

MAY 14 2008

JAMES N. HATTEN, Clerk
By:  Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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.

Case No. ~~1~~ 08-CV-1739

COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF

Plaintiffs, the Federal Trade Commission (“FTC”) and the Commonwealth of Kentucky *ex rel.* Jack Conway, Attorney General of Kentucky (“Commonwealth of Kentucky”), for their complaint allege:

1. The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108, to obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, disgorgement of ill-gotten monies, and other equitable relief for Defendants’ acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and in violation of the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

2. The Commonwealth of Kentucky, by and through Jack Conway, Attorney General of Kentucky, brings this action under the Telemarketing Act, 15 U.S.C. §§ 6101-6108, and the Kentucky Consumer Protection Act, KRS 367.010 *et seq.*, to obtain a permanent injunction, preliminary relief, consumer restitution and other equitable relief, damages, civil penalties, and reimbursement of its costs, expenses and attorneys’ fees for violations of the TSR and the Kentucky Consumer Protection Act.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), 6103(a) and 6105(b) with respect to the federal claims and pursuant to 28 U.S.C. § 1367 with respect to the supplemental state law claims.

4. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. §§ 53(b) and 6103(e).

PLAINTIFFS

5. Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. The FTC is also charged with enforcement of the Telemarketing Act, 15 U.S.C. §§ 6101-6108. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the TSR, 16 C.F.R. Part 310, which prohibits deceptive and abusive telemarketing acts or practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the TSR, and to secure

such equitable relief as may be appropriate in each case, including restitution and disgorgement. 15 U.S.C. §§ 53(b), 57b, 6102(c), and 6105(b).

6. Plaintiff Commonwealth of Kentucky is one of the fifty sovereign States of the United States. Jack Conway is the duly elected and qualified Attorney General of Kentucky acting for Plaintiff Commonwealth of Kentucky in this action. Pursuant to authority found in 15 U.S.C. § 6103(a), Plaintiff Commonwealth of Kentucky is authorized to initiate federal district court proceedings to enjoin telemarketing activities that violate the TSR, and in each such case, to obtain damages, restitution, and other compensation on behalf of Kentucky residents. Plaintiff Commonwealth of Kentucky, by and through its Attorney General, also brings its state claims under the Kentucky Consumer Protection Act, KRS 367.010 *et seq.* This Court has supplemental jurisdiction over the Commonwealth of Kentucky's state claims under 28 U.S.C. § 1367.

DEFENDANTS

7. Defendant Direct Connection Consulting, Inc. ("DCCI") is a corporation with its principal place of business at 11660 Alpharetta Highway, Suite 650, Roswell, Georgia 30076. DCCI transacts or has transacted business in this District.

8. Defendant Digicom, LLC (“Digicom”) is a limited liability company with its principal place of business at 2060 Franklin Way, #1000, Marietta, Georgia 30067. Digicom transacts or has transacted business in this District.

9. Defendant Elliott Borenstein is an owner, officer or manager of DCCI and Digicom. In connection with the matters alleged herein, he resides or has transacted business in this District. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices of DCCI and Digicom, including the acts and practices set forth in this complaint.

10. Defendant JoAnn R. (Jody) Martin is an owner, officer or manager of DCCI and Digicom. In connection with the matters alleged herein, she resides or has transacted business in this District. At all times material to this complaint, acting alone or in concert with others, she has formulated, directed, controlled, or participated in the acts and practices of DCCI and Digicom, including the acts and practices set forth in this complaint.

DEFENDANTS’ BUSINESS ACTIVITIES

11. Defendants are sellers of numerous goods and services.

Defendants are also telemarketers that initiate outbound telephone calls to consumers in the United States to induce the purchase of their goods or services.

12. Defendants have engaged in telemarketing by a plan, program, or campaign 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.

13. At all times relevant to this complaint, Defendants have maintained a substantial course of trade or business in the offering for sale and sale of goods or services via the telephone, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

14. Since at least January of 2006, Defendants have been engaging in a deceptive and abusive telemarketing scheme to defraud consumers by charging their credit cards and debit accounts with a host of unwanted and unauthorized charges.

15. Defendants cold-call consumers and trick them into agreeing to pay for goods and services without consumers’ express informed consent.

16. Defendants offer consumers a variety of free goods and services, but instead charge consumers’ credit cards for other goods and services to which they did not consent. Consumers are offered various “free” goods and services, ranging

from free merchandise gift and gas cards to free resort vacations. However, instead of receiving “free” goods and services, consumers find themselves billed for goods and services they did not agree to purchase, such as SureTouch long distance telephone cards, buyers’ clubs memberships, or Girls Gone Wild videos.

The Initial Pitch

17. Defendants begin their relationship with consumers with a false representation about their affiliation or sponsorship. Defendants often claim to be either the agent or telemarketer of a major retailer, such as Wal-Mart, Target or Home Depot, or of a consumer’s credit card company. Defendants then offer free goods and services to induce consumers’ participation in a verification process.

18. While most consumers are induced by offers of free gifts, Defendants sometimes begin their calls by falsely claiming to be calling on behalf of consumers’ credit card companies in order to help them avoid unwanted charges on their credit card accounts.

The Purported Verification

19. Once consumers have been led to believe they will receive free goods or helpful services, Defendants trick consumers into giving their recorded consent to be billed.

20. Defendants use a variety of deceptive methods to obtain consumers' consent. In some instances, defendants' telemarketers tell consumers they must confirm their agreement to receive the free goods or services being offered by recording a confirmation for quality assurance purposes. Consumers are told that the confirmation will be read very quickly because it is so long and are therefore instructed to just say "yes" when prompted.

21. In other instances, Defendants' telemarketers pretend to be calling from the consumer's credit card company about possible unauthorized charges. The consumer is then asked to go through a purported cancellation process to avoid the unwanted charges. The telemarketers instruct consumers that they must listen to the telemarketer read a description of the unwanted products, say "yes" when prompted and then, only after the telemarketer has finished reading (and taping), state affirmatively that the consumer wants to cancel.

22. In yet other instances, consumers are asked to assist the telemarketer by listening to a "pretend" telemarketing pitch, respond affirmatively when prompted, and then rate the telemarketer's presentation and customer service skills.

23. The telemarketers read their pitch so fast that it is largely unintelligible.

24. If consumers interrupt the pitch or refuse to answer in the affirmative when prompted, the telemarketer insists that the consumer allow the telemarketer to read the script without interruption and to just say “yes” when prompted.

25. Those consumers who do understand that they are being asked to authorize a charge are told that they can repudiate as soon as the recorded pitch concludes and they will still be allowed to keep the promised free goods and services.

26. Defendants repeatedly assure consumers that they will not be charged for any goods or services.

27. Defendants tell consumers that they cannot be charged because the consumers have not provided their billing information to Defendants. Indeed, Defendants tell consumers that it is simply not possible for the Defendants to bill consumers since Defendants do not have consumers’ billing information.

28. Defendants do not obtain consumers’ billing information from consumers prior to charging consumers’ credit cards or debiting their bank accounts.

29. Defendants do not tell consumers that they already have sufficient access to their full data string of billing information and will use that

information to charge consumers' credit cards or debit their bank accounts.

30. Consumers who refuse to provide their taped assent or who refuse to participate in the telemarketing call are, in many instances, harassed by telemarketers. Defendants' telemarketers harass consumers by calling their homes repeatedly, as many as six times a day, until the consumer agrees to listen to the telemarketing pitch and answer affirmatively when prompted.

31. Defendants continue to call consumers even after consumers specifically request that they stop calling. In fact, in some instances Defendants' telemarketers tell consumers that the only way to be placed on their internal Do-Not-Call list is to listen to the telemarketing pitch and answer affirmatively when prompted.

What Consumers Actually Receive

32. Consumers do not receive what they are promised. Many consumers receive nothing from Defendants, but are nonetheless charged. At best, consumers may receive a SureTouch long distance telephone card (but not a free trial), a buyer's club membership (for which they are charged) or Girls Gone Wild videos (for which they are charged).

33. Goods and services are charged to consumers' credit cards or debited from their bank accounts on a negative option basis. Consumers are charged each month until they realize that they are being billed and call to cancel. A negative option, in this instance, refers to the practice of a seller deeming an offer of goods or services accepted by a consumer based on the consumer's silence or failure to take an affirmative action.

34. The promised free gifts are often not delivered. However, even when delivered, the free gifts prove worthless. These "free gifts" invariably come at a price and with undisclosed cost and fees. For example, a "free \$40 gas coupon" turns out to be gasoline rebate vouchers. In order to use these vouchers, victims must save receipts, seek reimbursement from Defendants, and may only use one \$5 voucher every three months. Furthermore, in order to participate in the voucher program, the consumer must maintain active, paid membership in Defendants' buyer's club.

35. Some consumers' accounts are charged without Defendants speaking to consumers or even contacting them at all.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

36. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

37. Under Section 5(n) of the FTC Act, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).

**Count One: Misrepresentations of Material Fact
(By Plaintiff FTC)**

38. In numerous instances, in the course of marketing their goods or services, Defendants represent, directly or indirectly, expressly or by implication, that:

- (a) they are contacting consumers from, or on behalf of, or are otherwise affiliated with a major retailer or a consumer’s credit card company;
- (b) they will provide consumers with free goods or services or assistance with unwanted credit card charges; and that
- (c) consumers’ credit card accounts will not be charged or their bank accounts will not be debited.

39. In truth and in fact, in numerous instances in which Defendants have made the representations above:

- (a) they are not contacting consumers from, or on behalf of, or are not otherwise affiliated with a major retailer or the consumer's credit card company;
- (b) they do not provide consumers with free goods or services or assistance with unwanted credit card charges; and
- (c) they charge consumers' credit cards accounts or debit consumers' bank accounts.

40. Therefore, Defendants' representations as set forth in Paragraph 38 of this Complaint are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**Count Two: Unfair Unauthorized Charges
(By Plaintiff FTC)**

41. In numerous instances, Defendants have charged consumers' credit cards and debited their bank accounts without authorization.

42. Defendants' practice of charging consumers' credit cards and

debiting their bank accounts without authorization causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by benefits to consumers or competition.

43. Therefore, Defendants' practice, as set forth in Paragraphs 41 and 42 of this Complaint, constitutes an unfair act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

44. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108, in 1994. On August 16, 1995, the FTC adopted the Telemarketing Sales Rule (the "Original TSR"), 16 C.F.R. Part 310, which became effective on December 31, 1995. On January 29, 2003, the FTC amended the Original TSR by issuing a Statement of Basis and Purpose, and the final amended Telemarketing Sales Rule (the "TSR"). 68 Fed. Reg. 4580, 4669.

45. Defendants are "seller[s]" or "telemarketer[s]" engaged in "telemarketing," as defined by the TSR, 16 C.F.R. § 310.2(z), (bb), and (cc).

46. The TSR prohibits sellers and telemarketers from misrepresenting,

directly or by implication, in the sale of goods or services, any of the following information:

- (a) the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer.

16 C.F.R. § 310.3(a)(2)(i); or

- (b) a seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity. 16 C.F.R.

§ 310.3(a)(2)(vii).

47. It is an abusive telemarketing act or practice and a violation of the TSR for a telemarketer in an outbound telephone call to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information, among other information:

- (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. 16 C.F.R. § 310.4(d).

48. The TSR requires that sellers and telemarketers who make offers that

include a negative option feature 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 the negative option feature, including, but not limited to:

- (a) the fact 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). 16 C.F.R. § 310.3(a)(1)(vii).

The TSR defines a "negative option feature" to mean, in an offer or agreement to sell or provide any goods or services, "a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(t).

49. It is an abusive telemarketing act or practice and a violation of the TSR for any seller or telemarketer to cause billing information to be submitted for payment, directly or indirectly, without the express informed consent of the consumer. 16 C.F.R. § 310.4(a)(6). In order to establish the consumer's "express informed consent" in a telemarketing transaction that involves preacquired account

information, the seller or telemarketer must: at a minimum, identify the account to be charged with sufficient specificity for the consumer to understand what account will be charged, and obtain from the consumer his or her express agreement to be charged for the goods or services and to be charged using the account number identified. 16 C.F.R. § 310.4(a)(6)(ii)(A) and (B). The TSR defines “preacquired account information” to mean “any information that enables a seller or telemarketer to cause a charge to be placed against a consumer’s account without obtaining the account number directly from the consumer or donor during the telemarketing transaction pursuant to which the account will be charged.” 16 C.F.R. § 310.2(w).

50. Since December 31, 1995, sellers and telemarketers have been prohibited from initiating an outbound telephone call to any person when that person has previously stated that he does not wish to receive an outbound call made by or on behalf of the seller whose goods or services are being offered, or made on behalf of the charitable organization for which a charitable contribution is being solicited. 16 C.F.R. § 310.4(b)(1)(iii)(A).

51. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR

constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**Count Three: Misrepresenting Total Costs
(By Each Plaintiff)**

52. In numerous instances, in the course of telemarketing goods and services, Defendants have misrepresented, directly or by implication, the total costs to purchase, receive, or use, the goods or services that are the subject of their sales offer.

53. Defendants' practice as alleged in Paragraph 52 is a deceptive telemarketing practice that violates Section 310.3(a)(2)(i) of the TSR, 16 C.F.R. § 310.3(a)(2)(i).

**Count Four: Misrepresenting Defendants' Affiliations
(By Each Plaintiff)**

54. In numerous instances, in the course of telemarketing their goods and services, Defendants have misrepresented, 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.

55. Defendants' practice as alleged in Paragraph 54 is a deceptive

telemarketing practice that violates Section 310.3(a)(2)(vii) of the TSR, 16 C.F.R. § 310.3(a)(2)(vii).

**Count Five: Failure to Make Required Disclosures
(By Each Plaintiff)**

56. In numerous instances, in the course of telemarketing goods and services, Defendants in an outbound telephone call have failed 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.

57. Defendants' practice as alleged in Paragraph 56 is an abusive telemarketing practice that violates Section 310.4(d) of the TSR, 16 C.F.R. § 310.4(d).

**Count Six: Failure to Disclose Negative Option Feature
(By Each Plaintiff)**

58. In numerous instances, in the course of telemarketing their goods and services, Defendants have failed to disclose truthfully, in a clear and conspicuous

manner, before a consumer pays for the goods or services offered, all material terms and conditions of the 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).

59. Defendants' practice as alleged in Paragraph 58 is a deceptive telemarketing practice that violates Section 310.3(a)(1)(vii) of the TSR, 16 C.F.R. §310.3(a)(1)(vii).

**Count Seven: Lack of Express Informed Consent to be Billed
(By Each Plaintiff)**

60. In numerous instances, in the course of telemarketing their goods and services, Defendants have caused billing information to be submitted for payment, directly or indirectly, without the express informed consent of the consumer.

61. Defendants' practice as alleged in Paragraph 60 is an abusive telemarketing act or practice that violates Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6).

**Count Eight: Violation of Entity-Specific Do-Not-Call Rule
(By Each Plaintiff)**

62. In numerous instances, in connection with telemarketing, Defendants have engaged in or caused 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.

63. Defendants' practice as alleged in Paragraph 62 is an abusive telemarketing practice that violates Section 310.4(b)(1)(iii)(A) of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A).

THE KENTUCKY CONSUMER PROTECTION ACT

64. The Kentucky Consumer Protection Act, KRS 367.010 *et. seq.*, prohibits "unfair, false, misleading, or deceptive acts or practices in the conduct of trade or commerce." KRS 367.170.

65. The Commonwealth alleges that the Defendants made "telephone solicitations" to Kentucky residents which solicitations are subject to the requirements of Kentucky Revised Statutes, KRS 367.46951, *et seq.*

66. KRS 367.46967 (1) provides that "[a] violation by a telemarketing company, telemarketer, caller or merchant of KRS 367.46951 to 367.46999 shall constitute an unfair, false, misleading, or deceptive act or practice in the conduct of

trade or commerce in violation of KRS 367.170.”

67. KRS 367.990(25)(a) provides: “Notwithstanding any other provision of law, any telemarketing company, telemarketer, caller, or merchant that violates KRS 367.46951 to 367.46999 shall be assessed a civil penalty of not more than five thousand dollars (\$5,000.00) for each offense.”

68. KRS 367.990(2) provides: “In any action brought under KRS 367.190, if the Court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by KRS 367.170, the Attorney General, upon petition to the Court, may recover, on behalf of the Commonwealth, a civil penalty of not more than two thousand dollars (\$2,000) per violation”

VIOLATIONS OF THE KENTUCKY CONSUMER PROTECTION ACT

Count Nine: Unfair, False, Misleading or Deceptive Acts (By Plaintiff Commonwealth of Kentucky Against All Defendants Except Digicom)

69. The Commonwealth of Kentucky alleges that the Defendants’ acts and practices described herein were unfair, false, misleading, or deceptive acts or practices in the conduct of trade or commerce in violation of the Kentucky Consumer Protection Act.

70. Defendants have violated the Kentucky Consumer Protection Act, KRS 367.170, by engaging in the acts or practices described herein in connection with trade or commerce.

71. The Commonwealth of Kentucky alleges that each of the acts and omissions of Defendants alleged in the Commonwealth's Complaint were committed willfully.

**Count Ten: Notice of Cancellation Rights
(By Plaintiff Commonwealth of Kentucky
Against All Defendants Except Digicom)**

72. Pursuant to KRS 367.46963 a contract with a Kentucky consumer obtained through a telephone solicitation must meet certain statutory requirements. For example, the contract must contain a "Notice of Cancellation of Rights" which notice provides, *inter alia*, a fourteen-day right to cancel dated from the later of (a) the consumer's receipt of the goods; or (b) the consumer's receipt of two (2) copies of a written notice of cancellation rights containing the statutorily prescribed notice in 10 point type, which reads as follows:

NOTICE OF CANCELLATION RIGHTS
BECAUSE YOU AGREED TO BUY THESE GOODS (or services or
other appropriate description) AS A RESULT OF AN UNSOLICITED
TELEPHONE CALL, KENTUCKY LAW GIVES YOU FOURTEEN
(14) DAYS TO CANCEL YOUR AGREEMENT WITH US. IF YOU
WANT TO CANCEL, YOU MUST SIGN YOUR NAME BELOW

AND RETURN A COPY OF THIS NOTICE, TOGETHER WITH ANY GOODS YOU HAVE RECEIVED, SO THEY ARE POSTMARKED NO LATER THAN MIDNIGHT OF THE FOURTEENTH DAY FOLLOWING THE DATE YOU RECEIVED THE GOODS OR AGREED TO THE SERVICES, OR THE FOURTEENTH DAY FOLLOWING THE DATE YOU RECEIVED THIS NOTICE, WHICHEVER IS LATER. THE NOTICE AND GOODS MUST BE ADDRESSED AS FOLLOWS:

(Name and address of Merchant)

I want to cancel my agreement to purchase.

(Signature)

(Name of Consumer - Printed)

(Address of Consumer - Printed)

(Address - City, State, Zip)

(Date)

KRS 367.46961.

73. Pursuant to KRS 367.46957: "A contract or agreement made as a result of a telephone solicitation violating KRS 367.46951 to 367.46999 is voidable by the consumer for any reason at any time and shall not be enforced against the consumer." (Emphasis added).

74. Upon information and belief the Defendants failed to provide Kentucky consumers the Notice of Cancellation Rights required by KRS 367.46963 and violated KRS 367.46957 by enforcing their putative contracts

against consumers, including consumers who attempted to cancel said contracts.

**Count Eleven: Unauthorized Billing
(By Plaintiff Commonwealth of Kentucky
Against All Defendants Except Digicom)**

75. Pursuant to KRS 367.46955: “It is a prohibited telephone solicitation act or practice and a violation of KRS 367.46951 to 367.46999 for any person making a telephone solicitation to engage in the following conduct:

Obtaining or submitting for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, or bond or other account without the consumer's express written authorization, or charging a credit card account or making electronic transfer of funds except in conformity with KRS 367.46963.”

KRS 367.955(5).

76. The Commonwealth of Kentucky alleges that the Defendants made telephone solicitations and in connection therewith violated KRS 367.46955(5) by, *inter alia*, 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.

**Count Twelve: Use of Fictitious Names
(By Plaintiff Commonwealth of Kentucky
Against All Defendants Except Digicom)**

77. Pursuant to KRS 367.46955: “It is a prohibited telephone solicitation act or practice and a violation of KRS 367.46951 to 367.46999 for any person making a telephone solicitation to engage in the following conduct: “[d]irecting or permitting employees to use a fictitious name or not to use their name while making a telephone solicitation.” KRS 367.46955(10).

78. Upon information and belief, Defendants violated 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.

**Count Thirteen: Unfair, False, Misleading
or Deceptive Telemarketing Practices
(By Plaintiff Commonwealth of Kentucky
Against All Defendants Except Digicom)**

79. Pursuant to KRS 367.46955: “It is a prohibited telephone solicitation act or practice and a violation of KRS 367.46951 to 367.46999 for any person making a telephone solicitation to engage in the following conduct: engaging in any unfair, false, misleading, or deceptive practice or act as part of a telephone solicitation.” KRS 367.955 (19).

80. The Commonwealth of Kentucky alleges that the acts and practices alleged herein constitute unfair, false, misleading or deceptive acts or practices in violation of KRS 367.46955(19).

**Count Fourteen: Failure to Disclose
(By Plaintiff Commonwealth of Kentucky
Against All Defendants Except Digicom)**

81. Pursuant to KRS 367.46953 a caller making a telephone solicitation must “immediately” disclose specific information about the identity of the caller, and within thirty seconds, provide information about the purpose of the call.

82. Upon information and belief, the Defendants violated the requirements of 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. **CONSUMER INJURY**

83. Consumers in the United States have suffered and will continue to suffer injury as a result of Defendants’ violations of the FTC Act and the TSR. In addition, Defendants have been unjustly enriched as a result of their unlawful

practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

84. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of the FTC Act. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission of contracts and restitution, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

85. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR, including the rescission and reformation of contracts, and the refund of money.

86. Section 4(a) of the Telemarketing Act, 15 U.S.C. § 6103(a), empowers this Court to grant the Commonwealth of Kentucky injunctive and such other relief as the Court may deem appropriate to halt violations of the TSR and to redress injury to consumers, including the award of damages, restitution, or other

compensation.

87. Pursuant to 28 U.S.C. § 1367, this Court has supplemental jurisdiction to allow Plaintiff Commonwealth of Kentucky to enforce its state law claims against Defendants in this Court for violations of the Kentucky Consumer Protection Act, KRS 367.010 *et seq.*, and to grant such relief as provided under state law, including injunctive relief, restitution, a civil penalty of up to \$5,000 per violation, a civil penalty of up to \$2,000 per willful violation, costs and attorneys fees, and such other relief to which the Commonwealth of Kentucky may be entitled.

PRAYER FOR RELIEF

Wherefore, Plaintiff Federal Trade Commission, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equitable powers, and Plaintiff Commonwealth of Kentucky, pursuant to Section 4(a) of the Telemarketing Act, 15 U.S.C. § 6103(a), and the Kentucky Consumer Protection Act, KRS 367.010 *et seq.*, and the Court's own equitable powers, request that the Court:

A. Award Plaintiffs such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief, including but not

limited to, temporary and preliminary injunctive relief, an order freezing assets, immediate access to business premises and the appointment of a receiver;

B. Enter a permanent injunction to prevent future violations of the FTC Act, the TSR, and the Kentucky Consumer Protection Act, by Defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, the TSR, and the Kentucky Consumer Protection Act, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;

D. Award Plaintiff Commonwealth of Kentucky a civil penalty of \$5,000 per violation as authorized by KRS 367.990(25), or alternatively, a civil penalty of \$2,000 per willful violation as authorized by KRS 367.990(2);

E. Award Plaintiff Commonwealth of Kentucky the costs of bringing this action and reasonable attorneys' fees, as well as such other and additional relief as the Court may determine to be just and proper;

F. Award Plaintiff Federal Trade Commission the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted this 14th day of May, 2008

FEDERAL TRADE COMMISSION
WILLIAM BLUMENTHAL
General Counsel



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COMMONWEALTH OF KENTUCKY *EX*
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