

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

)	Case No. 96-6995-civ-ROETTGER
)	
)	
FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	Magistrate Judge Seltzer
)	
v.)	
)	
)	STIPULATED FINAL JUDGMENT
STUDENT ASSISTANCE SERVICES, INC.)	AND ORDER FOR PERMANENT
STUDENT FINANCIAL SERVICES, INC.)	INJUNCTION AND OTHER
FRED MARKOWITZ, and DONALD)	EQUITABLE RELIEF
MCGOVERN,)	
)	
Defendants.)	

On August 27, 1996, Plaintiff, Federal Trade Commission ("Commission"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), filed a complaint in this matter seeking injunctive and other relief, including redress to consumers, and moved ex parte for (1) a temporary restraining order; (2) an order freezing all accounts, wherever

located, belonging to any defendant or for which any defendant has signature authority and requiring an immediate accounting of the defendants' assets and transfers of assets; (3) an order permitting expedited discovery and immediate access to defendants' business premises; (4) an order appointing a temporary receiver over defendants Student Assistance Services, Inc. and Student Financial Services, Inc; and (5) an order to show cause why a preliminary injunction should not issue pursuant to Fed. R. Civ. P. 65(b).

On August 28, 1996, the Court granted the Commission's motion and issued an ex parte temporary restraining order against the defendants. The parties stipulated to a Preliminary Injunction With Asset Freeze, Appointment of a Permanent Receiver, and Other Equitable Relief, which was entered by this Court on September 4, 1996.

The Commission and defendants Student Assistance Services, Inc., Student Financial Services, Inc., Fred Markowitz, and Donald McGovern ("defendants"), have stipulated to the entry of the following Final Judgment and Order in settlement of the Commission's complaint against them, and the Court, being advised in this premises, finds:

1. This is an action by the Commission instituted under Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b) ("FTC Act"). The complaint seeks permanent injunctive relief and redress for allegedly injured consumers for alleged unfair or deceptive acts or practices by defendants in the promotion and sale of services related to identifying potential scholarships or grants for high school and college students or their families (hereinafter referred to as "college scholarship services").

2. This Court has jurisdiction of the subject matter of this case and jurisdiction over all parties hereto. Venue in the Southern District of Florida is proper.

3. The activities of the defendants are in or affecting commerce, as defined in 15 U.S.C. § 44.

4. The Commission alleges that, from approximately September, 1994, and continuing until August, 1996, defendants conducted a program to telemarket college scholarship services to high school and college students and their parents throughout the United States, and that the defendants made material misrepresentations to consumers that were false and misleading, as set forth in the Commission's Complaint.

5. The Commission has the authority under Section 13(b) of the FTC Act to seek the relief it has requested, and the Complaint states a claim upon which relief may be granted.

6. Defendants neither admit nor deny the Commission's allegations.

7. Defendants, for the purposes of settling the Commission's Complaint against them, agree to entry of this Final Judgment and Order for Permanent Injunction and Other Equitable Relief under Section 13(b) of the FTC Act. Sheila McGovern, wife of defendant Donald McGovern, agrees to entry of this Order to the extent that property she shares with defendant McGovern as his spouse will be used to guarantee the monetary judgment pursuant to Section X.C of this Order, as being in her best interests;

8. This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies, except that this action and the relief awarded herein constitute a final settlement with respect to college scholarship services as of this date between the Commission and defendants.

9. Each of the defendants waives any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, amended by Pub. L. 104-121, 110 Stat. 847, 863-64

(1996), concerning the prosecution of this action to the date of this Order.

10. Entry of this Order is in the public interest.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

DEFINITIONS

I.

A. “Defendants” shall mean Student Assistance Services, Inc., Student Financial Services, Inc., Fred Markowitz, and Donald McGovern, and each of them, or any combination thereof.

B. “College scholarship services” shall mean any service that purports to assist consumers with obtaining scholarships, grants, or any other financial assistance for an educational purpose.

C. “Business of Telemarketing” shall mean any business activity (including, but not limited to, initiating or receiving telephone calls, managing others who initiate or receive telephone calls, operating an enterprise that initiates or receives telephone calls, owning an enterprise that initiates or receives telephone calls, or otherwise participating as an officer, director, employee or independent contractor in an enterprise that initiates or receives telephone calls) that involves attempts to induce consumers to purchase any item, product, good or service, to make a charitable contribution, or to enter a contest for a prize, by means of telephone sales presentations, either exclusively or in conjunction with the use of other forms of marketing. *Provided, however,* that the term “telemarketing” shall not include transactions that are completed only after a face-to-face contact between the seller or solicitor and the consumers solicited.

D. “Assisting others engaged in telemarketing” means knowingly providing any of

the following goods or services to any person or entity engaged in telemarketing: (1) performing customer service functions for an entity engaged in telemarketing, including, but not limited to, receiving or responding to consumer complaints; (2) formulating or providing, or arranging for

notice of this Order by personal service, facsimile, or otherwise, in connection with the advertising, promotion, offer for sale, or sale of any item, product, good, service, or investment interest of any kind, are hereby permanently restrained and enjoined from:

A. Misrepresenting, directly or by implication, that defendants will provide consumers with names of sources from which they likely will receive at least a stated amount in grants or scholarships;

B. Misrepresenting, directly or by implication, any material aspect of a college scholarship service, including but not limited to:

1. misrepresenting that defendants will provide consumers who purchase defendants' services with personal portfolios of scholarships and grant sources that are specifically tailored to the consumers' qualifications;

2. misrepresenting that students are pre-selected by defendants to receive scholarships and grants;

3. misrepresenting that defendants obtain grants or scholarships on behalf of consumers who purchase defendants' services;

4. misrepresenting defendants' business relationship with any corporation or other entity that awards or may award scholarships and grants;

C. Misrepresenting, directly or by implication, that defendants will refund the processing fee to each consumer who purchases defendants' services and does not obtain at least a stated amount in scholarships or grants by using defendants' services;

D. Misrepresenting, directly or by implication, any aspect, qualifications or conditions of any refund policy;

E. Withdrawing money from a consumer's bank account or billing charges to a consumer's credit card without obtaining either: (i) oral authorization from the consumer that is tape recorded and made available on upon request to the customer's bank and which evidences clearly the customer's authorization of payment for the goods and services that are the subject of the sales offer, and the customer's receipt of the following information: (a) date of the charge or demand draft; (b) the amount of the charge or demand draft; (c) the payor's name; (d) the number of draft payments (if more than one); (e) a telephone number for customer inquiry that is answered during normal business hours; (f) and the date of the customer's oral authorization; or (ii) written authorization by the customer;

F. Misrepresenting, directly or indirectly, any fact material to a consumer's decision to purchase any item, product good, service or investment interest of any kind;

G. Violating or assisting others to violate any provision of the Telemarketing Sales Rule, 16 C.F.R. Part 310.

H. Assisting others in making, directly or by implication, any false or misleading oral or written statement or representation enumerated in subparts A-G of this Paragraph.

PERFORMANCE BOND

IV.

IT IS FURTHER ORDERED that defendant Fred Markowitz is hereby permanently restrained and enjoined from either (1) engaging in telemarketing or (2) assisting others engaged in telemarketing, unless he first obtains a performance bond in the principal sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000), and:

A. This bond must be conditioned upon compliance with Section 5 of the Federal

Trade Commission Act, 15 U.S.C. § 45, and with the provisions of this Order. This bond shall be deemed continuous and remain in full force and effect as long as the defendant continues to engage or participate in such activity and for at least three years after defendant has ceased to engage or participate in such activity. This bond shall cite this Final Judgment and Order for Permanent Injunction as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; the provisions of this Final Judgment and Order; insolvency; or to any other cause attributable to defendant engaging or participating in such activity, to the extent that any court, master, or arbitration panel of competent jurisdiction may determine;

B. The performance bond required pursuant to this Paragraph shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which the defendant obtaining the bond is doing business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. Each such performance bond shall be in favor of both (i) the Federal Trade Commission for the benefit of any consumer injured as a result of any false or misleading representation made, directly or by implication, in the promotion, advertising, marketing, sale, or offering for sale of any good or service through the use of telemarketing; and (ii) any consumer so injured.

C.

in telemarketing, defendant Markowitz shall provide a copy of the bond required by this Paragraph to the Associate Director for Service Industry Practices at the address specified in Paragraph VIII of this Order.

E. Defendant Markowitz shall not disclose the existence of the performance bond to any consumer, or other purchaser or prospective purchaser of any product or service that is advertised, promoted, offered for sale, sold or distributed via telemarketing, without also disclosing in a clear and prominent manner, at the same time in 100% black ink against a light background, in print at least as large as the main text as the brochure or document, set apart from the main text and enclosed in a box containing only the required disclosure, the following statement: “AS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT IN SETTLEMENT OF CHARGES OF FALSE AND MISLEADING REPRESENTATIONS IN THE PROMOTION AND SALE OF COLLEGE SCHOLARSHIP SERVICES.”

V.

IT IS FURTHER ORDERED that defendant Donald McGovern is hereby permanently restrained and enjoined from either (1) engaging in telemarketing or (2) assisting others engaged in telemarketing, unless he first obtains a performance bond in the principal sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000).

A. This bond must be conditioned upon compliance with Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and with the provisions of this Order. This bond shall be deemed continuous and remain in full force and effect as long as the defendant continues to engage or participate in such activity and for at least three years after defendant has ceased to engage or participate in such activity. This bond shall cite this Final Judgment and Order for

Permanent Injunction as the subject matter of the bond, and shall provide surety thereunder against financial loss resulting from whole or partial failure of performance due, in whole or in part, to any violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; the provisions of this Final Judgment and Order; insolvency; or to any other cause attributable to defendant engaging or participating in such activity, to the extent that any court, master, or arbitration panel of competent jurisdiction may determine;

B. The performance bond required pursuant to this Paragraph shall be an insurance agreement providing surety for financial loss issued by a surety company that is admitted to do business in each state in which the defendant obtaining the bond is doing business and that holds a Federal Certificate of Authority As Acceptable Surety On Federal Bond and Reinsuring. Each such performance bond shall be in favor of both (i) the Federal Trade Commission for the benefit of any consumer injured as a result of any false or misleading representation made, directly or by implication, in the promotion, advertising, marketing, sale, or offering for sale of any good or service through the use of telemarketing; and (ii) any consumer so injured.

C. The bond required pursuant to this Paragraph is in addition to, and not in lieu of, any other bond required by state, federal, or local law, or by any other court order not entered in this action.

D. At least ten (10) days before commencing telemarketing or assisting other engaged in telemarketing, defendant McGovern shall provide a copy of the bond required by this Paragraph to the Associate Director for Service Industry Practices at the address specified in Paragraph VIII of this Order.

E. Defendant McGovern shall not disclose the existence of the performance bond to

any consumer, or other purchaser or prospective purchaser of any product or service that is advertised, promoted, offered for sale, sold or distributed via telemarketing, without also disclosing in a clear and prominent manner, at the same time in 100% black ink against a light background, in print at least as large as the main text as the brochure or document, set apart from the main text and enclosed in a box containing only the required disclosure the following statement: “AS REQUIRED BY ORDER OF THE U.S. DISTRICT COURT IN SETTLEMENT OF CHARGES OF FALSE AND MISLEADING REPRESENTATIONS IN THE PROMOTION AND SALE OF COLLEGE SCHOLARSHIP SERVICES.”

RECORD KEEPING AND DOCUMENT RETENTION PROVISIONS

VI.

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, in connection with any business where

- (i) either defendant Markowitz or defendant McGovern owns at least fifty percent

division, or other device, are hereby restrained and enjoined from:

A. Failing to make and keep books, records, and accounts, including but not necessarily limited to:

1. Records that accurately reflect the name, address, and telephone number of each person that any of the above-referenced businesses employs in any capacity, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; any name used by the employee when dealing with consumers (if different from the employee's legal name); and the date and reason for the person's termination, if applicable.

The businesses subject to this Paragraph shall retain such records for any terminated employee for a period of two years following the date of termination;

2. Records containing the names, addresses, phone numbers, dollar amounts paid, quantity of items purchased, and description of items purchased, for all consumers to whom any of the above-referenced businesses has sold, invoiced or shipped any goods or services, or from whom any of the above-referenced businesses accepted money or other items of value;

3.

- conducted concerning the validity of any complaint;
- (d) each response to the complaint and the date of the response;
- (e) any final resolution of the complaint and the date of the resolution;
- and
- (f) in the event of a denial of a refund request, the reason for such denial, or if the complaint was cured, the basis for determining that the complaint was cured.

4. Copies of all written promotional materials, sales scripts, training packages, advertisements, or other marketing materials utilized that relate to any services or products promoted by them, directly or indirectly, or through agents, or by any business entity which is owned, managed, or controlled by them, including, but not limited to the following:

- (a) Hard copies of all advertising or other promotional or commercial material posted in any Internet newsgroup, on the World Wide Web, on any electronic bulletin board system, in any online interactive conversational space or chat room, in the classified advertising section of any online service, or in any other location accessible by modem communications. Each such copy shall be accompanied by an indication of the online location where the material was posted;
- (b) Hard copies of all advertising or other promotional or commercial material made available through any fax-back service;
- (c) electronic copies, in HTML format, of any advertising or other

promotional material made available on the World Wide Web, together with copies of all graphics files, audio scripts, and other computer files used in presenting information on the World Wide Web;

(d) Hard copies of all electronic mail sent to or received from any customer or potential customer;

5. Written authorization from each consumer permitting any of the above-referenced businesses to withdraw money from a consumer's bank account or bill charges to a consumer's credit card;

6. Books, cash disbursements and receipts, ledgers, accountants' reports, and bank and other financial account statements which, in reasonable detail, accurately and fairly reflect the assets, liabilities, owners' equity, sources of revenue, expenses, and dispositions of assets of all business entities which are owned, managed, or controlled by them;

B. Destroying, mutilating, changing, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any records, whether written, in computer-maintained form, or any other form, that they are required to keep by subparagraph A, or that pertain to any or all defendants to this lawsuit.

Provided that, the provisions of this Paragraph shall not prohibit compliance with legal process, including subpoenas and other legal requests to produce documents, but do require that, if such documents are subpoenaed by a non-governmental entity, any person producing such documents shall retain complete copies of all documents produced.

VII.

IT IS FURTHER ORDERED that:

A. Within ten (10) calendar days following the date of entry of this Order, defendants shall provide a copy of this Order to each of their officers, directors, managing agents, supervisory employees, divisions, subsidiaries, corporations, affiliates, successors, independent contractors or consultants and obtain a signed receipt therefor; and

B. For a period of five (5) years from the date of entry of this Order, defendants shall provide a copy of this Order to their officers, directors, managing agents, supervisory employees, divisions, subsidiaries, corporations, affiliates, successors, independent contractors or consultants

B. For a period of three (3) years from the date of entry of this Order, defendants Markowitz and McGovern shall notify the Commission in writing within thirty days (30) of any changes in their residence or mailing addresses, or telephone numbers;

C. For a period of five (5) years from the date of entry of this Order, defendants Markowitz and McGovern shall notify the Commission in writing within thirty days (30) of any change in business address or employment status;

D.

any business where (1) either defendant Markowitz or defendant McGovern owns at least fifty percent (50%) of the business or otherwise directly or indirectly manages or controls the business, and where (2) the business engages in or assists others engaged in telemarketing. In providing such access, defendants shall permit representatives of the Commission to inspect and copy all documents relevant to any matter contained in this Order; and

B. To interview or depose the officers, directors, and employees, including all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Subsection A of this Paragraph applies, concerning matters relating to compliance with the terms of this Order. The person interviewed or deposed may have counsel present.

Provided, however, that the Commission may otherwise monitor defendants' compliance with this Order by all lawful means available, including the use of compulsory process seeking production of documents and the use of investigators posing as consumers or suppliers.

MONETARY RELIEF

X.

IT IS FURTHER ORDERED that:

A. Judgment is hereby entered against defendants Markowitz and McGovern jointly and severally in the amount of TWO HUNDRED SEVENTY THOUSAND DOLLARS (\$270,000.00), payable within ten (10) days of the entry of this Order in the form of a wire transfer from accounts frozen by virtue of the Preliminary Injunction entered by this Court to an account designated by the Commission, for equitable monetary relief, including but not limited to

consumer redress as restitution, and for paying any attendant expenses of administering any redress fund. Defendants Markowitz and McGovern shall execute the necessary documents to transfer funds from the frozen accounts to the account designated by the Commission. Upon payment of the \$270,000 by defendants Markowitz and McGovern, the freeze of the defendants' personal assets entered by this Court as part of the Preliminary Injunction shall be lifted.

B. Judgment is hereby entered against defendant McGovern individually in the amount of THIRTY THOUSAND DOLLARS (\$30,000) for equitable monetary relief, including but not limited to consumer redress as restitution, and for paying any attendant expenses of administering any redress fund.

1. Within thirty (30) days after the entry of this Order, defendant McGovern shall transfer to the Commission cash in the form of a certified or cashier's check in the amount of Two Thousand Five Hundred Dollars (\$2,500);

2. Thereafter, on or before the expiration of each of the next twelve (11) thirty (30) day periods, defendant McGovern shall transfer to the Commission cash in the form of certified or cashier's checks in the amount of Two Thousand Five Hundred Dollars (\$2,500).

3. In the event that defendant McGovern does not fulfill, or only partially fulfills, the conditions set forth in the foregoing payment schedule, defendant McGovern shall be immediately liable for the entire judgment amount of \$30,000, less any payments he has already made.

C. Defendant McGovern and his wife, Sheila McGovern (a non-defendant), have agreed to execute a Mortgage Deed to provide the Commission a security interest in 363 Rock Island Road, Building 7, Apartment 208, Margate, Real Estate #8135G3176 in the form provided

in Attachment A to this Order, to guarantee satisfaction of the \$30,000 judgment. Defendant McGovern and Sheila McGovern shall execute the Mortgage Deed attached hereto as Attachment A within three (3) days of their signing of the Stipulation to entry of judgment. Defendant McGovern represents, and acknowledges that the Commission is relying on his material representation that the property at 363 Rock Island Road, Building 7, Apartment 208, Margate, Real Estate #8135G3176, is owned solely by Defendant McGovern and Sheila McGovern, and is not encumbered in any way. Defendant McGovern and Sheila McGovern agree that as of this date, neither one shall further encumber the property at 363 Rock Island Road, Building 7, Apartment 208, Margate, Real Estate #8135G3176, except with the express prior written permission of the staff of the Commission. Should the Commission reject the Consent Judgment and Order, this provision shall be of no further force and effect.

D. Judgment is hereby entered against defendants Student Assistance Services, Inc., and Student Financial Services, Inc. (“corporate defendants”), jointly and severally in the amount of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS (\$2,500,000) for equitable monetary relief, including but not limited to consumer redress, and for paying any attendant expenses of administering any redress fund. The individual defendants hereby relinquish all rights, title, and claim to the assets of Student Assistance Services, Inc. and Student Financial Services, Inc. The individual defendants shall execute all documents necessary to facilitate the payment of this judgment. The freeze of the corporate defendants’ assets entered as part of the Preliminary Injunction shall remain in place until further order of the Court.

E. The consumer redress fund shall be distributed to consumers pursuant to a Court-approved distribution plan to be submitted by the Commission. The Commission, in its sole

discretion, may use a designated agent to administer consumer redress. If the Commission, in its sole discretion, determines that redress is wholly or partially impractical, any funds not so used shall be deposited in the United States Treasury.

F. Defendants Markowitz and McGovern acknowledge and agree that this judgment for equitable monetary relief, as with all other relief provided in this Order, is solely remedial in nature as restitution and is not a fine, penalty, punitive assessment, or forfeiture.

G. Except as set forth in Paragraph XII below, each party to this Order hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action; *provided, however*, in the event the Commission determines that defendants have violated any term or provision of this Order, defendants shall pay the costs and attorneys' fees incurred by the Commission or its agents in connection with proceedings to enforce this Order.

H. Notwithstanding any other provision of this Order, defendants agree that if they fail to meet the payment obligations set forth in Paragraph X, they shall pay the costs and attorneys' fees incurred by the Commission and its agents in any attempts to collect amounts due pursuant to this Order. Defendants further agree that the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission pursuant to this Order, including but not limited to a non-dischargeability complaint in any subsequent bankruptcy proceeding.

REAFFIRMATION OF FINANCIAL STATEMENT

XI.

IT IS FURTHER ORDERED that, within three (3) business days from the date of entry of this Order, defendants Markowitz and McGovern shall each submit to the Commission a truthful

sworn statement that shall reaffirm and attest to the truth, accuracy, and completeness of the financial statements executed by each of the defendants on September 6, 1996.

RIGHT TO REOPEN

XII.

IT IS FURTHER ORDERED that the Commission's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of defendants' financial condition as represented in the sworn financial statements provided by each defendant on September 6, 1996, which contains material information relied upon by the Commission in negotiating and agreeing to the terms of this Order. If, upon motion by the Commission, this Court finds that the above-referenced financial statement failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Commission may request that this Order be reopened for the sole purpose of allowing the Commission to modify the monetary liability of the defendants; *provided, however*, that in all other respects this Order shall remain in full force and effect unless otherwise ordered by the Court and that defendants have no right to contest any of the allegations in the Commission's complaint in this matter in any proceedings brought pursuant to this subparagraph; and, *provided further*, that proceedings instituted under this provision would be in addition to and not in lieu of any other civil or criminal remedies as may be provided by law, including any other proceedings the Commission may initiate to enforce this Order.

RETENTION OF JURISDICTION

XIII.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for

purposes of construction, modification and enforcement of this Order.

XIV.

There being no just reason for delay, the Clerk is directed to enter this Final Judgment and Order.

Dated: _____

NORMAN C. ROETTGER
Chief United States District Judge
Southern District of Florida

STIPULATION

The parties hereby stipulate and agree to entry of the foregoing Order, which shall constitute a final judgment in this action as to defendants Student Assistance Services, Inc., Student Financial Services, Inc., Fred Markowitz, and Donald McGovern (“defendants”). The