

MAY 14 2008

JAMES N. HATTEN, Clerk

By: *JWH* Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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JAMES N. HATTEN, Clerk
Deputy Clerk

Case No. 1 08 - CV - 1739

FEDERAL TRADE COMMISSION, and

COMMONWEALTH OF KENTUCKY
EX REL. JACK CONWAY, ATTORNEY
GENERAL OF KENTUCKY,
Plaintiffs,

v.

DIRECT CONNECTION CONSULTING,
INC., a corporation, also d/b/a SureTouch
Long Distance;

DIGICOM, LLC, a limited liability
company, also d/b/a DigiTouch Long
Distance;

ELLIOTT BORENSTEIN, individually
and as an owner, officer or manager of
Direct Connection Consulting, Inc., and
Digicom, LLC; and

JOANN R. (JODY)WINTER, individually
and as an owner, officer or manager of
Direct Connection Consulting, Inc., and
Digicom, LLC,
Defendants.

~~EX PARTE~~
EX PARTE TEMPORARY
RESTRAINING ORDER WITH
ASSET FREEZE, THE
APPOINTMENT OF A
RECEIVER, AND OTHER
EQUITABLE RELIEF, AND
ORDER TO SHOW CAUSE
WHY A PRELIMINARY
INJUNCTION SHOULD NOT
ISSUE

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Plaintiffs, the Federal Trade Commission and the Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General of Kentucky, having filed their Complaint for Permanent Injunction and Other Equitable Relief pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, and having moved for an *ex parte* temporary restraining order and other relief pursuant Rule 65 of the Federal Rules of Civil Procedure, and the Court, having considered the Complaint, declarations, exhibits, and memorandum of law filed in support thereof, and now being advised in the premises, finds that:

1. This Court has jurisdiction over the subject matter of this case and there is good cause to believe that it will have jurisdiction over the parties.
2. Venue lies properly with this Court.
3. There is good cause to believe that Defendants, Direct Connection Consulting, Inc.; Digicom, LLC; Elliott Borenstein; and JoAnn R. (Jody) Winter (collectively “Defendants”), have engaged in and are likely to engage in the future in, acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, and the Kentucky

Consumer Protection Act, KRS 367.010 *et seq.*, and that the Commission is therefore likely to prevail on the merits of this action.

4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers will occur from the sale, transfer, or other disposition or concealment by Defendants of their assets or corporate records unless Defendants are immediately restrained and enjoined by order of this Court. Thus, there is good cause for an asset freeze, the appointment of a temporary receiver over the corporate Defendants, and for relieving Plaintiffs of the duty to provide Defendants with prior notice of Plaintiffs' motion.

5. Weighing the equities and considering Plaintiffs' likelihood of success, issuance of an *ex parte* temporary restraining order with asset freeze and other equitable relief is in the public interest.

6. No security is required of any agency of the United States for issuance of a temporary restraining order. Fed. R. Civ. P. 65(c).

DEFINITIONS

For purposes of this *Ex Parte* Temporary Restraining Order with Asset Freeze, the Appointment of a Receiver, and Other Equitable Relief, and Order to

Show Cause Why a Preliminary Injunction Should Not Issue (“Order”), the following definitions shall apply:

1. **“Asset” or “Assets”** means any legal or equitable interest in, right to, or claim to, any real or personal property, including, but not limited to, “goods,” “instruments,” “equipment,” “fixtures,” “general intangibles,” “inventory,” “checks,” or “notes,” (as these terms are defined in the Uniform Commercial Code), lines of credit, chattels, leaseholds, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and all cash, wherever located.
2. **“Defendants”** means Direct Connection Consulting, Inc.; Digicom, LLC; Elliott Borenstein; and JoAnn R. (Jody) Winter, and by whatever other names each may be known.
3. **“Document” or “Documents”** is synonymous in meaning and equal in scope to the documents and electronically stored information identified in Fed. R. Civ. P. 34(a), and includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary,

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

4. **“Financial institution”** means any bank, savings and loan institution, credit union, or any financial depository of any kind, including, but not limited to, any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, or precious metal dealer.

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

6. **“Person”** means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

7. **“Plaintiffs”** mean the Federal Trade Commission (“Commission” or “FTC”) and the Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General of Kentucky (“Commonwealth” or “Kentucky”).

8. **“Receivership Defendants”** means Direct Connection Consulting, Inc., and Digicom, LLC, and by whatever other names each may be known.

I. PROHIBITED BUSINESS ACTIVITIES

IT IS HEREBY ORDERED that, in connection with the advertising, marketing, promotion, offering for sale, or sale of any good or service, Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, members, partners, corporations, subsidiaries, affiliates, successors and assigns, 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, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of them, are hereby temporarily restrained and enjoined from:

- A. Misrepresenting, directly or indirectly, expressly or by implication, that:
- (a) Defendants are contacting consumers from, or on behalf of, or are otherwise affiliated with a major retailer or a consumer's credit card company;
 - (b) Defendants will provide consumers with free goods or services or assistance with unwanted credit card charges; or
 - (c) Consumers' credit card accounts will not be charged or their bank accounts will not be debited;

B. Charging consumers' credit cards or debiting consumers' bank accounts without their authorization;

C. Violating, or assisting others in violating, any provision of the TSR, including, but not limited to:

1. Section 310.3(a)(2)(i) of the TSR, 16 C.F.R. § 310.3(a)(2)(i), by misrepresenting, directly or by implication, the total costs to purchase, receive or use, any goods or services that are the subject of their sales offer;
2. Section 310.3(a)(2)(vii) of the TSR, 16 C.F.R. § 310.3(a)(2)(vii), by misrepresenting, directly or by implication, that they are calling from, on behalf of, or are otherwise affiliated with a major retailer or a consumer's credit card company;
3. Section 310.4(d) of the TSR, 16 C.F.R. § 310.4(d), by failing to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call:
 - (a) the identity of the seller;
 - (b) that the purpose of the call is to sell goods or services; and
 - (c) the nature of the goods or services;

4. Section 310.3(a)(1)(vii) of the TSR, 16 C.F.R. §310.3(a)(1)(vii), by failing to disclose truthfully, in a clear and conspicuous manner, before a consumer pays for the goods and services offered, all material terms and conditions of their negative option feature, including, but not limited to:
 - (a) that the consumer's account will be charged unless the consumer takes an affirmative action to avoid the charge;
 - (b) the date(s) the charge(s) will be submitted for payment; and
 - (c) the specific steps the consumer must take to avoid the charge(s);
5. Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6), by causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the consumer; and
6. Section 310.4(b)(1)(iii)(A) of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A), by engaging in, or causing others to engage in, initiating outbound telemarketing calls to persons who had previously stated that they do not wish to receive calls made by or on behalf of Defendants;

D. Violating, or assisting others in violating, the Kentucky Consumer Protection Act, KRS 367.010 *et. seq.*, as follows:

1. KRS 367.170, by engaging in unfair, false, misleading, or deceptive acts or practices in the conduct of trade or commerce;
2. KRS 367.46957, by failing to provide Kentucky consumers with a Notice of Cancellation Rights required by KRS 367.46963;
3. KRS 367.46955(5), by causing Kentucky consumers' credit card accounts to be charged without having obtained consumers' express written authorization or provided consumers the notice required in KRS 367.46961;
4. KRS 367.46955 (10), by directing or permitting employees to use a fictitious name or not to use their name while making a telephone solicitation to Kentucky consumers;
5. KRS 367.46955 (19), by engaging in any unfair, false, misleading, or deceptive practice or act as part of a telephone solicitation; and
6. KRS 367.46953 by:
 - (a) allowing their employees to use fictitious names;

- (b) failing to identify the product being offered within the first 30 seconds of the call; and
- (c) failing to inquire whether the consumers were interested in receiving a sales call within the first 30 seconds of the call.

II. MAINTAIN RECORDS AND REPORT NEW BUSINESS ACTIVITY

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, members, partners, corporations, subsidiaries, affiliates, successors and assigns, 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, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of them, are hereby restrained and enjoined from:

A. Failing to create and maintain books, records, accounts, bank statements, accountants' reports, general ledgers, general journals, cash receipt ledgers, cash disbursement ledgers and source documents, documents indicating title to real or personal property, and any other data which, in reasonable detail, accurately, fairly, and completely reflect the incomes, disbursements, transactions, dispositions, and uses of the Defendants' Assets;

B. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any Documents, including electronically stored information, that relate in any way to the business practices or business or personal finances of Defendants; to the business practices or finances of entities directly or indirectly under the control of Defendants; or to the business practices or finances of entities directly or indirectly under common control with any other Defendant; and

C. Creating, operating, or exercising any control over any new business entity, whether newly formed or previously inactive, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing Plaintiffs with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

III. ASSET FREEZE

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, members,

partners, corporations, subsidiaries, affiliates, successors and assigns, 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, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of them, are hereby restrained and enjoined from:

A. Transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, granting a lien or security interest or other interest in, or otherwise disposing of any funds, real or personal property or other Assets, or any interest therein, wherever located, including any Assets outside the territorial United States, that are: (1) owned, controlled or held by, or for the benefit of, in whole or in part, any Defendant; (2) in the actual or constructive possession of any Defendant, including, but not limited to, any Assets held for or by any Defendant in any account at any bank or savings and loan institution, or any credit card processing agent or agent providing electronic funds transfer services or automated clearing house processing, bank debit processing agent, network transaction processor, customer service agent, commercial mail receiving agency, or mail holding or forwarding company, or any credit union, retirement fund custodian,

money market or mutual fund, storage company, trustee, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, or other financial institution or depository of any kind, either within or outside the United States; (3) held by an agent of any Defendant as a retainer for the agent's provision of services to any Defendant; or (4) owned, controlled by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership or other entity directly or indirectly owned, managed, or controlled by any Defendant including, but not limited to, SureTouch, L.L.C., Choice Advantage, LLC, Choice Programs, LLC, Atlanta Aviation, LLC, Gilbor Aviation, LLC, and Ebor Management, Inc.;

B. Opening or causing to be opened any safe deposit boxes, commercial mail boxes, or storage facilities titled in the name of, or for the use or benefit of, any Defendant, or subject to access by any Defendant, or under the control of any Defendant;

C. Incurring charges or cash advances on any credit card, debit card, or lines of credit issued in the name, individually or jointly, of any Defendant;

D. Obtaining a personal or secured loan; and

E. Incurring liens or other encumbrances on real property, personal property, or other Asset titled in the name, individually or jointly, of any Defendant.

The Assets affected by this Section shall include both existing Assets and Assets acquired after the effective date of this Order.

IV. PROHIBITION ON DISCLOSING CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, members, partners, corporations, subsidiaries, affiliates, successors and assigns, 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, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of them, are hereby restrained and enjoined from:

A. Selling, renting, leasing, transferring, or otherwise disclosing the name, address, birth date, telephone number, email address, Social Security number, credit card number, bank account number, or other financial or identifying personal information of any person from whom or about whom any Defendant obtained such information in connection with activities alleged in the Complaint;

