 2.3.4.2). The upsales, however, were debited against customer accounts by Defendant Millennium through direct access to Defendant Zentel's database, and then Defendant Millennium remitted a commission of $35 per upsale to Defendant Zentel. (PX 58 at ¶ 2.3.8.2; Kimoto dep. at 36-37). Indeed, the Agreement required Defendant Zentel to allow Defendant Millennium "full and unfettered" access to its database with "remote administrative control capabilities." (PX 58 at ¶ 2.3.12)

113. The Agreement required that Defendant Zentel, upon its assumption of the operations of the call centers, re-hire most of the call center employees. (Stipulation at 18, Uncontested Fact 32.) The Agreement also required that Zentel meet a sales quota established by Defendants in order to market Defendants' Earn-a-Bankcard program. (3 R. at 18, *ll.* 1-3; PX 58 at ¶ 2.3.16)

114. Apart form the $25 per package fee, Defendant Zentel paid Defendant Millennium approximately $80,000 a month for consulting services under the terms of the Agreement. Among other things, Millennium provided consulting and training on how the credit card program should be operated, including scripting and setting guidelines, and on the use and updating of computer software. (Kimoto Dep. at 39-41.)

XI. <u>Common Enterprise</u>: Whether Corporate Defendants Capital Choice, Millennium, Ecommex, and Hartford Auto Club Constitute a Common Enterprise

115. Defendants Capital Choice, Millennium and Ecommex operated seamlessly for the purpose of marketing the Approval Certificate and Earn-A-Bankcard programs as well as the upsales to consumers. Although the Approval Certificate program may have been designed independently of Defendant Millennium, most consumers who purchased the Approval Certificate

Program, the Earn-A-Bankcard Program or an upsale, whether directly or indirectly from the Capital Choice Defendants, could not complete the transaction without interacting with each of them. For example, a consumer purchasing the Approval Certificate program from Capital Choice, mailed a check to Capital Choice which Capital Choice then used to electronically debit the customer's bank account through an ACH that contracted with Defendant Millenium; the customer then received a "package" that was mailed from Ecommex containing materials designed by Millennium; and then the customer was pitched an upsale, like the Hartford Auto Club by Defendant Millennium or one of its distributors using scripts prepared by Millenium. Likewise, a consumer purchasing the Earn- A- Bankcard program also had his bank account debited through an ACH that contracted with Defendant Millennium, then received a "package" from Ecommex containing materials prepared by Millennium and thereafter was pitched an upsale, such as Hartford Auto Club, by Millennium or one of its distributors.

116. Capital Choice, Millennium, Hartford and Ecommex have the same owner and president. Since January 2002, all of these Defendant corporations have maintained their principal offices at, and have operated out of, 9590 N.W. 25th Street, Miami, Florida, the same business premises. (Stipulation at 17, Uncontested Fact 26; 3 R. at 123)

117. Defendant Ricardo Martinez is the owner of all four corporations, and was the president of each company during the relevant time period alleged in the FTC's complaint. (3 R. at 121-122) Defendant appointed Miriam Montes president of Ecommex and his daughter, Caridad Martinez, president of Millennium in early 2003. (*Id.*) Defendant Smith has been the CEO of Defendant Millenium since November 2001 and in that capacity insures that Defendant Millennium fully supports the business operations of Capital Choice, Ecommex and Hartford Auto

Club (as well as other upsale programs) by designing and preparing marketing materials, formulating marketing strategies and interacting with the ACH houses. Defendant Smith works closely with, and reports to, Defendant Martinez.

118. Defendant Martinez testified that his corporations performed specific functions in relation to sales — Millennium was the marketing company, Capital Choice was the credit card company, and Ecommex was the fulfillment company. (3 R. 148, *ll*. 4-8) But the three corporations shared responsibilities for the purpose of marketing the Approval Certificate Program, the Earn-A-Bankcard program whether marketed directly or indirectly by the Capital Choice Defendants, and the upsales made by the Capital Choice Defendants, Defendant Zentel, and their distributors.

119. The name National Credit Shopper is a d/b/a of Capital Choice. (3 R. at 123, *ll*. 12-15) The Capital Choice and National Credit Shopper Earn-a-Bankcard programs were owned by Capital Choice, but they were telemarketed by Millennium and "fulfilled" by Ecommex. (*Id*. at 125, *ll*. 3-9)

120. Ecommex Corp. has been dormant since early 2003. (1 R. at 177) Prior to becoming dormant, Ecommex served as a shipping/handling/processing/mailing company for Capital Choice and Millennium. (Stipulation at 17, Uncontested Fact 27) In that capacity, it printed and mailed the Capital Choice Approval Certificate (3 R. at 123, *ll*. 21-22.), and printed and mailed the postcard solicitations for the Capital Choice and National Credit Shopper Earn-a-Bankcard programs when those programs were being sold by Defendants' telemarketers. (*Id*. at 123, *l*. 23 – 124, *l*. 12) Ecommex also made payroll for Capital Choice and Millennium and obtained benefits, such as health care insurance, life insurance, and dental insurance for

Defendants' employees. (Stipulation at 17, Uncontested Fact 27)

121. Prior to the time that all three businesses began doing business at 9590 N.W. 25th Street, there was a research and development department at the Ecommex warehouse on N.W. 34th Street. The research and development department looked for new products for all three companies. (*Id.* at 147, *ll.* 20-23)

122. Hartford Auto Club, Inc. was incorporated by Defendant Martinez after this action was filed in April 2002. (3 R. at 125-26.) Mr. Martinez testified that Hartford Auto Club has never done business and has no employees. (*Id.* at 127-28)

123. Because of the interrelationship of the companies and the overlapping character of their interaction with the public, the undersigned can discern no meaningful distinction that can be made among the Capital Choice Defendants for the purpose of fashioning consumer redress.

XII. Consumer Injury

124. Between October 19, 2000, and November 15, 2001, 61,688 consumers paid Defendants $199.95, or a total of $12,334,515, for the National Credit Shopper "Diamond Select" Earn-a-Bankcard program. (Stipulation at 14, Uncontested Fact 12) Between February 23, 2000 and October 19, 2000, 11,730 consumers paid Defendants $189.00, or a total of $2,216,970, for the Capital Choice "Platinum Plus" Earn-a-Bankcard program. (Stipulation at 13, Uncontested Fact 9) Consumers paid Defendants a total of $14,551,485 for the Earn-a-Bankcard program. Another 68,562 consumers purchased the National Credit Shopper "Diamond Select" Earn-a-Bankcard program from E-Credit Solutions and Zentel, to whom Defendants provided substantial assistance and support in violation of the TSR. These consumers paid $199.95, or a total of $13,708,971 for the Earn-a-Bankcard program. (Stipulation at 14,

Uncontested Fact 14)

125. From February 23, 2000, to April 11, 2002, 234,192 consumers responded to Defendants' direct mail Approval Certificate by sending Defendants checks for either $39 or $43. (Stipulation at 13, Uncontested Fact 6) Assuming all sales of the Approval Certificate were at $39, gross revenues to Defendants from the certificate program were at least $9,133,488. Approximately 12,334 consumers who purchased a Capital Choice credit card program received refunds. (Stipulation at 13, Uncontested Fact 8) Assuming all such refunds were to Approval Certificate purchasers in the amount of $43, Defendants' gross receipts minus refunds given for the Approval Certificate program totaled at least $8,603,126.

126. Defendants debited consumers bank accounts without their authorizations for Hartford Auto and MMS using the script contained in PX 51 at 03-01738 in the amount of approximately $455,000. Defendant Lugo testified that between January and April 2002, Defendants operated two shifts of five telemarketers each in their outbound call center to sell upsales using that script. (4 R. at 134, *l.* 25 – 136 *l.* 4) According to Lugo, each telemarketer averaged one sale per hour, and that each shift generated approximately 30 sales. (*Id.* at 135, *ll.* 13-19) Sixty sales per day of Hartford Auto at $99 would result in debits from consumers' bank accounts totaling $5,940, and sixty sales per day of MMS at $39 would result in debits from consumers' bank accounts totaling $2,340. If those amounts are rounded to $5,000 per day and $2,000 per day, respectively, to account for returned transactions, Defendants debited consumers bank accounts without authorization in the sum of $7,000 per day, or $35,000 each 5-day workweek. Assuming Defendants began using the script on January 4, 2002, and sold from it until April 5, 2002, Defendants debited consumers' accounts without authorization at the rate of

$35,000 per week for 13 weeks, or a total of $455,000. This amount is likely the least Defendants received from these unauthorized debits.

XIII. Individual Liability: Whether Defendants Martinez, Smith, Lugo Are Individually Liable

A. Defendant Martinez had the Authority to Control the Activities of Corporate Defendants, Exercised that Control, and Knew or Should Have Know of That it was Illegal

127. Defendant Martinez is the sole owner and president of Defendants Capital Choice, Millennium, Ecommex, and Hartford. (Stipulation at 12, Uncontested Fact 1) At trial, Mr. Martinez stipulated that "the buck stops here." (3 R. at 139, *ll.* 17-18) That stipulation included approving the scripts, approving the sales materials, and doing everything that Mr. Martinez's companies did. (*Id.* at 140, *ll.* 14-25)

128. Defendant Martinez sets the compensation of his management employees, and he can fire them at will. (3 R. at 139, *l.* 19-140 *l.* 4) Martinez talks with Defendant Smith and Mr. Jose Estruch (erroneously referred to as "Struff" in the Record), another senior manager, three to four times a week, and receives "cash flow, sales and other pertinent management reports." (*Id.* at 130.) These reports have included ACH reports. (*Id.* at 153, *ll.* 19-24) He had to have known that Defendants prepared rebuttal scripts to respond to consumers who obviously thought they were getting a major credit card, they prepared rebuttal scripts that declined to inform consumers who asked that the limit on the Visa card they would ultimately get would be just $240, and he had to have known that only a tiny fraction of his customers ever bought from the catalog, much less completed the program.

B. Defendant Smith had the Authority to Control the Activities of Corporate Defendants, Participated Directly in the Challenged Conduct, and Knew or

Should Have Known That it Was Illegal

129. Defendant Smith is the Chief Executive Officer of Defendant Millennium (Stipulation at 12, Uncontested Fact 2) and has been since late 2001. (1 R. at 153, *ll.* 15-18) Smith started with Millennium in May 1998. (1 R. at 153, *ll.* 19-21) He was hired by Defendant Ricardo Martinez, (1 R. at. 154, *ll.* 2-4) and has always reported only to Martinez, the owner of Millennium. (1 R. at 158, *ll.* 9-10) Smith has oversight of the marketing activities of Millennium. (1 R. at 145, *ll.* 5-18) Before becoming CEO in 2001, Smith had been Chief Operating Officer and Senior Vice President of Millennium. (1 R. at 155, *ll.* 7-10) Although he is CEO of Millennium, Smith also has responsibilities with regard to Ecommex and Capital Choice. (1 R. at 144, *ll.* 9-19; *see also,* PX 402 at Tr. 136, *l.* 8 – 137, *l.* 1)

130. Prior to his employment by Millennium, Smith was employed by Corporate Center of Miami as sales manager. Corporate Center, like Millennium, marketed catalog cards to people with bad credit. (1 R. at 155, *ll.* 11-21)

131. Defendant Smith has been involved in Telemarketing for five years, (1 R. at 175, *ll.* 10-11) and claims to be very familiar with the Telemarketing Sales Rule. (6 R. at 133, *ll.* 22-24)

132. Simultaneous with Smith's arrival, Millennium began telemarketing the Continental Advantage credit card program, which was owned by a third party named Ray Evans. (1 R. at 159, *ll.* 3-16) Millennium was subsequently sued by the Florida Attorney General over the sale of the Continental Advantage card. (1 R. at 160, *l.* 24 – 161, *l.* 4)

1. Defendant Smith's Liability for the Earn-A-Bankcard Program

133. Defendant Smith participated directly in the development and sale of the Earn-a-

Bankcard programs, had management responsibilities for the programs and knew or should have known that consumers were being deceived. He also knew that Defendants were requesting an advance fee in guaranteeing the acquisition of a credit card in violation of the TSR.

134. The testimony is that Defendant Martinez decided to develop his own credit card programs to replace the Continental Advantage credit card program. (1R., at 161, *ll.* 14-16) As a result Martinez, Smith, and Lugo jointly developed the Platinum, Platinum Plus, and National Credit Shopper programs. (1 R at 163, *ll* 13-23, *see also*, n. 2 to Defendants Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., Ecommex Corp., Hartford Auto Club, Inc., Ricardo Martinez and Wilfredo Lugo's Proposed Findings of Fact and Conclusions of Law (March 14, 2003)) The Platinum Plus and National Credit Shopper programs were the Earn-A-Bankcard programs, and were owned by Capital Choice with National Credit Shopper being a DBA of Capital Choice. (1 R. at 163, *l.* 23 – 164, *l.* 13) Smith had brought with him from Corporate Center telemarketing scripts, which served as the basis for the Capital Choice Platinum Plus and National Credit Shopper telemarketing scripts. (1 R. at 164, *l.* 14 – 165, *l.* 2) Smith assisted in modifying the Corporate Center scripts for use in selling the Earn-a-Bankcard programs. (1R. at 163, *l.* 13 – 165, *l.* 2) Smith also admits that he reviewed and commented to Martinez on the direct mail post card solicitation sent to prospective Earn-A-Bankcard customers. (1 R. at 165, *ll* 3-11) Smith also had overall responsibility for the telemarketing of the Earn-a-Bankcard programs including the customer service department, which was managed by Defendant Lugo who reported directly to Smith. (1 R. At 175 *ll.* 15-19)

135. Smith must certainly have been aware of the "Pull Tape Script," which Lugo's department used when customers called in to challenge Earn-a-Bankcard transactions, (Lugo

Test, 4R at 119, *ll.* 14-17) and which was publicly posted at workstations in the Customer Service Department. (*Id.* at 120, *ll.* 3-9) The script instructed employees to tell customers "I'm certain that the program was fully explained to you. It is a lot of information and your attention could have concentrated to the Major VISA Bankcard. You WILL receive one; just that it is the second step of the program." (PX 51 at 03-01750 (original emphasis and ellipsis.)) Smith also admits that he developed the "sales quiz." (PX 240; Smith Test. 5 R. At 142, *ll.* 5-21) That quiz was used to train telemarketers and directed them to tell inquiring consumers that the credit limit of the VISA card would be determined by the issuing bank, even though Smith admits that he knew that the secured VISA card would have a $240 credit limit. (Smith Test. 5 R. at 142 *l.* 21 – 43 *l.* 23) Smith's responsibility for the Capital Choice Earn-A-Bankcard programs is also demonstrated by the fact that it was he who was responsible for finding a replacement bank when Sterling Bank ceased issuing secured credit cards. (Smith Test., 5 R., 177 *l.* 7 – 178 *l.* 3)

136. Smith was handsomely rewarded for his role in developing and managing the Earn-a-Bankcard programs. In addition to his $300,000 per year salary he received up to a $4.00 commission on each of the nearly 200,000 Earn-a-Bankcard sales made by defendants, E-Credit Solutions and, by Capital Choices' other distributors. (*See,* Stipulations at 13-14, Uncontested Facts 9,12, 13, and 14) Under these facts Defendant Smith is jointly and severally liable for consumer redress to Earn-A-Bankcard consumers.

2. *Defendant Smith's Liability for the Approval Certificate Program.*

137. Smith is also jointly and severally liable for the consumer redress due the Approval Certificate (or Platinum card) consumers after January 2002. Smith contends that "there is not an iota of evidence that [he] had any involvement whatsoever in [the] . . . approval certificate

program," (1 R. at 47, *ll.* 3-5) and that he did not even know about the program. (1 R. at 48, *ll.* 2-8) The gravamen of Smith's argument is that the Approval Certificate program was conducted solely by Ecommex Corporation, which was managed by one Jose Estruch, and that Defendant Smith had no management control over Ecommex. The testimony and evidence show that these contentions are wrong. The Approval Certificate program belonged to Capital Choice, at least from January 2002 Smith exercised management responsibility over all Capital Choice credit card programs, and Smith knowingly acquiesced in and participated in the Approval Certificate program. He moreover exercised some management oversight of the certificate tasks performed by Ecommex after January 2002.

138. As found *supra*, at Findings of Fact ¶¶ 115 through 123, the Corporate Defendants were a joint enterprise. Defendant Martinez testified to this stating that Millennium was the marketing company, Ecommex the fulfillment company and Capital Choice the credit card company and that Ecommex "does the dirty work the mailing, the shipping, the printing, stuff like that. . . . But what happened was at the end, the two companies kind of moved under one company and that is what all this mess about creating another department. Sometimes I get confused." (Martinez Test., 3 R. at 148, *ll.* 2-13) The companies moved under one roof in approximately January 2002.

139. Consumers who purchased the Approval Certificate program made out their checks to Capital Choice and the electronic processing of these checks was done in the name of Capital Choice. (*see* PX 116) For example, it was Defendant Smith who wrote and submitted PX 116 to ACH Direct. At least after January 2002, Smith was responsible for the processing of these checks through the ACH houses. In that document, Smith describes both the Earn-a-

Bankcard program, and the Approval Certificate program and denominates them as Capital Choice programs. PX 116 thus demonstrates not only that the Approval Certificate program was a Capital Choice program, but also that Smith knew it and participated in the Approval Certificate program by, among other things, negotiating and maintaining the necessary ACH relationship. At the Preliminary Injunction Hearing in April of 2002, moreover, it was Smith who described the Approval Certificate program and how it worked to the Court. (PX 402 at Tr. 139-48)

140. Other evidence demonstrates Smith's connection to the Approval Certificate as early as June 2001. Millennium used the information obtained from consumers checks and the application forms sent in response to the Approval Certificate to telemarket the Hartford Auto Club and Minutes Mega Saver to consumers using the script contained in PX 51 at 03-01738, a Millennium script. (5 R. at 165-67)

141. The evidence further shows that Smith's contention that he had no responsibility for Ecommex's fulfillment activities is false. Plaintiff introduced at trial three documents Ecommex personnel directed to him. (PXs 269, 270, and 282) Two of these documents dealing with Ecommex's fulfillment activities, and which were from Ecommex personnel, were in fact on Millennium, not Ecommex letterhead. (PXs 269 and 270) Smith testified that Dennis White, the author of PX 269 and PX 270, directed the reports to Smith because Mr. White did not "recognize Mr. Estruch" as his boss, (5 R. at 242 *l.* 24 – 243 *l.* 2) showing that White, at least, viewed Smith as a person in charge. The reports include sales information on the Approval Certificate program, and in PX 269, White refers to directives discussed with "yourself" (Smith) and "Ricardo" (Martinez) about the fulfillment department. (5 R. at 246, *ll.* 11-16) Therefore as a matter of law Defendant Smith is liable for consumer redress to the victims of the Approval

Certificate.

3. *Defendant Smith's Liability for Unfair and Deceptive Practices Resulting from the Use of the Upsale Script in PX 51.*

142. Defendant Smith is also jointly and severally liable for consumer redress to the consumer victims of the upsale script contained in PX 51 at 03-01738, which the court granted summary judgment on as to Count Three of the Second Amended Complaint, and which resulted in consumers bank accounts being unfairly debited as alleged in Count Two. Smith, in fact, agrees that the language of the PX 51 outbound upsale script confused and deceived consumers. (3 R. at 37, *l.* 22 – 38, *l.* 1) Although Smith testified that Defendant Martinez wrote the script, he admitted that he reviewed and approved it, and that it was a Millennium script. (3 R. at 28, *l.* 25 – 29, *l.* 14)

143. Smith also testified that Defendant Lugo informed him in "early April" 2002, that consumers were complaining that they thought that their Capital Choice credit cards, not their bank accounts, would be charged for upsales. Lugo suggested that they change the script's language to "bank account on record." (3 R. at 34, *ll.* 2-16.) Even so, Defendants continued to use the script until May 6, 2002. (Stipulation at 16, Uncontested Fact 22)

4. *Defendant Smith's Liability for the Other Unfair Debiting Activities.*

144. Defendant Smith is also jointly and severally liable for the other unfair debiting involved in Defendants' upsales. Millennium was responsible for upsales. (Smith Test., 1 R. at 152) Smith received daily reports from the ACH houses showing the rate of charge backs including the unauthorized rates where consumers filed affidavits with their banks stating that they had not authorized debits, (3 R. at 45 *l.* 10 - 46 *l.* 1) and that he reviewed the reports. (6 R. at

140, *ll.* 9-23) Smith testified that he did not specifically break out the rate for unauthorized debits on these reports because he believed consumers signed sworn affidavits with their banks that were not true just to get their money back. (3 R. at 46, *ll.* 4-14) Nevertheless, he believed the unauthorized rate was 6% or 7%. (6 R. at 136, *ll.* 6-17)

145. Millennium was responsible for handling customer service and it was Millennium under the direct management of Defendant Lugo that listened to tapes such as the one played in court and denied consumers refunds based on their alleged affirmative responses to such tapes.

C. Defendant Lugo had the Authority to Control the Activities of Corporate Defendants, Participated Directly in the Challenged Conduct, and Knew or Should Have Know That it Was Illegal

146. Defendant Lugo started with Millennium Communications as a sales manager in 1998, and has since become general manager. He oversees customer service, the compliance managers, and the sales managers. Also as part of his duties, he reviews recordings of consumer transactions to verify authorization. (4 R. at 101 *l.* 5 – 102 *l.* 3)

147. Part of Lugo's duties include finding out what customers are calling in to complain about. (4 R. at 108, *ll.* 13-17) Although the Customer Service Department was trained to respond to customer-service calls, Lugo would bring complaints to Defendant Smith's attention when necessary, and to no one else. (4 R. at 109, *ll.* 9-19) His responsibilities also include reporting to Defendant Smith any problems that might come to his attention relating to Defendants' inbound scripts, (5 R. at 17, *ll.* 20-22) and outbound scripts. (*Id.* at 23, *ll.* 16-22)

148. Lugo testified that he had approved the use of the pull-tape script, *i.e.,* PX 51 at 0301750. That script responds to customer inquiries by telling consumers "I'm also positive that the program was fully explained to you. It is a lot of information and your attention could have

concentrated to the Major Visa Bankcard. You WILL receive one; just that . . . it is the second step of the program." He testified that he had no problems with it being used. (4 R. at 120, *l.* 16–121, *l.* 4)

149. Lugo also testified that he approved for use by customer service PX 52, another rebuttal script. (4 R. at 125) That script contains a planned response to a customer question asking what the credit line will be on the Visa or MasterCard, not by telling them that the credit line would be $240, but by telling the consumer that the issuing bank will determine the credit line. Lugo further testified that he had authority to make recommendations as to how this script should read, and that he failed to correct it. (*Id.* at 126, *l.* 22 – 127, *l.* 2) He further testified that the script was brought to Millennium by he and Defendant Smith, (*id.* at 129, *ll.* 15-19) and that he, Smith, and Ricardo Martinez modified it to conform to Millennium's current practices. (*Id.* at 130, *ll.* 9-20) It's use was okay with each of them. (*Id.* at 130, *ll.* 21-22)

150. Lugo also testified that he, Smith, and Martinez, brought over to Millennium an answer key to a test given to potential sales representatives, (PX 240 (*identified at* Lugo Test. at 132, *ll.* 6-10)) and that the three of them updated it to reflect Millennium's practices. (*Id.* at 132, *ll.* 11-17) Later, he testified that Johnny Smith had originally created the sales quiz. (5 R. at 13, *ll.* 22-25) Like the rebuttal script admitted as PX 52, that answer key tells consumers who ask what their credit limit will be, not the truthful answer that it will be only $240, but that the issuing bank will determine the credit line.

151. Lugo also testified that he himself drafted PX 247, a rebuttal script that was used for Defendants' 1000 Minute Mega Saver program, (4 R. at 138, *ll.* 18-19) and which answers the questions "I was debited $39 from my checking/savings account, what for?" and "I was never

told about this calling card . . . ." Lugo further testified that customers in fact called in with those questions or comments. (*Id.* at 139, *ll.* 8-14) Similarly, Lugo also acknowledged that he drafted PX 246, (*id.* at 142, *ll.* 18-19) a rebuttal script Defendants used for their Premium Mega Saver and Minute Mega Saver programs.

152. Moreover, although Defendants characterize Lugo as the officer in charge of Compliance, (*see, e.g.*, Opening Arg., 1 R. at 55, *ll.* 1-10) there is nothing in the record to show what Lugo, or anyone else at Defendants' companies, did to instruct the sales force on the law of deception or to ensure that Defendants remained current on laws relating to deception as well as the TSR.

153. Given the depth of Lugo's involvement with the Earn-a-Bankcard programs and the telemarketing of the upsales, Lugo must have known or should have known that consumers were being deceived.

CONCLUSIONS OF LAW

I. Jurisdiction and Venue

1. The District Court for the Southern District of Florida has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337, 1345, and 15 U.S.C. §§ 53(b), 57b, 6102(c), 6105(b).

2. Venue is proper in the Southern District of Florida under 28 U.S.C. § 1391(b) and (c), and under 15 U.S.C. § 53(b).

3. Defendants' offering and sale of credit related services have been in or affecting commerce, as "commerce" is define in section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. The Applicable Provisions of the Federal Trade Commission Act

4. The Federal Trade Commission ("Commission") is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 *et seq*. The Commission is charged, *inter alia,* with enforcing section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), which declares unlawful unfair or deceptive acts or practices in or affecting commerce.

5. Section 16(a)(2) of the FTC Act, 15 U.S.C. § 56(a)(2), authorizes the Commission to commence and supervise litigation under sections 13 and 19 of the FTC Act.

6. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides that, in proper cases and after proper proof, the district courts are authorized to issue permanent injunctions to restrain violations of the FTC Act.

7. Section 19 of the FTC Act, 15 U.S.C. § 57b, provides that the Federal Trade Commission may bring actions in the district courts for violations of Federal Trade Commission rules, such as the Telemarketing Sales Rule. Section 19(b) of the FTC Act, 15 U.S.C. §57b(b), provides that the district court is authorized to order redress to consumers for such rule violations.

III. Count One (Section 5(a) of the FTC Act)

8. Plaintiff's Second Amended Complaint states in count one that "[i]n numerous instances, in connection with the marketing of advance fee credit cards, defendants or their employees or agents have represented, expressly or by implication, that after paying defendants a fee, consumers will, or are highly likely to, receive an unsecured major credit card, such as a VISA or MasterCard credit card." Second Amended Complaint at 9. "In truth and in fact, in numerous instances, after paying defendants a fee, consumers do not receive an unsecured major credit card,

such as a VISA of MasterCard credit card. [] Therefore, the representation . . . is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. §45(a)." *Id.*

9. An act or practice is deceptive in violation of section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), if there is:

(1) A representation, omission or practice likely to mislead the consumer;

(2) the consumer is acting reasonably under the circumstances; and

(3) the representation, omission or practice is a material one likely to affect the consumer's purchase decision.

FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Wilcox,* 926 F. Supp. 1091, 1098 (S.D. Fla. 1995); *FTC v. Atlantex Assoc.*, 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,252-53 (S.D. Fla. 1987), *aff'd,* 872 F.2d 966 (11th Cir. 1989); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied,* 514 U.S. 1083 (1995); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *In re Cliffdale Assoc.,* 103 F.T.C. 110, 164-65 (1984); *FTC Deception Policy Statement, appended to Cliffdale,* 103 F.T.C. at 174-84 (1984) [hereinafter *Deception Policy Statement*].

10. To determine whether an act or practice is deceptive, a Court cannot rest on the literal truth or falsity of the sales pitch, but must instead consider the overall net impression that Defendants' representations have had on consumers. *FTC v. Atlantex Assocs.,* 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,254; *see also Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (3d Cir. 1976); *Removatron v. FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989). Thus, implied claims as well as express claims may be deceptive, and a claim may be deceptive even though it is literally true. *American*

Home Products v. FTC, 695 F.2d 618, 687 (3d Cir. 1982) ("[t]he impression created by the advertising, not its literal truth or falsity, is the desideratum[.]"); *Regina Corp. v. FTC,* 322 F.2d 765, 768 (3d Cir. 1976); *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565 at *7 (W.D. Wash. July 10, 2002) (deception may result from literally true statements); *FTC v. Equifin Int'l, Inc.*, No. 97-4526, 1997 U.S. Dist. LEXIS 10288 at *43 (C.D. Cal. July 3, 1997) (claims deceptive when Defendants "knowingly tempted" buyers with irrelevant information). As this Court explained in *Wilcox,* "[e]xplicit deception is not necessary to a finding of violation under § 5(a). 'Deception may be accomplished by innuendo rather than by outright false statements. . . . It is sufficient that deception be possible.' " *Wilcox,* 926 F. Supp. at 1098, *citing Regina Corp. v. FTC,* 322 F.2d 765, 768 (3d Cir. 1963) (original ellipses).

11. The elements of a sales presentation that contribute to the net impression, and so to the representations conveyed, include the headline, general tone, the presence or absence of elements contradicting a general impression or tone, the interaction of all the different elements, and the juxtaposition of phrases within the presentation. *See Thompson Medical Corp.*, 104 F.T.C. 648 at 789,793, 799-800 (1984). Section 5 of the FTC Act is to be applied broadly to protect the public interest, and as the Eleventh Circuit has just recently stated, "*caveat emptor* is simply not the law . . . ." *Tashman,* 318 F.3d at 1277.

12. Reliance may be presumed to be reasonable when it is in response to express claims, *FTC v. Crescent Publishing Group, Inc.*, 129 F. Supp. 311, 321 (S.D.N.Y. 2001); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 502, 528 (S.D.N.Y. 2000); or when it is in response to deliberately made implied claims. *FTC v. SlimAmerica,* 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *Deception Policy Statement*, 103 F.T.C. at 178. As the Commission explained in its

Deception Policy Statement, "[t]o be considered reasonable, the interpretation or reaction does not have to be the only one. When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. An interpretation will be presumed reasonable if it is the one the respondent intended to convey." *Id.* "An interpretation may be reasonable," moreover, "even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers." *Id.* at 177 n.20. Extrinsic evidence of deception is not required, but deception may be found by reviewing the claims themselves. *Kraft Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992); *FTC v. Garvey,* 2001 U.S. Dist LEXIS 25,060 at *20 (C.D. Ca. Nov. 7, 2001). In applying these principles, the Eleventh Circuit recently found that a Court may not ignore overwhelming evidence that reasonable consumers were likely to rely on, and in fact did rely on, Defendants misrepresentations and impose on consumers a duty of "walking around common sense." *Tashman,* 318 F.3d at 1278. As the *Tashman* Court explained, "[t]he FTCA does not have an 'extravagant claim' defense." *Id.* at 1277.

13. As with affirmative misstatements, failure to disclose pertinent information is deceptive if it has a tendency or capacity to deceive. *Five-Star Auto Club,* 97 F. Supp. 2d at 532, *citing Transworld Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (8th Cir. 1979). As this Court has previously stated, "[d]eception by omission, as in the case of deception by affirmative misstatement, is established by the sales presentation itself. Proof of the actual materiality of the omitted fact through consumer testimony is unnecessary, as an inference of materiality may reasonably be made when a deceptive omission is found." *FTC v. U.S. Oil & Gas Corp.* 1987 U.S. Dist LEXIS 16137 at *47-48 (S.D. Fla. July 10, 1987), *citing FTC v. Colgate-Palmolive,* 380

U.S. 374, 391-92 (1965).

14. The Commission moreover need not show intent to deceive, *World Travel Vacation Brokers*, 861 F.2d at 1029, *citing Beneficial Corp. v. FTC*, 542 F.2d at 617; *Regina Corp. v. FTC*, 322 F.2d at 768, nor must it show that each individual consumer relied on the misrepresentations. *Wilcox*, 926 F. Supp. at 1105; *FTC v. Wolf*, 1996 U.S. Dist LEXIS 1760 at *14 (S.D. Fla. Jan. 30, 1996), *aff'd*, 113 F.3d 1251 (11th Cir. 1997) *citing FTC v. U.S. Oil & Gas Corp.*, 1987 U.S. Dist. LEXIS 16137 at *68, (S.D. Fla. 1987). "Not only would such proof be 'virtually impossible,' [*FTC*] v. *Security Rare Coin* [*& Bullion*], 931 F.2d [1312],1316 [(8th Cir. 1991)], but such a requirement 'would thwart the effective prosecutions of large consumer redress actions and frustrate the statutory goals of the section.' " *Wilcox*, 926 F. Supp. at 1105, *quoting FTC v. Figgie Int'l Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). Rather, once the Commission shows that the representations were of the type ordinarily relied on by reasonably prudent persons, that they were widely disseminated, and that consumers purchased the product, the burden then shifts to Defendants to show there was no reliance. *SlimAmerica*, 77 F. Supp. 2d at 1275; *Wilcox*, 926 F. Supp. at 1105; *Security Rare Coin*, 931 F.2d at 1316; *World Travel Vacation Brokers*, 861 F.2d at 1029, *citing FTC v. Kitco of Nevada, Inc.* 612 F. Supp. 1282, 1293 (D. Minn. 1985); *FTC. v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,709 (N.D. Cal. 1983).

15. Moreover, because the FTC need not show that each individual consumer was injured, evidence that some consumers were not injured or were satisfied with Defendants' services is no defense and is not relevant to the question whether consumers were injured. *Wilcox*, 926 F. Supp. at 1009, *citing Amy Travel*, 875 Fd. 564, 572 (7th Cir. 1989). *Cf. Tashman*, 318 F.3d at 1278 (evidence of a few satisfied customers was insufficient to overcome overwhelming evidence

that reasonable consumers were likely to be and were misled, and District Court's finding to the contrary was clearly erroneous).

16. As stated earlier, to be actionable under section 5, the misrepresentations or practices need not be made with an intent to deceive. *See Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (3d Cir.1976), *cert. denied,* 430 U.S. 983 (1977); *Regina Corp. v. FTC,* 322 F.2d 765, 768 (3d Cir.1963). As such, "[a]n advertiser's good faith does not immunize it from responsibility for its misrepresentations...." *Chrysler Corp. v. FTC,* 561 F.2d 357, 363 n. 5 (D.C. Cir.1977). Where defendants should know that their conduct is wrong, that conduct cannot be sanctioned by outside advice that the conduct is legal, whether that advice comes from counsel, *Amy Travel,* 875 F.2d at 575 (reliance on advice of counsel [is] not a valid defense on the question of knowledge; counsel could not sanction something that the defendants "should have known was wrong"), defendants' probation officer, *FTC v. Sharp,* 782 F. Supp. 1445, 1451 (D. Nev. 1991), an outside marketing company, a bank, "or anyone else for that matter . . . ." *FTC v. American Standard Credit Systems, Inc.,* 874 F. Supp. 1080, 1089 (C.D. Ca. 1994).

17. Express claims and deliberately made implied claims are presumed material, *SlimAmerica,* 77 F. Supp. 2d at 1272, *citing Pantron I Corp.*, 33 F.3d at 1096; *Wilcox,* 926 F. Supp. at 1098; *FTC v. Wolf,* 1996 U.S. Dist LEXIS 1760 at *15; *Thompson Medical,* 104 F.T.C. at 816; *Deception Policy Statement,* 103 F.T.C. at 182, as are claims that relate to the central characteristics of the product or service. *Deception Policy Statement* at 182. Moreover, "[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect." *Id.*

18. Defendants' offering of the Earn-a-Bankcard program created the overall net impression that consumers who paid Defendants $189 or $199.95 would receive an unsecured, major credit card with a high credit limit, instead of a secured Visa card with a $240 limit after paying an additional $175.15 for Defendants' catalog merchandise. Indeed, Defendants' sales materials (which included the post cards, *see* Findings of Fact, *supra* at ¶¶ 35-38, the on-hold message, *see id.* at ¶¶ 39-40, the sales script, *see id.* at ¶¶ 41-44, the pull tape, *see id.* at ¶¶ 45-46, and the Bankcard Qualification Manual, *see id.* at ¶ 47), the consumer witnesses, *see id.* at ¶¶ 49-64, the customer service scripts and sales training materials, *see id.* at ¶¶ 65-67, and Defendants' admissions regarding customer performance, *see id.* at ¶¶ 68-71, show that Defendants deceived consumers acting reasonably under the circumstances about a material fact (namely that the consumers would receive an unsecured, major credit card with at least a $4,000 credit limit) which affected the consumers' purchasing decisions. Therefore, Defendants violated section 5 of the FTC Act, 15 U.S.C. §45(a).

19. Defendants argue, citing to the FTC's own policy statement, that "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." Defendants' Proposed Findings of Fact and Conclusions of Law at 17 (emphasis and citation omitted). According to Defendants, the "F.T.C.'s four consumer witnesses cannot be considered a 'significant representative segment' of the class of persons to whom the postcard and telephone script were addressed," *see id.*, and, as a result, "it was incumbent on the F.T.C. to offer greater proof of deception," *id.* at 18, which, according to Defendants, should have could done through "expert testimony or survey evidence." *Id.* at 19.

20. However, as the evidence presented at trial showed, of a total of the 199,846 consumers who purchased the Earn-a-Bankcard program at a price of $189 or $199.95, only 700, or less than one half of one percent, ever completed the program and qualified for a Visa card. *See* Findings of Fact at ¶ 68. The number of consumers who actually received a Visa card was even smaller, because 235 of those who qualified never cashed the money orders Defendants supposedly sent them. These numbers demonstrate more graphically than a survey or expert testimony could that the consumers were deceived as to the requirements of the Earn-a-Bankcard program because, although it would be normal to expect that some consumers would fall behind in making their monthly payments and thus not complete the program, surely more than one half of one percent would have completed the program had they understood its requirements and limitations before paying the $189 or $199.95 fee.

21. Additionally, of the 445,761 consumers who paid for one of Defendants' credit card programs, only 12,900 ever purchased an item from one of the catalogs. That is less than 3% of all consumers who bought one of Defendants' credit card programs, and would be just 6.4% of the 199,846 Earn-a-Bankcard program buyers. This evidence shows that the consumers were deceived by Defendants' representations as to the Earn-a-Bankcard program because, even assuming that all consumers who purchased from a catalog were Earn-a-Bankcard customers, it is illogical to believe that nearly 94% of Earn-a-Bankcard purchasers would not have bought a single item from the catalog had they known they were paying $189 or $199.95 for a catalog card.

22. Defendants further argue that in their presentations of the Earn-a-Bankcard program, they relied in good faith on a state-court decision sanctioning their post card, and on Florida Attorney General's approval of their sales script. Both arguments fail.

23. In 1998, the Florida Attorney General brought suit against Defendants-Millennium and Martinez, alleging deception in a credit-card scheme similar to Defendants' Earn-a-Bankcard program involved in this litigation. Based on the postcard used in 1998 — and according to the uncontroverted record, based solely on that postcard (Collins Test., 4 R. at 30, *ll.* 16-23) — the trial court granted a temporary injunction "as to use of the postcard." (DX 28 (Ord. Grant. Pl's. Mtn. Temp. Inj., May 17, 1999)) The court then required the parties to confer on acceptable postcard modifications, and also required that they modify the sales script "to conform to [the] card." (*Id.*)

24. The parties then conferred over, and agreed on, modifications acceptable to both sides. According to the agreement, the post card was modified to expressly state "let us be your gateway to a major bankcard," and that "our Advantage Merchandise Card is not a Visa® or MasterCard® . . . ." (PX 265 at 6) The script was modified to include the disclosure that "there are 2 credit cards if you complete the program. There's an Advantage merchandise card which is not a Visa® or MasterCard®, and there's a National Core Network Visa® bankcard." (PX 265 at 3)

25. Defendants then appealed the grant of the temporary injunction and the Appellate Court reversed. According to the Court, the issue was "whether the trial court correctly determined that Millennium's postcard was deceptive . . . and therefore, whether the [state] established a clear legal right to a temporary injunction." *Millennium Communications & Fulfillment, Inc., v. Office of the Attorney General,* 761 So.2d 1256, 1263 (Fla. Dist. Ct. App. 2000). The court then ruled in the negative and dissolved the injunction. *Id.* at 1264.

26. Following the appeal, the trial court granted a protective order precluding

discovery, and this time, the state appealed. The court again reversed, rejecting Defendants' argument that the first appellate panel had found that Defendants' sales materials were not deceptive as a matter of law:

> Our review of "Millennium I" does not demonstrate that we made such a determination. We simply reversed a temporary injunction based on the fact that the postcard was not sufficiently deceptive to support the extraordinary remedy of injunctive relief.

Office of the Attorney General v. Millennium Communications and Fulfillment, Inc., 800 So.2d 255, 257 (Fla. Dist. Ct. App. 2001). For the reasons explained in paragraphs 27-30 below, nothing in this history supports Defendants' argument that they were merely selling their Earn-a-Bankcard program in good-faith reliance on the court and the Attorney General.

27. First, the postcards used in this case and the *Millennium I* case are different. In fact, the postcard in *Millennium I* does not include many of the misleading references involved in this litigation, such as "this may be your final notification," "your credit card has not been activated," and check marks indicating "Platinum" and "Unsecured."

28. Second, *Millennium I* was clear in framing the issue narrowly as to whether the postcard alone was sufficiently deceptive to support a temporary injunction. It ruled on neither the ultimate merits of the case, nor on the entirety of Defendants' sales pitch. (*Millennium I,* 761 So.2d at 1263; *see also* 4 R. at 30, *ll.* 17-22 (Judge Tobin ruled on the postcard alone and did not permit additional proof)). In fact, the litigation in state court remains pending.

29. Third, while the Attorney General approved the use of the modified script, she did so only because the postcard was also modified. Not only does the trial court's order state that "the script is to be changed to conform to [the] postcard," but the AG testified in this case that she

agreed to the script only because Defendants agreed to the disclosures in the postcard. (Collins Test., 4 R. at 35, *ll.* 5-11) And in fact, Defendants negotiated the changes to the postcard and script together, (PXs 264-65) having had to have known that the two were a package. There is no basis in the record or in logic to support Defendants' claim that they thought the Attorney General approved the sales script separately from the postcard.

30. Finally, and most importantly, any good-faith belief that Defendants may have had that their program was not deceptive had to have been shattered by actual performance. In fact, Defendants prepared rebuttal scripts because they anticipated that consumers would believe they were getting a major credit card, *see* Findings of Fact, *supra* at ¶ 65, they prepared rebuttal scripts that failed to inform consumers that the limit on the Visa card they would ultimately get would be just $240 because they anticipated that customers would expect a card with a $4,000 limit, *see id.* at ¶ 66, and they knew that only a small fraction of their customers ever would buy from the catalog, much less complete the program and receive a Visa card. *See id.* at ¶ 68. Regardless of what Defendants thought the court said in *Millennium I,* they had to have known in the face of overwhelming evidence of consumer confusion that they were committing fraud. Their good faith is simply farfetched and, if anything, their abandonment of a more clear way to market their program, particularly when confronted with evidence that consumers were obviously misled, demonstrates fraudulent intent.

IV. Count Two (Section 5(a) of the FTC Act)

31. Count two of the Second Amended states that "[i]n numerous instances, defendants cause consumers' checking accounts to be debited for defendants' Up-Sale programs without having previously obtained the consumer's authorization for such debit. Therefore, consumers

cannot reasonably avoid the defendants' billing for these products or services. [. . .] Defendants' practice of debiting consumers' checking accounts without authorization causes substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition. [. . .] Therefore, defendants' practice, as outlined above, is unfair and violates Section 5(a) of the FTC Act, 15 U.S.C. §45(a)." Second Amended Complaint at 10.

32. An act or practice is unfair within the meaning of section 5 of the FTC Act, 15 U.S.C. §45, if it (1) causes substantial injury to consumers (2) which is not reasonably avoidable by consumers themselves, and (3) is not outweighed by countervailing benefits to consumers or to competition. (Stipulation, Uncontested Legal Issue 1 (March 7, 2003) [hereinafter UCLI]) While conduct must meet each of these prongs to be deemed unfair, 15 U.S.C. §45(n), conduct that is unfair violates section 5(a) of the FTC Act. *Orkin Exterminating Co. v. FTC,* 849 F.2d 1354, 1364 (11th Cir. 1988).

33. As the evidence summarized at paragraphs 73 trough 89, *supra*, shows, the consumers who were solicited between January 2002 and May 6, 2002 for the MMS and Hartford upsales, in numerous instances, did not actually authorize Defendants to debit their bank accounts either because they were led to believe their credit cards would be charged for the upsales or because they otherwise were tricked into providing their authorizations. Additionally, the manner in which these authorizations were obtained–using the script that employed the "account on record" language which the Court found to violate section 5 of the FTC Act and using a recording played at such a speed so as to be nearly unintelligible–shows that the consumers could not reasonably have avoided having their accounts debited for the upsales. These unauthorized debits by the Defendants, in the aggregate, caused substantial injury to consumers, *see* Findings of Fact,

supra at ¶¶ 124-126, and are not outweighed by countervailing benefits to consumers: they are therefore unfair. As a result, Defendants violated section 5 of the FTC Act, 15 U.S.C. §45 as alleged in count two of the Second Amended Complaint.

V. Count Four[6] (Section 310.3(a)(2)(iii) of the TSR)

34. In count four of the Second Amended Complaint, Plaintiff alleges that "[i]n numerous instances, in connection with the telemarketing of advance fee credit cards, defendants or their employees or agents have misrepresented, directly or by implication, that after paying defendants a fee, consumers will, or are highly likely to, receive an unsecured major credit card, such as a VISA or MasterCard credit card. [. . .] Defendants have thereby violated Section 310.3(a)(2)(iii) of the Telemarketing Sales Rule, 16 C.F.R. §310.3(a)(2)(iii)." Second Amended Complaint at 12.

35. Pursuant to section 3(c) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102(c), and section 18(d)(3) of the Federal Trade Commission Act, 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales Rule, 16 C.F.R. Part 310, constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). (UCLI 2)

36. The Second Amended Complaint alleges violations of the Telemarketing Sales Rule in effect on April 8, 2002. The Rule was amended in 2003, and the amendments have been codified at 16 C.F.R. Part 310. References to the provisions of the Telemarketing Sales Rule contained in the Second Amended Complaint and in these Findings of Fact and Conclusions of Law are to the Rule as it appeared in the Code of Federal Regulations in April 2002.

---

[6] The Court granted Plaintiff's summary judgment motion with regards to count three.

37. The Telemarketing Sales Rule ("TSR"), promulgated by the FTC pursuant to the Telemarketing Act, defines "telemarketing" as "a plan, program, or campaign which is 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." 16 C.F.R. § 310.2(u). The definition excludes catalog sales where the consumer initiates the telephone call after receiving a catalog. *Id.* The Rule defines a "telemarketer as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer." 16 C.F.R. § 310.2(t). The Rule defines a "seller" as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2.

38. Defendants are, and have been, telemarketers and sellers within the meaning of the TSR since at least as early as January 2000.

39. The TSR prohibits telemarketers and sellers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2)(iii). (UCLI 4)

40. Defendants' sales presentation for the Earn-a-Bankcard program misrepresented a material aspect of the performance, efficacy, nature or central characteristics of the goods or services they were offering by suggesting that the targeted consumers would receive a major credit card with at least a $4,000 limit when they would receive a secured Visa card with a $240 limit and then only after paying an additional $175.15 for Defendants' catalog merchandise. In fact, as stated earlier, Defendants' sales materials (which included the post cards, *see* Findings of Fact, *supra* at ¶¶ 35-38, the on-hold message, *see id.* at ¶¶ 39-40, the sales script, *see id.* at ¶¶ 41-44,

the pull tape, *see id.* at ¶¶ 45-46, and the Bankcard Qualification Manual, *see id.* at ¶ 47), the consumer witnesses, *see id.* at ¶¶ 49-64, the customer service scripts and sales training materials, *see id.* at ¶¶ 65-67, and Defendants' admissions regarding customer performance, *see id.* at ¶¶ 68-71, show that Defendants misrepresented a "material aspect of the performance, efficacy, nature, or central characteristics of" the program they were offering. Accordingly, Defendants violated Section 310.3(a)(2)(iii) of the Telemarketing Sales Rule, 16 C.F.R. §310.3(a)(2)(iii), as alleged in count four of the Second Amended Complaint.

VI. Count Five (Section 310.4(a)(4) of the TSR)

41. Count five of the Second Amended Complaint states that "[i]n numerous instances, in connection with the telemarketing of advance fee credit cards, defendants or their employees or agents have requested and received payment of a fee in advance of consumers obtaining a credit card when defendants have guaranteed or represented a high likelihood of success in obtaining or arranging for the acquisition of an unsecured credit card, such as a VISA or MasterCard credit card, for such consumers. [...] Defendants have thereby violated Section 310.4(a)(4) of the Telemarketing Sales Rule, 16 C.F.R. §310.4(a)(4)." Second Amended Complaint at 12.

42. The TSR prohibits telemarketers and sellers from requesting or receiving payment of any fee or consideration in advance of obtaining or arranging a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging the loan or other extension of credit. 16 C.F.R. § 310.4(a)(4). UCLI 3. The prohibition against taking an advance fee applies any time a guarantee or representation of likelihood is made, regardless of whether it is made in conjunction with the sale of some other product that is not a loan or extension of credit. *FTC v. Consumer Alliance, Inc.*, 2003 U.S. Dist.

LEXIS 17,423 at * 3-18 (N.D. Ill. Sept. 30, 2003) (advance-fee loan provision violated where, in connection with sales of credit-card-protection services, Defendants promised to provide or arrange to provide low-interest credit cards); *In re National Credit Management Group,* 21 F. Supp. 2d 424, 457 (D.N.J. 1998) (TSR does not violate First Amendment by restricting sales of "educational" materials on improving credit, "but merely regulates when payment may be collected in a situation where a company has represented or guaranteed a high likelihood of success of an extension of credit. . . ."); *New York v. Vacco,* 930 F. Supp. 865, 870-71 (W.D.N.Y. 1996) (state enforcement of TSR) (advance-fee loan provision of TSR violated, even though Defendants claimed they were merely selling club memberships that provided, *inter alia,* collateralized credit cards, where initial offering claimed consumer was pre-approved for a credit line). It thus prohibits the acceptance of a fee for any service after the guarantee or representation has been made.

43. Defendants requested and received $189 or $199.95 from the consumers "in advance of obtaining or arranging [an] . . . extension of credit when [Defendants] . . . guaranteed or represented the high likelihood of success in obtaining or arranging the . . . extension of credit." 16 C.F.R. §310.4(a)(4). In fact, the Earn-a-Bankcard postcard, the sales pitch and the testimony of the consumer witnesses, *see* Findings of Fact, *supra* at ¶¶ 35-67, all show that Defendants represented that the Visa card was "guaranteed" when Defendants had not obtained or arranged for the extension of credit. Therefore, Defendants violated the TSR, 16 C.F.R. § 310.4(a)(4).

44. Defendants characterize themselves as a catalog company. However, they marketed a major, unsecured credit card in the form of the Earn-a-Bankcard program. *See* Findings of Fact, *supra* at ¶¶ 30-34. Defendants' deliberately-made implied claims conveyed the

impression that consumers were purchasing an unsecured, VISA card with at least a $4,000 credit limit, and that is what consumers paid Defendants for.

45. Moreover, regardless of how Defendants characterize themselves, the TSR prohibits the taking of an advance fee for a credit card even if that credit card is merely one part of a larger package. *See* Conclusions of Law, *supra* at ¶ 42.

46. Defendants argue that Section 310.4 (a)(4) of the TSR applies only to loans and not to credit cards. That interpretation is wrong. Section 310.4 (a)(4) specifically covers "loans or *other extension of credit*." "Credit" is defined in the Rule as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment," § 310.2 (e), and "credit card" is defined as "any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor or services on credit." § 310.2 (f). Moreover, the Commission affirmed that the TSR as originally adopted prohibits advance-fee credit card offers in its explanatory statement to the recently implemented amendments to the Rule. Notice of Proposed Rule Making, 67 Fed. Reg. 4492 at 4512 (January 30, 2002). Accordingly, the Commission has filed cases alleging the sale of advance-fee credit cards to be a violation of § 310.4(a)(4) of the TSR. *See, e.g.*, 67 Fed. Reg. at n.191.

47. Defendants also argue that the TSR, 16 C.F.R. §310.4(a)(4), does not apply to "firm offers of credit by a creditor who properly uses a prescreened list" and, in this case, Defendants "were the creditor making pre-screened, firm ("pre-approved") offers of credit to consumers." *See* Defendants' Proposed Conclusions of Law at 24. This Court disagrees. It is well settled that firm offers are limited to offers of such a nature that the acceptance by the offeree will give rise to a binding contract. *See, e.g., Webster v. Bowles*, 213 F.2d 417 (1st Cir. 1954); *see*

also Hoover Co. v. Fuqua Industries, Inc., 1979 WL 1244, *6 (N. D. Ohio 1979) ("[T]he offer is 'firm' because acceptance of the offer result in a binding contract to sell."). It is also well settled that in order for a binding contract to exist, a mutual assent or a meeting of the minds of the parties on all essential elements of the contract must occur. *See, e.g., Joseph v. Donover Co.*, 261 F.2d 812 (9th Cir. 1959); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §29 (3d ed. 1990). As the Court found earlier, *see* Findings of Fact at ¶ 72, Defendants deceived the consumers into believing that, by paying the $189 or $199.95 fee, they would receive a major unsecured credit card when, in reality, they received a catalog card and the right to earn a Visa or MasterCard. Therefore, the meeting of the minds required for the existence of an enforceable contract between Defendants and the consumers never occurred. As a result, the undersigned rejects Defendants' argument that their offers to the consumers constituted "firm offers" to which the TSR, 16 C.F.R. §310.4(a)(4), does not apply.

VII. Count Seven[7] (Section 310.4(d) of the TSR)

48. Count seven of the Second Amended Complaint states that "[i]n numerous instances, in connection with the telemarketing of defendants' Up-Sale programs, such as the Hartford Auto Club, 1000 Minute Mega Saver, and Premium Mega Saver, defendants have failed to promptly and in a clear conspicuous manner to the person receiving the call, the following information: 1) The identity of the seller; 2) That the purpose of the call is to sell goods or services; and 3) The nature of the goods or services. [. . .] Defendants have thereby violated Section 310.4(d) of the Telemarketing Sales Rule, 16 C.F.R. §310.4(d)." Second Amended

[7] The Court granted Defendants' motion for judgment as a matter of law as to count six of the Second Amended Complaint.

Complaint at 13.

49. The TSR requires that telemarketers, in outbound telemarketing calls, disclose promptly and in a clear and conspicuous manner to the person receiving the call: (1) the identity of the seller, (2) that the purpose of the call is to sell goods or services, and (3) the nature of the goods or services. 16 C.F.R. § 310.4(d). (UCLI 8.)

50. "Outbound telephone call" means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution. 16 C.F.R. § 310.2(n). (UCLI 7.)

51. As found earlier at paragraphs 102-104, *supra*, Plaintiff has failed to establish that the Capital Choice Defendants engaged in abusive telemarketing practice when using the scripts that were admitted into evidence as PX 51, DX 23 and DX 24. With regards to PX 51, Plaintiff has failed to offer any convincing evidence that Defendant Millenium, identified in the script, was not a person that was itself providing or arranging with others to provide the upsale program. As to DX 23 and DX 24, Plaintiff has not offered any convincing evidence showing that the "seller" using those scripts had not been identified during that same outbound telephone call in which the upsale took place. Accordingly, the Capital Choice Defendants did not engage in abusive telemarketing practices violating 16 C.F.R. §310(4)(d) by using PX 51, DX 23 and DX 24.

VIII. Count Eight (Section 310.3(b) of the TSR)

52. In count eight of the Second Amended Complaint, Plaintiff alleges that "Defendants Capital Choice, Millennium, Ecommex, Hartford and Ricardo Martinez provide substantial assistance or support to defendants E-Credit and Zentel, including but not limited to, obtaining and paying for leads, approving scripts, and fulfilling sales of E-Credit and Zentel, when they know, or

consciously avoid knowing that E-Credit and Zentel are engaged in acts or practices that violate the Telemarketing Sales Rule. [. . .] Defendants Capital Choice, Millennium, Ecommex, Hartford and Martinez have thereby violated Section 310.3(b) of the Telemarketing Sales Rule, 16 C.F.R. §310.3(b)." Second Amended Complaint at 13.

53. Under the TSR, any person who provides substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a) or (c), or § 310.4 of the TSR, also is engaged in a deceptive act or practice and is also violating the TSR. 16 C.F.R. § 310.3(b). (UCLI 9.) Examples of what constitutes assisting and facilitating include: "providing lists of contacts to a seller or telemarketer that identify persons over the age of 55, persons who have bad credit histories, or persons who have been victimized previously by deceptive telemarketing or direct sales; providing any certificate or coupon which may later be exchanged for travel-related services; providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing; or providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered." Telemarketing Sales Rule Statement of Basis and Purpose, 60 Fed. Reg. 43,842, 43,852 (August 23,1995).

54. The evidence summarized at paragraphs 105 through 114 shows that Defendants Capital Choice, Millennium, Ecommex, Hartford Auto Club, and Ricardo Martinez provided substantial assistance or support to E-Credit Solutions, Inc., and Zentel Enterprises, Inc., when they knew or consciously avoided knowing that E-Credit and Zentel misrepresented the nature and central characteristics of the Earn-a-Bankcard program and that Defendant E-Credit took a fee in

advance after guaranteeing consumers would receive an unsecured, major credit card.

55. Therefore, Defendants Capital Choice, Millennium, Ecommex, Hartford Auto Club and Ricardo Martinez violated section 310.3(b) of the TSR, 16 C.F.R. § 310.3(b).

IX. Common Enterprise

56. Plaintiff has alleged in the Second Amended Complaint that "Defendants Capital Choice, Millennium, Ecommex and Hartford have operated as a common enterprise while engaging in the unfair and deceptive acts and practices and Telemarketing Sales Rule violations alleged above. Defendants E-Credit and Zentel have operated as a common enterprise while engaging in the unfair and deceptive acts and practices and Telemarketing Sales Rule violations alleged above." Second Amended Complaint at ¶57.

57. When two or more corporations act as a common enterprise, equity demands that they be held jointly and severally liable for their equitable misconduct. *U.S. Oil and Gas Corp.*, 1987 U.S. Dist LEXIS at *58. "When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, *Sunshine Art Studios, Inc. v. FTC,* 481 F.2d 1171, 1175, (1st Cir. 1973), *Waltham Precision Instrument Co. v. FTC,* 327 F.2d 427, 431 (7th Cir. 1964); the sharing of office space and officers, *Zale Corp. and Corrigan-Republic, Inc. v. FTC,* 473 F.2d 1317, 1320 (5th Cir. 1973); *Delaware Watch Co. v. FTC,* 332 F.2d 745, 746 (2d Cir. 1964); whether business is transacted through 'a maze of interrelated companies,' *Delaware Watch,* 322 F.2d at 746; the commingling of corporate funds and failure to maintain separation of companies, *SEC v. Elliott,* 953 F.2d 1560, 1565 n.1 (11th Cir. 1992); unified advertising, *Zale Corp.*, 473 F.2d at 1320; and "evidence which 'reveals that no real distinction existed between the Corporate Defendants,' *Jordan Ashley,* 1994-1 Trade Cas. (CCH) ¶ 70,570 at 72,095 [(S.D. Fla.

1994)]." *Wolf,* 1996 U.S. Dist LEXIS at *22-23.

58. Defendants Millennium, Capital Choice, Ecommex, and Hartford are wholly owned by Defendant Ricardo E. Martinez. Among other things, they also share the same business premises, commingle funds, share information about consumers, share marketing strategies and responsibilities and have the same employees. *See* Findings of Fact, *supra* at ¶¶ 115-123. Therefore, they constitute a common enterprise as alleged in Paragraph 57 of the Second Amended Complaint.

X. This Court's Power to Grant Permanent Relief

59. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes permanent injunctive relief against conduct in violation of any provision of law enforced by the Commission. *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982); *Kitco of Nevada*, 612 F. Supp. at 1291. Injunctive relief is appropriate where there is a cognizable danger of recurrent violation. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). *See also SlimAmerica,* 77 F. Supp 2d at 1275.

60. Injunctive relief is appropriate even as against conduct that may have stopped prior to the entry of relief where, as here, there is significant danger that practices will recur absent an injunction. *FTC v. Febre,* 1996 U.S. Dist. LEXIS 9487 at *22 (N.D. Ill. July 3, 1996), *citing FTC v. Security Rare Coin,* 1989-2 Trade Cas. at 62,205; *U.S. Oil & Gas Corp.* 1987 U.S. Dist LEXIS 16137 at *52. Or as the FTC has more colorfully stated, "a claim of abandonment is rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred 'only after the Commission's hand was on the respondent's shoulder.' " *International*

Assoc. of Conf. Interpreters, 123 F.T.C. 465, 658 (1997), *quoting Zale Corp.*, 78 F.T.C. 1195, 1240 (1971).

61. The court's authority to grant permanent injunctive relief includes all of the Court's inherent equitable powers, including the ability to order restitution and disgorgement of improper gains. *Gem Merchandising, 87 F.3d at 468-69; U.S. Oil & Gas Corp.*, 748 F.2d at 1434; *Security Rare Coin*, 931 F.2d at 1314-15; *Amy Travel Service,* 875 F.2d at 571-72; *World Travel,* 861 F.2d at 1026; *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982); *H.N. Singer, Inc.*, 668 F.2d at 1112-1113; *Wilcox*, 926 F. Supp. 1103.

62. The egregious nature of past violations of the FTC Act shows a likelihood of future violations and a need for permanent injunctive relief of a broad nature. *Wilcox,* 926 F. Supp. at 1103 (injunctive relief appropriate where conduct continued up to the time of the litigation); *Kitco,* 612 F. Supp. at 1296. *See generally Sterling Drug v. FTC,* 741 F.2d 1146 (9th Cir. 1984); *Sears, Roebuck & Co. v. FTC,* 676 F.2d 385 (9th Cir. 1982). Ancillary equitable relief is necessary to provide redress to consumers, to effectuate enforcement of Section 5 of the FTC Act, and to deter future violations by these Defendants. Moreover, as the Eleventh Circuit has stated previously, "since the public interest is involved in a proceeding of this nature, [the Court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Gem Merchandising,* 87 F.3d at 469.

63. There is a likelihood that Defendants' illegal conduct will recur. Defendants sold the Earn-a-Bankcard program with their own employees from February 2000, until November 2001. (*See* Findings of Fact, *supra* at ¶ 30) From June 2001, until served with this Court's TRO of April 9, 2002, Defendants provided substantial assistance and support to E-Credit Solutions and

Zentel in the sale of the Earn-a-Bankcard program by, among other things, creating and mailing postcard solicitations and providing scripts to E-Credit Solutions and Zentel that were substantively identical to those used by Defendants when their own employees were telemarketing the program. (*See id.*).

64. Further, Defendants' conduct was egregious and their fraud widespread. Sales scripts for the Earn-a-Bankcard program appear to have been crafted by Defendants to deceive consumers. Defendants' rebuttal script shows that they were well aware of the impression created in consumers' minds. Approximately 200,000 consumers paid either $189 or $199.95 for the deceptively marketed Earn-a-Bankcard program, (Stipulation at 15, Uncontested Fact 17) while over 234,000 consumers paid Defendants either $39 or $43 for the Approval Certificate program. (*See supra* Findings of Fact at ¶ 125)

65. Therefore, entry of injunctive relief against Defendants is warranted.

XI. Redress

66. Consumers injured as a result of Defendants' deceptive sales scheme are entitled to the monetary equivalent of rescission and restitution, even though that amount may exceed Defendants' unjust enrichment. As this Court has held in a previous 13(b) consumer fraud case, "[t]he appropriate measure of restitution is the aggregate amount invested by customers, less refunds made by Defendants." *SlimAmerica,* 77 F. Supp 2d at 1276, *quoting Wolf,* 1996 U.S. Dist. LEXIS at *27. *See also U.S. Oil and Gas Corp.*, 1987 U.S. Dist LEXIS at *64 (appropriate measure of restitution is aggregate amount invested by consumers, not defendants' unjust enrichment); *see also Security Rare Coin*, 931 F.2d at 1316 ; *FTC v. Windward Marketing, Ltd.,* No. 1:96-CV-615 FMH, 1997 U.S. Dist LEXIS at *45-46 (N.D. Ga. 1997) (proper equitable

remedy is full amount paid by consumers); *Kitco of Nevada, Inc.*, 612 F. Supp. at 1295-96; *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,709 (N.D. Cal. 1983).

67. Indeed, the Eleventh Circuit has held that Courts may order disgorgement of amounts paid to defendants under Section 13(b), including disgorgement of unclaimed funds to the United States Treasury. *Gem Marketing*, 87 F.3d at 468-70. As the Court noted in *Gem Marketing*, "[t]o hold otherwise would permit a Defendant to retain such funds simply by keeping poor records. Such a result would permit unjust enrichment and undermine the deterrence function of section 13(b)." *Id.* at 470. While consumer redress is one objective of section 13(b), another is to deprive the wrongdoer of his ill-gotten gains so as to serve deterrence. *Id.*

68. Section 19(b) of the FTC Act similarly empowers the Court to fashion relief it finds necessary to redress consumer injury resulting from Defendants' Rule violations. "Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation . . . ." 15 U.S.C. § 57b(b). Like redress under section 13(b), redress under section 19(b) is not limited to Defendants' gains from the deceptive practices, but is properly measured by the loss suffered by the victims. *Figgie Int'l,* 994 F.2d at 606.

69. Relying on *Figgie,* Defendants argue that 1) the full amount consumers paid to Defendants is not the appropriate measure of redress because Defendants products had some value, and 2) redress should be accomplished by establishing a fund, presumably of a significantly smaller amount, to which consumers may submit claims. (9 R. at 48-51.) Defendants reliance on *Figgie* is simply misplaced.

70. First, *Figgie* merely stands for the proposition that under Section 19(b), a court

may not order disgorgement in excess of redress. Contrary to Defendants' argument, *Figgie* found that the value of what was received by consumers should not be taken into account in determining the amount of restitution. *Figgie Int'l*, 994 F.2d at 606. As the Court noted, "[t]he fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds . . . ." *Id.*

71. Second, as the Eleventh Circuit has explained, *Figgie*, which did not allow for disgorgement, is inapplicable to an action brought under Section 13(b) of the FTC Act because redress in *Figgie* was made pursuant to Section 19(b) of the Act. *Gem Marketing*, 87 F.3d at 468-70. The case at bar was brought pursuant to both Sections 13(b) and Section 19(b), which provides restitutionary relief for violations of FTC Rules, such as the TSR. In *FTC v. Wolf*, this Court held that Rule violations are also violations of Section 5 of the FTC Act, which may be redressed under Section 13(b), as well as Section 19(b). *FTC v. Wolf*, 1996 U.S. Dist LEXIS 1760 at *126 n.4.

72. The measure of redress is thus the amount consumers paid. The FTC has established that consumers paid Defendants a total of $14,551,485 for the Earn-a-Bankcard program. Consumers paid E-Credit Solutions, to whom Defendants provided substantial assistance and support in violation of the TSR, a total of $13,708,971 for the Earn-a-Bankcard program. E-Credit Solutions, Inc., has paid redress in the amount of $601,030 pursuant to the Stipulated Final Judgment entered on May 21, 2003. Unredressed injury flowing from E-Credit's sale of the Earn-a-Bankcard program, for which Defendants are liable, is therefore $13,107,941. The appropriate redress amount for the Earn-a-Bankcard program is the amount consumers paid directly to Defendants and the unredressed amount paid to E-Credit for the Earn-a-Bankcard

program, or a total of $27,659,426.

73. The FTC has established that consumers paid Defendants a total of at least $8,603,126 for the Approval Certificate program after refunds given by Defendants are subtracted from gross revenues for the program. This constitutes the appropriate redress amount for the Approval Certificate program.

74. The FTC has established that Defendants, using the script that appears at PX 51 at 03-01738, debited consumers' bank accounts without authorization for Hartford Auto and MMS in an amount totaling at least $455,000.

75. Therefore, the appropriate amount of consumer redress in this case is $36,716,000.00. In the event that the full amount of redress cannot be distributed to purchasers of Defendants programs, the remaining funds shall be disgorged to the United States Treasury.

XII. Individual Liability

76. An individual Defendant may be held jointly and severally liable for redress to consumers for violations of the FTC Act when that individual (a) directly participated in the conduct or had the authority to control the conduct, and (b) had knowledge of the deceptive practices. *SlimAmerica,* 77 F. Supp. 2d at 1276; *Wilcox,* 926 F. Supp. at 1104; *FTC v. Jordan Ashley,* 1994 Trade Cas. (CCH) ¶ 70,570 at 72,096 (S.D. Fla. 1994), *citing Amy Travel Service,* 875 F.2d at 573; *Kitco of Nevada,* 612 F. Supp. at 1292.

77. Authority to control the company can be shown by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. *Amy Travel Service,* 875 F.2d at 573; *FTC v. National Business Consultants, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 68,984 at 63,340 (E.D. La. 1990); *Kitco of Nevada*, 612 F. Supp. at 1292.

78. The knowledge requirement may be met by showing that the individual had " 'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.' " *SlimAmerica,* 77 F. Supp. 2d at 1276; *Wilcox,* 926 F. Supp. at 1104; *Amy Travel Service*, 875 F.2d at 574, *quoting Kitco of Nevada*, 612 F. Supp. at 1292, *cited with approval by Jordan Ashley, 1994 Trade Cas.* at 72,096; *see also Wolf*, 1996 U.S. Dist LEXIS at *23-24; *Atlantex Assoc.*, 1987-2 Trade Cas. at 59,255; *FTC v. Pantron I Corp.*, 33 F.3d at 1103; *FTC v. Windward Marketing, Ltd.*, No. 1:96-CV-615 FMH, 1997 U.S. Dist LEXIS at *29 (N.D. Ga. Sept. 30, 1997); *Equifin,* 1997 U.S. Dist LEXIS at *47; *FTC v. Hayes,* 1997-2 Trade Cas. (CCH) ¶ 71,880 at 80,217 (E.D. Mo. 1997).

79. Principals, moreover, are liable under the FTC Act for their agents claims whether those agents are acting with actual or apparent authority, or whether the agents are employees or independent contractors. *U.S. Oil & Gas Co.*, 1987 U.S. Dist. LEXIS at *48-49; *see also Southwest Sunsites, Inc. v. FTC,* 785 F.2d 1431, 1438-39 (9th Cir. 1986) (Defendants liable for Section 5 violations committed by independent broker acting within the scope of its actual and apparent authority); *FTC v. Five Star Auto Club*, 97 F. Supp. 2d 502, 527-28 (S.D.N.Y. 2000) (for purposes of holding principals liable under section 5, it is irrelevant whether the agents are employees or independent contractors). As this Court said in *U.S. Oil & Gas,* "the 'independent contractor defense' has been frequently raised and invariably rejected." 1987 U.S. Dist. LEXIS at *48 n.99, *citing Goodman v. FTC,* 244 F.2d 584, 603-04 (9th Cir. 1957).

80. Defendants Martinez, Smith, and Lugo participated directly in the design, implementation, and telemarketing of the Earn-a-Bankcard program. Defendants Martinez and

Smith also had the authority to control the corporate Defendants' activities with respect to the Earn-a-Bankcard program. These Defendants knew or should have known that the marketing of the Earn-a-Bankcard program was deceptive, and that Defendants received payment in advance for an extension of credit. Defendants Martinez and Smith are also liable for consumer redress for violations of section 5 of the FTC Act and section 310.4(a)(4) of the TSR in connection with the Earn-a-Bankcard program.

81. Defendants Martinez and Smith participated directly in the sale and fulfillment of the Approval Certificate program. Defendants Martinez and Smith also had the authority to control the corporate Defendants' activities with respect to the Approval Certificate program, and knew or should have known that the marketing of the Approval Certificate was deceptive. However, Smith did not become involved with the Approval Certificate program until after January 2002. Therefore, Defendants Martinez and Smith are liable for consumer redress for violations of section 5 of the FTC Act in connection with the marketing of the Approval Certificate program, although Defendant Smith is responsible only after January 2002.

INJUNCTIVE PROVISIONS

DEFINITIONS

82. For purposes of these Injunctive Provisions, the following definitions apply:

1. ***Credit*** means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

2. ***Credit card*** means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

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, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term.

4. ***Defendants*** means Capital Choice Consumer Credit, Inc., Millennium Communications and Fulfillment, Inc., Ecommex Corporation, Hartford Auto Club, Inc., Ricardo E. Martinez, Johnnie Smith and Wilfredo Lugo, and each of them individually or severally.

5. ***Corporate defendants*** means Capital Choice Consumer Credit, Inc.; Millennium Communications and Fulfillment, Inc.; Ecommex Corporation; and Hartford Auto Club, Inc.; and each of them individually or severally.

6. ***Individual defendants*** means Ricardo E. Martinez, Johnnie Smith and Wilfredo Lugo, and each of them individually or severally.

7. ***Consumer*** means any person, including any individual, group, unincorporated association, limited or general partnership, corporation or other government or business entity.

8. ***Assisting others*** means knowingly providing any of the following goods or services to another entity: (1) performing customer service functions—including, but not limited to, receiving or responding to consumer complaints; (2) formulating or providing, or arranging for the formulation or provision of, any telephone sales script, mailing, electronic communication, point-of-purchase promotional material,

advertisement or any other marketing material; (3) providing names of, or assisting in the generation of, potential customers; or (4) performing marketing services of any kind.

9. *And* and *or* have both conjunctive and disjunctive meanings.

PERMANENT INJUNCTION

83. **IT IS HEREBY ORDERED** that defendants, whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, are hereby permanently restrained and enjoined from engaging or participating in the advertising, offering for sale, sale or distribution of credit cards.

PROHIBITED BUSINESS PRACTICES

84. **IT IS FURTHER ORDERED** that defendants, individually and severally, and their agents, servants, employees, attorneys and all persons or entities directly or indirectly under defendants' control, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each such person, whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, are hereby permanently restrained and enjoined from offering for sale, selling or promoting any secured credit card or any debit card without disclosing clearly and conspicuously in all sales and promotional materials the fact that the card is a secured credit card or a debit card and the credit limit of the credit card.[8]

RESTRICTION ON DEBITING CONSUMER ACCOUNTS

---

[8] This provision is reasonable fencing-in that it covers debit cards, which are similar to credit cards and ensures that if the ban provision is unenforceable, Defendants cannot resume their conduct that has already been found to be illegal.

85. **IT IS FURTHER ORDERED** that defendants, individually and severally, and their agents, servants, employees, attorneys and all persons or entities directly or indirectly under defendants' control, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each such person, whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, are hereby permanently restrained and enjoined from debiting or otherwise obtaining funds from any consumer's bank account, savings and loan account, credit union account or any other type of money or credit account unless, prior to making such debit or obtaining such funds, defendants have received in writing from the consumer whose account the funds are to come from a written and signed authorization which, at a minimum, contains the amount of the debit, the date(s) of such debit(s), the goods and/or services for which defendants are receiving payment and the name of the entity that is authorized to make the debit or obtain the funds.

BOND PROVISION

86. **IT IS FURTHER ORDERED** that defendants, individually and jointly, are permanently restrained and enjoined from engaging in telemarketing or assisting others engaged in telemarketing unless they first obtain a performance bond in the principal sum of TEN MILLION DOLLARS ($10,000,000).

1. This bond shall be conditioned upon compliance with Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Telemarketing Sales Rule, 16 C.F.R. § 304, and the provisions of this Order. The bond shall be deemed continuous and remain in full force and effect as long as defendants continue to engage in telemarketing or continue to assist others engaged in telemarketing, and

for at least three years after defendants have ceased to engage in such activity. The bond shall cite this Order as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due in whole or in part to any violation of Section 5 of the Federal Trade Commission Act, the Telemarketing Sales Rule or the provisions of this Order, or any other violation of law.

2. The performance bond required pursuant to this Section shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each of the states in which defendants do business and that holds a FEDERAL CERTIFICATE OF AUTHORITY AS ACCEPTABLE SURETY ON FEDERAL BOND AND REINSURING. Each such performance bond shall be in favor of both (1) the Federal Trade Commission for the benefit of any consumer injured as a result of any violation of Section 5 of the Federal Trade Commission Act, the Telemarketing Sales Rule or the provisions of this Order, made by any defendant or any of defendants' agents, or any other persons acting in concert with any defendant or under any defendant's authority, supervision or control, while engaged in telemarketing; and (2) any consumer so injured.

3. The bond required pursuant to this Section is in addition to, and not in lieu of, any other bond required by any other federal, state, or local law, or by any other court order not entered in this action.

4. At least ten days before the commencement of telemarketing or assisting others engaged in telemarketing, ***defendant or defendants*** shall provide a copy of the

bond required by this Section to the Director of the East Central Region of the FTC at the address specified in Section XII of this Order.

5. Defendant or defendants shall not disclose the existence of the performance bond to any consumer or other purchaser or prospective purchaser of any product or service that is advertised, promoted, offered for sale, sold or distributed via telemarketing, without also disclosing clearly and prominently, at the same time, "AS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT ARISING FROM CHARGES OF FALSE AND MISLEADING REPRESENTATIONS PREVIOUSLY MADE IN TELEMARKETING SALES."

TELEMARKETING SALES RULE

87. **IT IS FURTHER ORDERED** that defendants, individually and severally, and their agents, servants, employees, attorneys and all persons or entities directly or indirectly under defendants' control, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each such person, whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, are hereby permanently restrained and enjoined from violating the Telemarketing Sales Rule, 16 C.F.R. § 310.

PROHIBITION AGAINST DISTRIBUTION OF CUSTOMER LISTS

88. **IT IS FURTHER ORDERED** that defendants, individually and severally, and their agents, servants, employees, attorneys and all persons or entities directly or indirectly under defendants' control, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each such person,

whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, 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 or other identifying information of any person who paid any money to defendants at any time in connection with the offering for sale or sale of any good or service; ***provided, however,*** that any defendant may disclose such identifying information to a law enforcement agency or as required by any law, regulation or court order, and shall disclose such identifying information to the Commission pursuant to this Order.

PROHIBITION ON TRANSFERRING BUSINESS INFORMATION

89. **IT IS FURTHER ORDERED** that defendants, individually and severally, and their agents, servants, employees, attorneys and all persons or entities directly or indirectly under defendants' control, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, and each such person, whether acting directly or through any corporation, limited liability company, subsidiary, division or other device, are hereby permanently restrained and enjoined from transferring or in any other way providing to any person (other than a federal, state or local law enforcement agency or pursuant to a court order), directly or indirectly, any books, records, tapes, disks, accounting data, manuals, electronically stored data, banking records, invoices, telephone records, ledgers, payroll records, or other documents of any kind, including information stored in computer-maintained form, in the possession, custody or control of defendants, or any trade secrets or knowledge, whether recorded or otherwise, that are in any way related to defendants.

MONETARY RELIEF

90 **IT IS FURTHER ORDERED** that the corporate defendants and defendant Ricardo E. Martinez, jointly and individually, are liable for payment of equitable monetary relief—including, but not limited to, consumer redress and/or disgorgement, and for paying any attendant expenses of administration of any redress fund, in the amount of THIRTY-SIX MILLION, SEVEN HUNDRED AND SIXTEEN THOUSAND DOLLARS ($36,716,000):[9]

1. EIGHT MILLION, SIX HUNDRED AND THREE THOUSAND DOLLARS ($8,603,000) for the credit card sold through the certificate program also known as the Platinum Card;
2. FOURTEEN MILLION, FIVE HUNDRED AND FIFTY ONE THOUSAND DOLLARS ($14,551,000) for defendants' direct sale of the Earn a Bankcard program, also known as the Platinum Card and NCS or Diamond Select program;
3. THIRTEEN MILLION, ONE HUNDRED AND SEVEN THOUSAND DOLLARS ($13,107,000) for the sale of the Diamond Select credit card through E-Credit Solutions/Zentel Corporation;
4. FOUR HUNDRED AND FIFTY-FIVE THOUSAND DOLLARS ($455,000) for 1,000 Minute Mega Saver and Hartford Auto Club sales made in response to the upsale script in PX 51.

91. **IT IS FURTHER ORDERED** that defendants Wilfredo Lugo and Johnnie Smith are individually and jointly liable with the other Defendants for payment of equitable monetary

---

[9]The amount of equitable monetary restitution equals the amount paid by the consumer victims, less refunds. *FTC v. Febre*, 128 F.3d at 536. *See also FTC v. Gem Merchandising*, 87 F.3d 466; *FTC v. Amy Travel*, 875 F.2d at 570; *FTC v. Renaissance Fine Arts, Ltd.*, 1995-2 TRADE CAS. (CCH) ¶ 71,086 at 75,194 (N.D. Ohio 1995); *FTC v. Siluetas Distribs., Inc.*, 1995-1 TRADE CAS. (CCH) ¶ 70,918 at 74,099 (N.D. Cal. 1995).

relief—including, but not limited to, consumer redress and/or disgorgement and for paying any attendant expenses of the administration of any redress fund—in the amount of SIXTEEN MILLION, SEVEN HUNDRED NINETEEN THOUSAND DOLLARS ($16,719,000):[10]

1. FOURTEEN MILLION, FIVE HUNDRED AND FIFTY ONE THOUSAND DOLLARS ($14,551,000) for defendants' direct sale of the Earn-a-Bankcard program, also known as the Platinum Plus and NCS or Diamond Select program;

2. ONE MILLION, SEVEN AND THIRTEEN THOUSAND DOLLARS ($1,713,000) for the sale of the Diamond Select credit card through E-Credit Solutions/ Zentel Corporation based on TWENTY-FIVE DOLLARS ($25) per sale;

3. FOUR HUNDRED AND FIFTY-FIVE THOUSAND DOLLARS ($455,000) FOR 1,000 Minute Mega Saver and Hartford Auto Club sales made in response to the upsale script in PX 51.

92. **IT IS FURTHER ORDERED** that Defendant Johnnie Smith is individually and jointly liable with the other Defendants for payment of equitable monetary relief—including, but not limited to, consumer redress and/or disgorgement and for paying any attendant expenses of the administration of any redress fund—in the amount of NINE HUNDRED THOUSAND DOLLARS ($900,000) for the credit card sold through the certificate program also known as the Platinum

---

[10] Corporate and individual defendants may be held jointly and severally liable for the total amount of consumer injury. *FTC v. Amy Travel*, 875 F.2d at 570; *FTC v. Think Achievement Corp.*, 2000-2 TRADE CAS. (CCH) ¶ 73,084. Once the Commission shows that its calculations reasonably approximate the amount of consumers' net losses, the defendants have the burden of showing that the Commission's figures are inaccurate. *Febre*, 128 F.3d at 535; *Think Achievement Corp.*, 2000-2 Trade Cas. (CCH) ¶ 73,089.

Card.

ACKNOWLEDGMENT OF RECEIPT OF THIS ORDER

93. **IT IS FURTHER ORDERED** that, within ten (10) business days after entry of this Order, each of the defendants shall submit to the Commission a truthful sworn and notarized statement, in the form shown on Appendix A *infra*, that shall acknowledge receipt of this Order as entered.

USE OF CONSUMER REDRESS AND DISGORGEMENT FUNDS

94. **IT IS FURTHER ORDERED** that:

1. Plaintiff shall deposit funds received from defendants pursuant to this Order in an interest-bearing account administered by plaintiff or its agent;

2. All funds paid pursuant to this section shall 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 funds remain after redress is completed, plaintiff may apply any remaining funds to such other equitable relief (including consumer education remedies) as they determine to be reasonably related to the defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited as disgorgement to the United States Treasury.

MONITORING

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

1. Within ten (10) days of receipt of written notice from a representative of the

Commission, defendants shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendants' possession or direct or indirect control to inspect the business operation.

2. In addition, the Commission is authorized to monitor compliance with this Order 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;

   2. Posing as consumers and suppliers to defendants' employees, or any other entity managed or controlled in whole or in part by any defendant;

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, 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)).

3. Defendants shall permit representatives of the Commission to interview any employee, 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.

REPORTING PROVISIONS

96. **IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Order may be monitored:[11]

1. For a period of five (5) years from the date of entry of this Order,

    1. The individual defendants shall notify the Commission of the following:

        1. Any changes in defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

        2. Any changes in defendant's employment status (including self-employment) within ten (10) days of the date of such change. Such notice shall include the name and address of each business that defendant is affiliated with, employed by, or performs services for; a statement of the nature of the business; and a statement of defendant's duties and responsibilities in connection with the business; and

        3. Any changes in defendant's name or use of any aliases or fictitious names; and

    2. The corporate defendants shall 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,

[11]Courts may order record keeping and monitoring to ensure compliance with a permanent injunction. *See, e.g., FTC v. Slim America, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999); *see also FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753-54 (N.D. Ill. 1991); *FTC v. Sharp*, 782 F. Supp. 1445, 1456-57 (D. Nev. 1991).

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 the defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

2. One hundred eighty (180) days after the date of entry of this Order, defendants shall provide a written report to the FTC, 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 this Paragraph;
    2. A copy of each acknowledgment of receipt of this Order obtained by defendants pursuant to this Paragraph.

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

REGIONAL DIRECTOR
Federal Trade Commission
East Central Region
Eaton Center
1111 Superior Avenue — Suite 200
Cleveland, Ohio 44114–2507

Re: ***FTC v. Capital Choice Consumer Credit, Inc., et al.***
Case No. 02–21050—CIV, U.S.D.C., S.D. Florida

4. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate directly with the individual defendants.

97. **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Order, defendants and their 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 or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

1. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

2. 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;

3. 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;

4. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests; and

5. Copies of all sales scripts, training materials, advertisements, or other marketing materials.

98. **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Order,

1. Defendants shall deliver a copy of this Order to all principals, officers, directors, managers, employees, agents and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order.

2. Corporate defendants shall deliver this Order to current personnel within fifteen (15) days after the date of service of this Order, and shall deliver this Order to new personnel within fifteen (15) days after the person assumes such position or responsibilities.

3. Individual defendants shall deliver a copy of this Order to the principals, officers, directors, managers and employees under his control for any business that (1) employs or contracts for personal services from him and (2) has responsibilities with respect to the subject matter of this Order. Each individual defendant shall secure from each such person a signed and dated statement acknowledging receipt of the Order within fifteen (15) days after the date of service of the Order or the commencement of the employment relationship.

99. **IT IS FURTHER ORDERED** that, within thirty (30) days of the date of this Order, the Clerk of this Court shall remit to the Federal Trade Commission all funds in the Court's depository account held in the name(s) of Millennium Communications and Fulfillment, Inc., Capital Choice Consumer Credit, Inc., and Ecommex Corporation that were placed in the depository account pursuant to the Consent Order *Pendente Lite* dated April 23, 2002. These funds shall be remitted to:

REGIONAL DIRECTOR
Federal Trade Commission
East Central Region
Eaton Center
1111 Superior Avenue — Suite 200
Cleveland, Ohio 44114–2507

100. **IT IS FURTHER ORDERED** that within thirty (30) days of the date of this Order, Gregg J. Ormond, Esq., shall remit to the Federal Trade Commission the FOUR HUNDRED AND FIFTY THOUSAND DOLLARS ($450,000), plus any accrued interest, that was placed in an interest-bearing account pursuant to the Consent Order *Pendente Lite* dated April 23, 2002. These funds shall be remitted to:

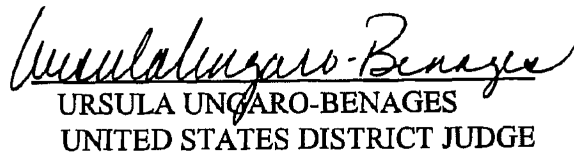
REGIONAL DIRECTOR
Federal Trade Commission
East Central Region
Eaton Center
1111 Superior Avenue — Suite 200
Cleveland, Ohio 44114–2507

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

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

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

DONE AND ORDERED in Chambers at Miami, Florida, this 18 day of February, 2004.



URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-2150-CIV
U.S. DISTRICT JUDGE UNGARO-BENAGES

FEDERAL TRADE COMMISSION, Plaintiff, v. CAPITAL CHOICE CONSUMER CREDIT, *et al.* Defendants.	**AFFIDAVIT OF DEFENDANT**

I, ______________________, being duly sworn, hereby states and affirms as follows:

1. My name is _________________________. My current residence address is ____. I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.

2. I am a Defendant in *FTC v. Capital Choice Consumer Credit, et al.* (United States District Court for the Southern District of Florida).

3. On ___________________, 200__, I received a copy of the Final Order and Permanent Injunction, which was signed by the Honorable Judge Ursula Ungaro-Benages and entered by the Court on _____________, 200__. A true and correct copy of the Order I received is appended to this Affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: ______________, 200__

____
NAME
State of ___________, City of _____________

Subscribed and sworn to before me

this ____ day of _________, 20___.

____
Notary Public
My Commission Expires: ______________________