

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

STEVEN L. KENNEDY,

Defendant.

Civ. No.: H-06-1980

**STIPULATED FINAL JUDGMENT AND
ORDER FOR PERMANENT INJUNCTION AGAINST STEVEN L. KENNEDY**

Plaintiff, the Federal Trade Commission ("Commission"), filed its Amended Complaint for a permanent injunction and other equitable relief in this matter pursuant to Sections 5(a) and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 53(b). After a trial on the merits, this Court found in favor of the Commission. Defendant timely appealed that ruling. Now Plaintiff and Defendant stipulate to the entry of, and request this Court to enter, this Stipulated Final Judgment and Order for Permanent Injunction Against Steven L. Kennedy ("Final Judgment and Order") to resolve all matters of dispute between them in this action without further appellate proceedings.

Being fully advised in the premises and acting upon the joint motion of the parties to enter this Final Judgment and Order,

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. This Court has jurisdiction over the subject matter of this case and personal jurisdiction over Defendant Steven L. Kennedy;

2. The Amended Complaint states a claim upon which relief may be granted against Defendant Steven L. Kennedy under Sections 5 and 13(b) of the FTC Act, 15 U.S.C. §§ 45 and 53(b);

3. Venue in this district is proper under 28 U.S.C. § 1391(b) and 15 U.S.C. § 53(b);

4. The activities of Defendant Steven L. Kennedy are “in or affecting commerce” as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44;

5. Entry of this Final Judgment and Order is in the public interest;

6. Defendant Steven L. Kennedy has read and fully understands the Amended Complaint against him and the provisions of this Final Judgment and Order, and he freely enters into this Final Judgment and Order; and

7. Defendant Steven L. Kennedy has waived all claims under the Equal Access to Justice Act, 28 U.S.C. § 2412, and all rights to seek judicial review or otherwise challenge the validity of this Final Judgment and Order. The parties shall each bear their own costs and attorney’s fees incurred in this action.

DEFINITIONS

For the purpose of this Final Judgment and Order, the following definitions shall apply:

A. “Defendant” means Steven L. Kennedy.

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

C. **“Document”** is synonymous in meaning and equal in scope to the usage of the term “documents or electronically stored information” 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 stored in any medium from which the 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.

D. **“Telemarketing”** means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer’s call or in a substantially similar catalog.

E. **“Telemarketer”** means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

F. **“Person”** means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

G. **“Internet services”** means any product or service that assists persons to access, use, search, browse, advertise on, communicate through, or do business on the Internet, including but not limited to: design, hosting and maintenance of web pages and Web sites, providing Internet access or e-mail accounts, and establishing domain names and virtual domain names.

H. **“Authorized purchaser”** means any person who has the authority to bind the person who would be responsible for payment of any charges associated with a telemarketing transaction.

I. **“Material terms of the offer”** means all terms material to an authorized purchaser’s decision to purchase, including, but not limited to:

1. the fact that the authorized purchaser will be billed unless the authorized purchaser takes affirmative action to cancel;
2. the account which will be billed if the authorized purchaser does not cancel;
3. the length of any trial period before a charge is assessed;
4. the amount of each charge and the frequency of each charge if the authorized purchaser does not cancel within the trial period;
5. a toll-free telephone number which may be utilized by the authorized purchaser to cancel prior to any billing; and
6. the terms and conditions of any refund policies.

J. **“Express written authorization”** means written authorization signed by the authorized purchaser which evidences clearly both the authorized purchaser’s receipt of all of the material terms of the offer of goods or services and the authorized purchaser’s subsequent

authorization of payment from a specific account for the goods or services which are the subject of the telemarketing transaction. For purposes of this Final Judgment and Order, the term “signed” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

K. **“Express oral authorization”** means oral authorization which is audio-recorded by an independent third-party and made available upon request to the authorized purchaser, the authorized purchaser’s bank, credit card company, or telephone company, and which evidences clearly both the authorized purchaser’s authorization of payment from a particular account for the goods or services which are the subject of the telemarketing transaction and the authorized purchaser’s receipt of all of the material terms of the offer of goods or services prior to the authorization. An audio recording of the entire telemarketing transaction must be made and maintained, and the telemarketer may not participate in that portion of the telemarketing call which is recorded for the purpose of documenting the authorized purchaser’s express oral authorization to be billed for goods and services.

L. **“Express informed consent”** means either express written authorization or express oral authorization.

M. **“Verification recording”** means an audio-recording of some or all of a telemarketing transaction which is created for the purpose of documenting an authorized purchasers’s express oral authorization to purchase goods or services and to be billed for those goods or services.

N. **“Active concert and participation”** means “active concert and participation” as that term is used in and construed under Rule 65(d), Fed. R. Civ. P.

O. “Material” and “materially,” when used to describe assets and representations made in previous financial statements and information provided to the Commission by Steven L. Kennedy, mean a difference of at least \$1,000.

ORDER

I. PROHIBITED MISREPRESENTATIONS

IT IS THEREFORE ORDERED that in connection with the telemarketing, advertising, promotion, offering for sale, or sale of any good or service, including but not limited to Internet services, Defendant Steven L. Kennedy, and each of his agents, servants, employees, and those persons in active concert or participation with him who receive actual notice of this Final Judgment and Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, affiliate, or other device, are permanently restrained and enjoined from misrepresenting, expressly or by implication, any material fact, including, but not limited to, misrepresenting:

- A. That a free trial service will be cancelled automatically if the authorized purchaser does not affirmatively approve the continuation of the service;
- B. That a verification recording is being made for any purpose other than to document the authorized purchaser’s express informed consent; and
- C. That an authorized purchaser is obligated to pay any charge for which the authorized purchaser has not given express informed consent.

II. PROHIBITED BILLING PRACTICES

IT IS FURTHER ORDERED that in connection with the telemarketing, advertising, promotion, offering for sale, or sale of any good or service, including but not limited to Internet services, Defendant Steven L. Kennedy, and each of his agents, servants, employees, and those

persons in active concert or participation with him who receive actual notice of this Final Judgment and Order by personal service or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, affiliate, or other device, are permanently restrained and enjoined from, directly or indirectly, billing or receiving money, or assisting others in billing or receiving money, from any authorized purchaser without the authorized purchaser's express informed consent.

III. PROHIBITION ON DISCLOSING CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendant Steven L. Kennedy is permanently restrained and enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, social security number, or other identifying information of any person who purchased services from the Defendant at any time prior to the date this Final Judgment and Order is entered. *Provided*, however, that Defendant Steven L. Kennedy may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

IV. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Defendant Steven L. Kennedy shall be liable for payment of equitable monetary relief, including but not limited to restitution and/or disgorgement, and for paying any attendant expenses of administration of any restitution fund, in the amount of TEN THOUSAND DOLLARS (\$10,000).

B. Within ten (10) days of entry of this Final Judgment and Order, Defendant Steven L. Kennedy shall turn over the entire payment of TEN THOUSAND DOLLARS (\$10,000) to the Commission in the form of a wire transfer or certified or cashier's check made payable to the

Commission, or such agent as the Commission may direct.

C. Time is of the essence for the payment specified above. In the event that Defendant Steven L. Kennedy does not fulfill, or only partially fulfills, the payment obligations set forth in this Section within ten (10) days, Defendant Steven L. Kennedy shall be immediately liable for payment of ONE HUNDRED THOUSAND DOLLARS (\$100,000), on which interest will accrue at a rate of 1½% per month until paid.

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

E. Defendant Steven L. Kennedy shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

F. Defendant relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Defendant shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.

G. Defendant agrees that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this Final Judgment and Order, including but not limited to a nondischargeability complaint in any bankruptcy case. Defendant further stipulates and agrees that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this Final Judgment and Order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).

V. FINANCIAL STATEMENTS

IT IS FURTHER ORDERED that:

A. The Commission's agreement to and the Court's approval of this Final Judgment and Order are expressly premised upon the truthfulness, accuracy, and completeness of the financial statements and information provided to the Commission by Defendant Steven L. Kennedy on or about June 19, 2006, February 27, 2007, and May 15, 2009, which contain material information relied upon by the Commission in negotiating and agreeing to the terms of this Final Judgment and Order.

B. If the Commission should have evidence that the above-referenced financial statements and information failed to disclose any material asset the value of which exceeds \$1,000, materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Commission may move that the Court reopen this Final Judgment and Order for the sole purpose of allowing the Commission to modify the monetary liability of Defendant Steven L. Kennedy. If the Court finds that Defendant Steven L. Kennedy failed to disclose any material asset, materially misrepresented the value of any asset, or made

any other material misrepresentation or omission in the above-referenced financial statements and information, the Court shall amend the judgment to require additional payment in the amount of the difference between the actual value of the asset or other representation and the value as represented. *Provided*, however, that in all other respects this Final Judgment and Order shall remain in full force and effect unless otherwise ordered by the Court.

C. Proceedings initiated under this Section are in addition to, and not in lieu of, any other civil or criminal penalties that may be provided by law, including any other proceedings the Plaintiff may initiate to enforce this Final Judgment and Order.

VI. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of (i) monitoring and investigating compliance with any provision of this Final Judgment and Order, and (ii) investigating the accuracy of Defendant's financial statements upon which the Commission's agreement to this Final Judgment and Order is expressly premised:

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendant Steven L. Kennedy 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 his possession or under his direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including, but not limited to:

I. Obtaining discovery from any person, without further leave of Court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45, and 69;

2. Posing as consumers and suppliers to Defendant, his employees, or any other entity managed or controlled in whole or in part by Defendant, without the necessity of identification or prior notice; and

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

Provided, however, that nothing in this Final Judgment and Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49 and 57b-1, to 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)).

VII. COMPLIANCE REPORTING BY DEFENDANT

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

- A. For a period of three (3) years from the date of entry of this Final Judgment and Order,
 1. Defendant Steven L. Kennedy shall notify the Commission of the following:
 - a. Any changes in Defendant's residence, mailing address, and/or telephone number within ten (10) days of the date of such change;
 - b. Any changes in Defendant's employment status (including self-employment), and any change in his ownership interest in any

business entity, within ten (10) days of the date of such change.

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

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

- 2. Defendant shall notify the Commission of any changes in corporate structure of any business entity that Defendant directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Final Judgment and Order, including, but not limited to: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Final Judgment and Order; or a change in the business name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the business entity about which Defendant learns less than thirty (30) days prior to the date the action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. One hundred and eighty (180) days after the date of entry of this Final Judgment and Order, and annually thereafter for a period of three (3) years, Defendant shall provide a written report to the Commission, which is true and accurate and sworn to under penalty of perjury, setting forth in detail the manner and form in which he has complied and is complying with this Final Judgment and Order. This report shall include, but not be limited to:

1. Defendant's then-current residence address, mailing addresses, and telephone numbers;
2. Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that the Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of the Defendant's duties and responsibilities in connection with the business or employment;
3. A copy of each acknowledgment of receipt of this Final Judgment and Order obtained pursuant to the Section titled: "Distribution of Final Judgment and Order for Permanent Injunction by Defendant;"
4. A list of all names under which Defendant has conducted or currently conducts business since entry of this Final Judgment and Order;
5. A list of all entities through which Defendant and each of his businesses has submitted, directly or indirectly, billings, including, but not limited to, telephone Local Exchange Carriers, billing aggregators, and credit card processors;
6. The names, addresses, and telephone numbers of all consumers who, after

entry of this Final Judgment and Order, have made complaints to, and/or requested refunds from, Defendant and each of his businesses;

7. A list of all domain names and web page addresses Defendant has registered or used in connection with telemarketing or marketing through the Internet; and
8. Any other changes required to be reported under Subsection A of this Section.

C. Each Defendant shall notify the Commission of the filing of a bankruptcy petition by the Defendant within fifteen (15) days of filing.

D. For the purposes of this Final Judgment and Order, the Defendant shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Final Judgment and Order to the Commission, to the following address:

Associate Director of Enforcement
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Washington, D.C. 20580
Re: *FTC v. Kennedy*, Civil Action No. 06-1980

Provided that, in lieu of overnight courier, Defendant may send the reports or notifications by first-class mail, but only if Defendant contemporaneously send an electronic version of the report or notification to the Commission at: DEBrief@ftc.gov.

E. For purposes of the compliance reporting and monitoring required by this Final Judgment and Order, the Commission is authorized to communicate directly with Defendant.

VIII. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of six (6) years from the date of entry of this Final Judgment and Order, in connection with any business where Defendant Steven L. Kennedy is the majority owner of the business or directly or indirectly manages or controls the business, Defendant and his agents, employees, officers, corporations, and those persons in active concert or participation with him who receive actual notice of this Final Judgment and Order by personal service or otherwise, are permanently restrained and enjoined from failing to create and/or retain the following records:

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;
- D. Records that reflect, for every written or oral consumer complaint or refund request received, whether directly or indirectly or through any third party: (1) the customer's name, address, and telephone number; (2) the written complaint or request, if any; (3) the basis of the complaint or request, including the name of any salesperson referenced; (4) the nature and result of any investigation conducted concerning the complaint or request; (5) each response and the date of such response to the complaint or request; (6) any final resolution of the complaint or

request, and the date of such resolution; and (7) in the event of a denial of any resolution, the reason for the denial;

E. Copies of all sales scripts, training materials, advertisements, or other promotional or marketing materials;

F. Copies of all contracts or agreements with telephone companies;

G. Copies of all contracts or agreements with telemarketers;

H. Copies of all contracts or agreements with billing aggregators;

I. Records reflecting contacts with customers regarding customer service: (1) the customer's name, address, and telephone number; (2) the stated reason for the contact; and (3) the nature and reason for any and all actions taken as a result of the customer service contact, including any actions taken solely from the impetus of any defendant;

J. All audio-recordings made in accordance with the provisions of this Final Judgment and Order; and

K. All records and documents necessary to demonstrate full compliance with each provision of this Final Judgment and Order, including, but not limited to, copies of acknowledgments of receipt of this Final Judgment and Order, required by the Sections titled "Distribution of Final Judgment and Order for Permanent Injunction by Defendant" and "Acknowledgment of Receipt of Order By Defendant," and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting By Defendant."

**IX. DISTRIBUTION OF FINAL JUDGMENT AND ORDER FOR
PERMANENT INJUNCTION BY DEFENDANT**

IT IS FURTHER ORDERED that, for a period of three (3) years from the date of entry of this Final Judgment and Order, Defendant Steven L. Kennedy shall deliver copies of this Final

Judgment and Order as directed below:

A. **Defendant Steven L. Kennedy as control person:** For any business that Defendant controls, directly or indirectly, or in which Defendant has a majority ownership interest, Defendant must deliver a copies of this Final Judgment and Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives of that business who engage in conduct related to the subject matter of this Final Judgment and Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting by Defendant." For current personnel, delivery shall be within five (5) days of service of this Final Judgment and Order upon Defendant. For new personnel, delivery shall occur prior to their assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting by Defendant," delivery shall be at least ten (10) days prior to the change in structure.

B. **Defendant Steven L. Kennedy as employee or non-control person:** For any business where Defendant is not a controlling person of the business but otherwise engages in conduct related to the subject matter of this Final Judgment and Order, Defendant must deliver a copy of this Final Judgment and Order to all principals and managers of such business before engaging in the conduct.

C. Defendant must secure a signed and dated statement acknowledging receipt of this Final Judgment and Order, within thirty (30) days of delivery, from all persons receiving a copy of the Final Judgment and Order pursuant to this Section.

**X. ACKNOWLEDGMENT OF
RECEIPT OF ORDER BY DEFENDANT**

IT IS FURTHER ORDERED that Defendant Steven L. Kennedy, within five (5) business days of receipt of this Final Judgment and Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Final Judgment and Order.

XI. COSTS AND ATTORNEYS' FEES

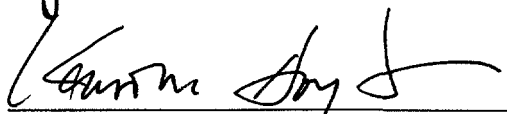
IT IS FURTHER ORDERED that each party to this Final Judgment and Order shall bear its own costs and attorneys' fees incurred in connection with this action; *provided however*, that in the event the Commission initiates proceedings to enforce the provisions of this Final Judgment and Order and the Court determines that the Defendant has violated any term of this Final Judgment and Order, the Defendant shall pay reasonable costs and attorneys' fees incurred by the Commission in connection with the proceedings to enforce this Final Judgment and Order.

XII. RETENTION OF JURISDICTION

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

IT IS SO ORDERED.

ENTERED, this 29th day of July, 2009.

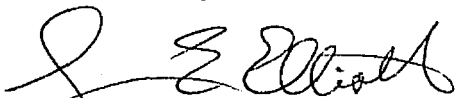

UNITED STATES DISTRICT JUDGE

SO STIPULATED:

FOR THE PLAINTIFF:

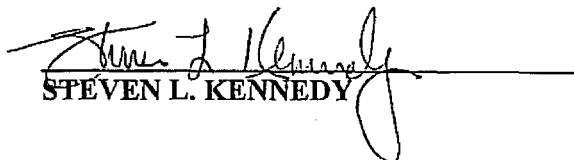
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General Counsel

DEANYA T. KUECKELHAN
Regional Director
Southwest Region

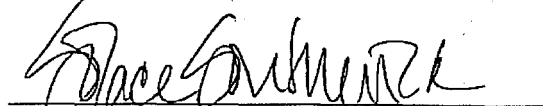


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