

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Case No. 8:08-cv-899-T-17 MAP

USA FINANCIAL, LLC, a Florida Limited
Liability Company,

AMERICAN FINANCIAL CARD, INC.,
formerly known as CAPITAL FINANCIAL,
INC., a corporation,

JEFFREY R. DEERING, individually and as
owner, officer, or manager of the
above-listed corporations,

RICHARD R. GUARINO, individually and as
owner, officer, or manager of the
above-listed corporations, and

JOHN F. BUSCHEL, Jr., individually and as
owner, officer, or manager of one or both of
the above-listed corporations,

Defendants.

FINAL JUDGMENT AND ORDER
FOR PERMANENT INJUNCTION

This matter comes before the Court on the complaint of Plaintiff, Federal Trade Commission, against Defendants, USA Financial, LLC (“USA Financial”), American Financial Card, Inc., formerly known as Capital Financial, Inc. (“American Financial”), Jeffrey R. Deering (“Deering”), Richard R. Guarino (“Guarino”), and John F. Buschel, Jr. (“Buschel”).

Plaintiff commenced this action by filing their complaint for a permanent injunction and other relief pursuant to 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. The complaint alleges that Defendants engaged in unfair and deceptive acts and practices in connection with the telemarketing of goods and services, including an advance fee credit card.

Plaintiff has filed a motion for summary judgment against the Defendants, and that motion is now granted. Accordingly, for a Final Judgment and Order against Defendants, it is hereby ORDERED, ADJUDGED, AND DECREED:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and personal jurisdiction over the Defendants.
2. Venue in the Middle District of Florida is proper.
3. The activities of Defendants are or were “in or affecting commerce,” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The Federal Trade Commission has authority to seek the relief it has requested and the complaint states a claim upon which relief may be granted under §§ 5(a)(1), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 53(b) and 57b; and under the TSR, 16 C.F.R. Part 310.
5. This Final Judgment and Order (“Final Order”), and the relief awarded herein, is in addition to, and not in lieu of, any other remedies that may be provided by law, including both civil and criminal remedies.
6. Entry of this Final Order is in the public interest.

FINAL ORDER

DEFINITIONS

For the purpose of this Final 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, deposits, reserve accounts, funds, any monies held for or on behalf of Defendants or for the benefit of Defendants, and all cash belonging to Defendants, wherever located.

2. "Assisting others" includes, but is not limited to, providing any of the following services to any person or entity: (a) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other marketing material; (c) performing marketing services of any kind; or (d) providing credit card merchant processing accounts, or otherwise providing access to a billing and collection system (such as a credit card, checking, savings, share or similar account, utility bill, telephone bill, mortgage loan account or debit card), or causing any charges to be made to such an account or utilizing such a system.

3. "Billing information" means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

4. "Corporate Defendants" means USA Financial, LLC, and American Financial

Card, Inc., formerly known as Capital Financial, Inc., and their successors and assigns.

5. “Customer” means any person who is or may be required to pay for goods or services offered through telemarketing.

6. “Defendants” means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.

7. “Document” means writings, drawings, graphs, charts, photographs, sound recordings, images, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form and is synonymous in meaning and equal in scope to the usage of the term in the Federal Rules of Civil Procedure 34(a). A draft or non-identical copy of a document is a separate document within the meaning of the term.

8. “Individual Defendants” means Jeffrey R. Deering, Richard R. Guarino, and John F. Buschel, Jr., by whatever other names each may be known, and any fictitious business entities or business names created or used by these individuals, or any of them.

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

10. “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.

11. “Plaintiff” means the Federal Trade Commission (“Commission” or “FTC”).

12. “Receiver” means Mark J. Bernet, Esq.

13. “Receivership Defendants” means the Corporate Defendants, USA Financial, LLC, and American Financial Card, Inc.

14. "Representatives" means Defendants' officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, corporations, subsidiaries, affiliates, successors, and assigns, and those persons in active concert or participation with them, who receive actual notice of this Final Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device.

15. "Telemarketer" means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.

16. "Telemarketing" is defined by the Telemarketing Sales Rule, 16 C.F.R. § 310.2(cc), and 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.

17. The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary, and to make the applicable phrase or sentence inclusive rather than exclusive.

I.

BAN ON TELEMARKETING

IT IS THEREFORE ORDERED that Defendants Deering, Guarino, and Buschel are permanently restrained and enjoined from engaging or participating in telemarketing of any kind, in any manner or capacity whatsoever, whether directly, indirectly through an intermediary or otherwise, individually, or through any business entity or other device.

II.

PROHIBITED BUSINESS ACTIVITIES

IT IS FURTHER ORDERED that, in connection with the advertising, promotion, offering, or sale of any product or service, Defendants and their Representatives are hereby permanently restrained and enjoined from:

A. Misrepresenting, or assisting others in misrepresenting, expressly or by implication, that:

1. After paying a consumer a fee, Defendants will or are likely to provide the consumer with a general-purpose credit card, such as a MasterCard or Visa;
or
2. Defendants report consumers' credit histories to credit bureaus;

B. Making or assisting others in making, expressly or by implication, any false or misleading statement or representation of Material fact in connection with any offer of any good or service, including, but not limited to:

1. Any Material restrictions, limitations, or conditions to purchase, receive, or use the goods or services; or
2. Any Material aspect of the nature or terms of a refund, cancellation,

exchange, or repurchase policy for the goods or services;

C. Failing to disclose, or disclose adequately, Material terms and conditions of any offer of any good or service, including, but not limited to, any and all fees and expenses associated with any credit card offer; and

D. Violating, or assisting others in violating, any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310, including, but not limited to:

1. Section 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii), by misrepresenting, directly or by implication, Material aspects of the performance, efficacy, nature, or central characteristics of an product or service Defendants sell, including, but not limited to, any false claim that a credit card is a general-purpose credit card;
2. Section 310.3(a)(4) of the TSR, 16 C.F.R. § 310.3(a)(4), by making false or misleading statements to induce a person to pay for goods or services, including, but not limited to, statements that Defendants report consumers' credit histories to major credit bureaus; and
3. Section 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4), by requesting or receiving payment of a fee or consideration in advance of consumers obtaining a credit card when the Defendants have guaranteed or represented a high likelihood of success in obtaining or arranging the acquisition of a credit card for such consumers;

III.

PROHIBITION ON SELLING OF CUSTOMER LISTS

IT IS FURTHER ORDERED that Defendants and their officers, agents, servants,

employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual notice of this Final Order by personal service or otherwise are permanently restrained and enjoined from:

- A. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), of any person which any Defendant obtained prior to entry of this Final Order in connection with the telemarketing of goods and services, including an advance fee credit card; and
- B. Failing to dispose of such customer information in all forms in their possession, custody or control within thirty (3) days after entry of this Final Order. Disposal shall be by means that protects against unauthorized access to the customer information, such as by burning, pulverizing, or shredding any papers, and by erasing or destroying any electronic media to ensure that the customer information cannot practicably be read or reconstructed.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by a law, regulation, or court order.

IV.

MONETARY JUDGMENT AND CONSUMER REDRESS

IT IS FURTHER ORDERED that:

- A. Judgment is hereby entered in favor of the FTC and against Defendants,

jointly and severally, in the amount of seventeen million three hundred thousand five hundred nine dollars (\$17,300,509) for equitable monetary relief, including, but not limited to, consumer redress and disgorgement;

B. Funds paid over to the FTC pursuant to this Final Order shall be deposited into a fund administered by the FTC or its designated representative to be used for equitable relief, including, but not limited to, consumer redress and any attendant expenses for the administration of any redress fund. Defendants will cooperate fully to assist the FTC in identifying consumers who may be entitled to redress pursuant to this Final Order. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply funds for any other equitable relief (including consumer information remedies) that it determines to be reasonably related to defendants' practices alleged in the complaint. Any funds not used for this equitable relief shall be deposited into the U.S. Treasury as disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies under this Section.

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

D. 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 FTC to enforce its rights to any payment or money judgment pursuant to this Final Order, including but not limited to a nondischargeability complaint in any bankruptcy case. Furthermore, the facts alleged in the complaint establish all elements necessary to sustain an action pursuant to, and that this Final 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).

E. The judgment entered pursuant to this Section is equitable monetary relief, solely remedial in nature, and is not a fine, penalty, punitive assessment, or forfeiture.

F. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the FTC Defendants' taxpayer identifying numbers (social security number or employer identification number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.

V.

LIFTING OF ASSET FREEZE

IT IS FURTHER ORDERED that, except for funds necessary for the payment of the monetary judgment required by Section IV of this Final Order, Defendants' assets shall remain frozen pursuant to Section III of the Stipulated Order for Preliminary Injunction with Asset Freeze and Other Relief entered by the Court on July 29, 2008 ("Preliminary Injunction"), except that the asset freeze set forth in Section III of the Preliminary Injunction is modified so that the assets affected by this Section shall include both existing assets and assets acquired after the issuance date of this Final Order, and shall not exclude any assets derived from any source. The asset freeze against Defendants shall remain in effect until the Defendants have made full payment of the monetary judgment required by Section III of this Final Order.

VI.

ASSETS HELD BY THIRD PARTIES

IT IS FURTHER ORDERED that in order to partially satisfy the monetary judgment set forth in Section IV above, any law firm, financial or brokerage institution, escrow agent, title

company, commodity trading company, automated clearing house, network transaction processor, business entity, or person that holds, controls, or maintains custody of any account or asset of, on behalf of, or for the benefit of, Defendants, or has held, controlled or maintained custody of any account or asset of, or for the benefit of, Defendants, shall turn over such account or asset to the FTC, within ten (10) business days of receiving notice of this Final Order by any means, including, but not limited to, via facsimile.

VII.

RECEIVERSHIP PROVISIONS

IT IS FURTHER ORDERED that:

A. The Receiver, Mark J. Bernet, Esq., shall wind down the affairs and marshal the records and assets of the Corporate Defendants. Within 45 days after entry of this Final Order, the Receiver shall file a final report to this Court describing the wind-down of the business of the Corporate Defendants and the scope of the Receiver's activities.

B. The Receiver and all personnel hired by the Receiver as previously authorized by the Court shall be entitled to reasonable compensation for the performance of duties pursuant to his appointment and this Final Order and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by or in possession or control of the Receiver, or which may be received by the Receivership Defendants. Within 45 days after entry of this Final Order, the Receiver shall file with the Court, and serve on the parties, a final accounting and request for the payment of such reasonable compensation.

C. Upon the Court's approval of the Receiver's final report and request for payment, the Receiver shall transfer any remaining funds of Receivership Defendants to the FTC to be used for consumer redress, and the receivership shall terminate.

VIII.

COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Final Order:

A. Within ten (10) days of receipt of written notice from a representative of the FTC, Defendants each shall submit additional written reports, which are true and accurate and 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;

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

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, 45 and 69;
2. Posing as consumers and suppliers to Defendants, Defendants' employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

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

Provided, however, that nothing in this Final Order shall limit the FTC'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)).

IX.

COMPLIANCE REPORTING BY DEFENDANTS

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

- A. For a period of five (5) years from the date of entry of this Final Order,
 1. Each Individual Defendant shall notify the FTC of the following:
 - a. Any changes in such Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
 - b. Any changes in such Defendant's employment status (including self-employment), and any change in such Defendant's ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that such 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 such Defendant's duties and responsibilities in connection with the business or employment; and
 - c. Any changes in such Defendant's name or use of any aliases or fictitious names; and
 2. Defendants shall notify the FTC of any changes in corporate structure that may affect compliance obligations arising under this Final Order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or

dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Final 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 Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants shall notify the FTC as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Final Order and annually thereafter for a period of five (5) years, Defendants each 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 Final Order. This report shall include, but not be limited to:

1. For each Individual Defendant:
 - a. such Defendant's then-current residence address, mailing addresses, and telephone numbers;
 - b. such Defendant's then-current employment and business addresses and telephone numbers, a description of the business activities of each such employer or business, and such Defendant's title and responsibilities for each such employer or business; and
 - c. any other changes required to be reported under subparagraph A of this Section; and
2. For all Defendants:
 - a. a copy of each acknowledgment of receipt of this Final Order,

obtained pursuant to Part XII of this Final Order; and

b. any 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 such Defendant within fifteen (15) days of filing.

D. For the purposes of this Final Order, Defendants shall, unless otherwise directed by the

FTC's authorized representatives, send by overnight courier all written notifications to the FTC to:

Associate Director for the
Division of Enforcement
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
Re: FTC v. USA Financial, Inc.,
Civil Action No. 8:08-cv-899-T-17 MAP

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

D. For purposes of the compliance reporting and monitoring required by this Final Order, representatives of the FTC are authorized to communicate directly with Defendants.

X.

RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Final Order, Defendants and those businesses where any Defendant is the majority owner or otherwise controls the business, and their agents, employees, officers, corporations, and those

persons in active concert or participation with them who receive actual notice of this Final Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and 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. Complaints and refund requests (whether received directly, indirectly, or through any third party) and any responses to those complaints or requests;
- E. Copies of all sales scripts, training materials, advertisements, or other marketing materials;
- F. All records and documents necessary to demonstrate full compliance with each provision of this Final Order, including, but not limited, to copies of acknowledgments of receipt of this Final Order required by the Sections titled "Distribution of Final Order" and "Acknowledgment of Receipt of Final Order" and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

XI.

DISTRIBUTION OF FINAL ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Final Order, Defendants shall deliver copies of the Final Order as directed below:

A. Corporate Defendants: Each Corporate Defendant must deliver a copy of this Final Order to (1) all of its principals, officers, directors, and managers; (2) all of its employees, agents, and representatives who engage in conduct related to the subject matter of the Final Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Final Order upon such Defendant. For new personnel, delivery shall occur prior to them 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," delivery shall be at least ten (10) days prior to the change in structure.

B. Individual Defendants and Control Persons: For any business that an Individual Defendant controls, directly or indirectly, or in which such Defendant has a majority ownership interest, such Defendant must deliver a copy of this Final 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 Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Final Order upon such Defendant. For new personnel, delivery shall occur prior to them 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," delivery shall be at least

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ten (10) days prior to the change in structure.

C. Individual Defendant as Employee or Non-Control Person: For any business where an Individual Defendants is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Final Order, such Defendant must deliver a copy of this Final Order to all principals and managers of such business before engaging in such conduct.

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

XII.

ACKNOWLEDGMENT OF RECEIPT OF FINAL ORDER BY DEFENDANTS

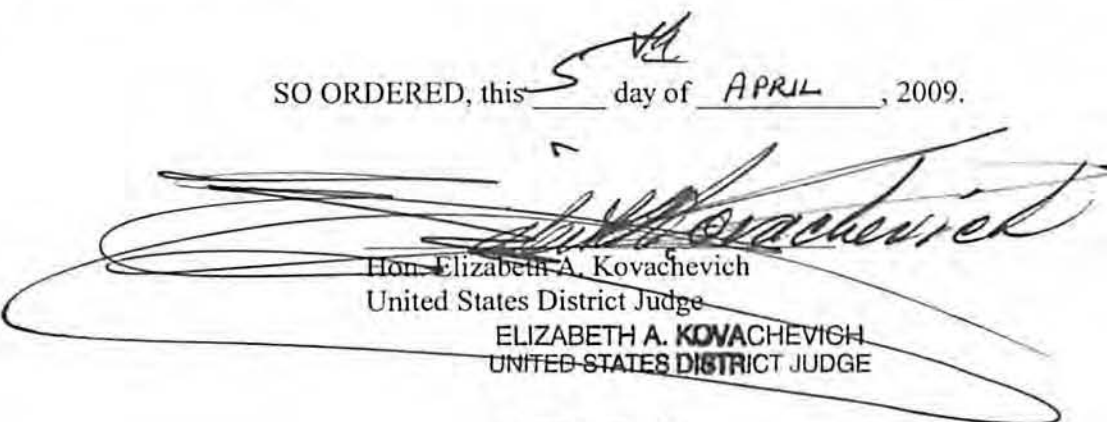
IT IS FURTHER ORDERED that each Defendant, within five (5) business days of receipt of this Final Order as entered by the Court, must submit to the FTC a truthful sworn statement acknowledging receipt of this Final Order.

XIII.

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 Order.

SO ORDERED, this 5th day of APRIL, 2009.


Hon. Elizabeth A. Kovachevich
United States District Judge

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE