IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

GEORGE CARTER, *et al.*, individually and on behalf of all persons similarly situated,	)	
Plaintiffs,	)	
v.	)	**No. CV-00-C-2666-W**
ICR SERVICES, INC., D/B/A NATIONAL CREDIT REPAIR, *et al.*,	)	
Defendants.	)	

FEDERAL TRADE COMMISSION'S MEMORANDUM AS AMICUS CURIAE
IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION

The Federal Trade Commission ("Commission" or "FTC"), as amicus curiae, submits this memorandum in opposition to the Motion for Injunction filed by the class plaintiffs on July 2, 2003.[1] For the reasons set forth below, that motion should be denied, at least insofar as it seeks an order that would prohibit defendants from making any payments to the Commission under a pending settlement. The Commission's settlement would substantially further the public interest, and the requested injunction could upset that settlement. In addition, plaintiffs have not shown that any harm they might suffer if the

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[1] Although plaintiffs' motion seeks an order specifically prohibiting defendants from paying any money to the FTC in connection with any settlement of its independent investigation of the *Carter* defendants, class counsel failed to serve or otherwise notify Commission counsel of its motion. Commission counsel only happened to learn of plaintiffs' motion on July 14, 2003, while reviewing the Court's computerized "PACER" docket. Upon learning of the motion, Commission counsel immediately contacted the Court's law clerk, and the Court subsequently allowed the Commission until July 29, 2003 to respond to plaintiffs' motion.

injunction were denied outweighs the substantial harm to the public interest. Accordingly, plaintiffs' motion should be denied.

I. STATEMENT OF FACTS

A. The Commission's Interest in the *Carter* Case.

As the Commission explained to the Court in initially seeking permission to participate as an amicus curiae in this case, the FTC is the nation's principal consumer protection agency and, more specifically, is the agency charged with enforcing the Credit Repair Organizations Act ("CROA"), the federal statute at issue in *Carter*. *See* 15 U.S.C. § 1679h(a). The Court ultimately granted the Commission's request to participate as an amicus curiae at the August 16, 2002 fairness hearing. As we explained at the time, the FTC was interested in the proposed settlement in *Carter* because the agency's staff was then investigating the business practices of the *Carter* defendants. That investigation involved conduct that was much broader than that challenged by the *Carter* class. For that reason, the Commission had not attempted to formally intervene in *Carter* for the purpose of bringing its own complaint against defendants. Rather, the Commission had determined to continue its investigation and, if necessary, to initiate a separate action at a later date.

As the Court recognized in its September 6, 2002 Memorandum Opinion supporting its judgment in this case, the *Carter* class alleged that defendants had violated CROA by collecting money from consumers in advance of fully performing their credit repair service. *See* Sept. 6, 2002 Mem. Op. at 1; *see also* 15 U.S.C. § 1679b(b) (prohibiting credit repair organizations from collecting money in advance of full performance). The parties in *Carter* apparently agreed, however, that the alleged statutory violation ceased as of September 30, 2001, when defendants transferred their credit repair

Commission's complaint against the *Carter* defendants and others, to a federal district court in the Northern District of Illinois for entry by that court. However, we believe that it is appropriate that this Court have a full understanding of the issues entailed in this settlement before we proceed to file it.[2] Ordinarily, the Commission and its staff would not publicly discuss the existence or terms of a consent order that has not yet been made public through its submission to a court. Yet here, because the provisions of the consent order have effectively been put in issue by plaintiffs' motion for an injunction, the Commission has authorized public discussion of the consent order for the purpose of responding to plaintiffs' motion.

B. The Commission's Consent Order.

As we explain below, the consent order negotiated by the Commission's staff and recently approved by the Commission is designed to end defendants' deceptive practices and to provide redress to victimized consumers that is complementary to the relief provided in the *Carter* class action. It was never our intention to undercut this Court's judgment, as is clear from the terms of the consent order itself.

In deciding to settle with these or any other potential defendants to a Commission action, the Commission has at least two primary goals. First, we seek to ensure that the deceptive practices challenged in a Commission complaint are enjoined. The consent order in this case, for instance,

[2] We wanted to avoid a situation where by entering the Commission's consent order, the federal court in Illinois would have ordered defendants to pay the $350,000 to the Commission that is the primary subject of plaintiffs' current motion. We would like to have the consent order entered as soon as possible, however, so that the deceptive practices covered by that order would be enjoined by a federal court.

includes comprehensive injunctive relief against all of the deceptive practices defendants continued to employ in their credit repair business even after September 30, 2001. For example, the consent order prohibits the misrepresentations discussed above and, in fact, enjoins defendants from making any further reference to the $200 million computer search program they purported to use in their credit repair business. Importantly, the consent order also includes a notice that must be distributed to defendants' thousands of independent sales representatives across the country. The purpose of this notice is to ensure that defendants' sales representatives do not continue to pass on false and deceptive information to defendants' potential customers. Moreover, after witnessing the problems that class counsel and the Court had with defendants in this case in distributing the notice of settlement to potential class members, the Commission decided that it could not rely on defendants to distribute the notice themselves. As a result, the Commission accepted the responsibility for disseminating the notice, but at defendants' expense. Under the consent order, then, the cost of disseminating the notice would be taken from defendants' initial redress payment of $350,000.

The Commission's second goal in settling any case is to require that a defendant pay redress to victimized consumers or, at the very least, that the defendant disgorge its ill-gotten gains. That remained one of the Commission's goals in this case even after the settlement in *Carter*, because tens of thousands of additional consumers who are not members of the *Carter* class also were victimized by defendants' deceptive practices. Yet in attempting to negotiate a monetary settlement, Commission claims, their obligation in the class action is already fully funded, because most of the approved claimants are former sales representatives rather than ordinary consumers. Class counsel took the opposite position, telling us that most of the claimants are ordinary consumers and that defendants may owe more than $1 million to the settlement funds.

In negotiating the consent order's consumer redress provisions, it was never our intention to take assets away from the class action settlement so that the settlement would not be fully funded. To the contrary, satisfaction of this Court's judgment would serve to further our own goals of providing redress to victimized consumers and depriving defendants of their ill-gotten gains. At the same time, however, with no impending answer to the question of how much defendants still owed to the class settlement, Commission staff could not in good conscience allow assets to remain on the table.

Given the uncertainties surrounding the ultimate amount of this Court's judgment, Commission staff carefully structured the order to take account of the judgment, while at the same time advancing the Commission's interest in depriving defendants of their ill-gotten gains. The consent order provides that defendants, jointly and severally, must pay consumer redress to the Commission in the amount of $1,150,000.[3] That amount would be paid in two installments. The first installment of $350,000 would be due seven days after the order's entry by a federal court. Nothing in this Court's September 6, 2002 judgment or any other order entered by the Court would prohibit defendants from making such a payment to the Commission. Significantly, moreover, to secure this first installment payment,

[3] The consent order imposes that obligation on all defendants named in the order, which includes two defendants (National Credit Education and Review and Todd Renzi) who are not subject to this Court's judgment.

and other defendants that furthers the public interest and that does not contravene any order of this Court in the class action.

II. GRANTING THE REQUESTED INJUNCTION WOULD UPSET THE COMMISSION'S CONSENT ORDER AND WOULD THEREFORE CONTRAVENE THE PUBLIC INTEREST

This Court should not relieve defendants of their obligation to pay $350,000 to the Commission within seven days of the consent order's entry by a federal court. The Commission recognizes that this Court entered a judgment almost eleven months ago that must be satisfied, primarily because there are thousands of class members who have now waited over a year to receive their portion of the settlement funds. Yet by enjoining defendants from paying money to the Commission until this Court's judgment is satisfied, the Court would upset a carefully crafted consent order that substantially furthers the public interest. In circumstances like this, where the Commission has made no attempt to circumvent the Court's judgment, we respectfully submit that the Court should decline to enter such an order.

In the Eleventh Circuit,

> [a] district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc); *see also Horton v. City of St. Augustine,* 272 F.3d 1318, 1326 (11th Cir. 2001). Injunctions are considered to be extraordinary remedies that should not be granted "'unless the movant clearly established the 'burden of persuasion' as to each of the four prerequisites.'" *Siegel,* 234 F.3d at 1176 (quoting *McDonald's Corp. v.*

Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (internal citation omitted)). In this case, the public interest will suffer if the injunction is granted. Moreover, plaintiffs have not shown that any injury they might suffer if the injunction were denied would outweigh the harm to the public interest if the injunction were to issue.

As explained above, one of the most important provisions in the Commission's consent order relates to the distribution of a formal notice to more than 20,000 of defendants' independent sales representatives. That notice would officially inform the sales representatives of the basis for the Commission's complaint against defendants and of the nature of the relief imposed by the negotiated consent order. Such a notice is a typical and important tool that the Commission regularly employs in multi-level marketing cases like this one to correct misimpressions that may linger in a geographically dispersed sales force. The notice in this case, for example, would inform the sales force that according to the Commission's complaint, the information defendants provided them about a proprietary computer search program was false and that the negotiated consent order now prohibits defendants and their sales representatives from even mentioning any computer program to their prospective customers. Importantly, moreover, the consent order requires that defendants' sales representatives sign and return a form acknowledging receipt of the notice within four weeks; otherwise, they would be prohibited from making any further credit repair sales on defendants' behalf.

The notice is an important aspect of the Commission's effort to eradicate through the consent order all lingering effects of defendants' widespread deceptive practices. But that notice cannot be disseminated to defendants' 20,000 active sales representatives unless defendants are permitted to make the initial $350,000 payment to the Commission. We estimate that it will cost approximately

$50,000 for the Commission's third-party contractor to disseminate the notice, and the consent order provides that that money will come from defendants' initial $350,000 payment. An order from this Court enjoining defendants from making that payment would effectively prevent the dissemination of the notice, thereby nullifying an essential component of the Commission's consent order. We respectfully ask the Court not to contravene the public interest by taking such a drastic step.

If the injunction is denied and defendants are not prohibited from paying $350,000 to the Commission under the consent order, then plaintiffs would not suffer harm offsetting the injury to the public interest. In particular, if defendants fail to make the initial $350,000 payment, the Commission would be entitled under the terms of the order to execute against its security interest in two otherwise unencumbered parcels of real property. These are parcels that plaintiffs in this case could not reach in to class members. Those funds may not even be needed, of course, if class counsel proceeds to execute on the previously sequestered assets, and the Court otherwise freezes defendants' assets until the judgment is satisfied. But if a deficiency remains in the claims fund, the Commission intends to turn over monies paid to it so that a distribution to the class could be made.[5] In light of this offer, the requested injunction would provide little added benefit to the class, but it would do substantial harm to the Commission and to the public interest. In those circumstances, the injunction should be denied.[6]

III. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that Plaintiffs' motion for an injunction be denied, at least insofar as that motion seeks to enjoin defendants from making any payments to the Commission under the negotiated consent order. Such an extraordinary order, which would have the potential to upset a consent order negotiated by the Commission in furtherance of the public interest, is not warranted in the circumstances of this case, where the Commission carefully

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[5] Commission staff made such an offer to class counsel in writing on July 25, 2003. Staff's letter is attached to this Memorandum as Exhibit A. Any funds that the Commission would make available to the class are likely to come from assets that are not sequestered by this Court and that class counsel could not reach in executing on the judgment. The Commission believes that those funds must be distributed exclusively to class members, rather than having any portion go to class counsel as attorney's fees.

[6] If this Court is reluctant to permit defendants to pay $350,000 to the Commission, then the Commission requests that the Court at least permit defendants to pay the Commission an amount sufficient to fund the distribution of the notice to defendants' independent sales representatives. The notice provides a significant consumer protection remedy that plaintiffs' motion should not be allowed to derail.

Respectfully submitted,

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Dated: ____________________

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