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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PREFERRED ALLIANCE, INC.,
doing business as
VACANTSUN TRAVEL DISCOUNTS
AND GENESISCARD, AND
BRUNO FAILLACE,
individually, as an
officer or director of
Preferred Alliance, Inc., and
also doing business as
VACANTSUN TRAVEL DISCOUNTS
AND GENESISCARD,

Defendants.

Civil Action No.

1 03-GV 0405

COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission"), for its complaint alleges as follows:

1. The Commission brings this action under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 et seq., and the Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq., to secure

permanent injunctive relief, rescission of contracts, restitution, redress, disgorgement, and other equitable relief against defendants for engaging in deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), the FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, and Section 226.12(e) of Regulation Z, 12 C.F.R. § 226.12(e), which implements the TILA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), 6105(b), and 1607(c).

3. Venue in the United States District Court for the Northern District of Georgia, Atlanta Division is proper under 28 U.S.C. §§ 1391 (b) and (c), and 15 U.S.C. §§ 53(b) and 1607(c).

PLAINTIFF

4. Plaintiff, FTC, is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 et seq. The Commission is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the TSR, 16 C.F.R. Part 310, which

prohibits deceptive or abusive telemarketing acts or practices. The Commission also enforces the TILA and its implementing Regulation Z. A violation of the TILA is a violation of the FTC Act. 15 U.S.C. § 1607(c). The Commission is authorized to initiate federal district court proceedings by its own attorneys to enjoin violations of the FTC Act, the TSR, and the TILA to secure such equitable relief as may be appropriate in each case, and to obtain consumer redress. 15 U.S.C. §§ 53(b), 57b, 6102(c), 6105(b), and 1607(c).

DEFENDANTS

5. Defendant Preferred Alliance, Inc. is a Georgia corporation that does or has done business as VacantSun Travel Discounts and GenesisCard ("Preferred Alliance"). Preferred Alliance maintains offices at 1149 Sunny Field Lane, Lawrenceville, Gwinnett County, Georgia 30043. It transacts or has transacted business in this District and throughout the United States.

6. On March 7, 2002, Defendant Preferred Alliance, Inc. filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 et seq., in the United States Bankruptcy Court for the Northern District of Georgia, Case No. 02-92559-WHD. On June 4, 2002, the Bankruptcy Court entered an order converting Defendant Preferred Alliance, Inc.'s Chapter 11

reorganization case to a Chapter 7 liquidation case. James C. Cifelli was appointed the Chapter 7 trustee for Defendant Preferred Alliance, Inc. The Commission's action against Defendant Preferred Alliance is not stayed by 11 U.S.C. § 362(a) because it is an exercise of the Commission's police or regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and thus falls within an exception to the automatic stay.

7. Defendant Bruno Faillace is and was an officer or director of Preferred Alliance. He resides at 1149 Sunny Field Lane, Lawrenceville, Gwinnett County, Georgia 30043. 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 set forth in this complaint. Bruno Faillace is a resident of Georgia and transacts or has transacted business in this District and throughout the United States.

COMMERCE

8. At all times relevant to this complaint, defendants have maintained a substantial course of telemarketing, trade, advertising, offering for sale, and selling memberships in buying services and other services in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFINITION

9. An offer or agreement with a "negative option" feature means an offer or agreement to sell or provide any goods or services under which (a) the consumer must take an affirmative action to reject goods or services or cancel the agreement and (b) the consumer's silence or failure to reject goods or services or cancel the agreement is interpreted by the seller or provider as acceptance or continuing acceptance of the goods or services. Agreements with negative option features include, but are not limited to, agreements in which the consumer, subsequent to agreeing to the offer, will automatically be billed or charged at the end of the trial period (whether or not there is a fee for the trial period) unless the consumer cancels, and continuity plans in which, subsequent to the consumer's agreement to the plan, the seller or provider automatically ships goods to a consumer unless the consumer notifies the seller or provider within a certain time not to ship the goods.

DEFENDANTS' COURSE OF BUSINESS

10. Since at least April 1998, defendants have advertised, marketed, telemarketed, promoted, offered to sell, sold, and distributed memberships in buying services and other services under various names, including VacantSun Travel Discounts and GenesisCard. These buying services purportedly allow consumers

to obtain discounted prices for various goods and services, including, but not limited to, discounted travel and discounted family health care plans and benefits. To promote the memberships, defendants have engaged in a marketing campaign through arrangements with third parties who telemarket their own products or services ("telemarketers"), such as foods, dietary supplements, gadgets, or magazine subscriptions. The telemarketers have used both inbound and outbound telemarketing. Defendants have provided scripts to the telemarketers for marketing defendants' memberships.

11. Generally, when a consumer spoke with a telemarketer to order goods or services advertised or promoted by the telemarketer, including free-trial negative option offers, the consumer was asked to provide billing information, such as a credit or debit card number, to pay for the telemarketer's goods or services, or to confirm acceptance of the free-trial negative option offer.

12. After obtaining the consumer's billing information to process the initial transaction, the telemarketer then "upsold" defendants' memberships. "Upselling" is a telemarketing technique where one seller sells its products or services through a telemarketing call, and then solicits the purchase of additional goods or services after the consumer has provided his or her payment information. The telemarketer did not disclose in

the upsell, however, that the consumer's billing information, which the consumer previously provided to the telemarketer, would be transferred to and used by defendants to pay for their services.

13. In the "upsell" to a consumer, the telemarketer purportedly offered defendants "free" trial memberships in their buying services. However, in some instances, defendants' telemarketer made no mention whatsoever of defendants' trial offer and consumers were billed by defendants anyway.

14. In many instances, when defendants' telemarketer did attempt to offer defendants "free" trial memberships, the telemarketer failed to disclose, in a manner a consumer was likely to notice and understand: a) that a consumer who fails to contact defendants within a specified period of time and cancel the trial membership is automatically enrolled as a GenesisCard or VacantSun Travel Discounts member; b) that a consumer's credit or debit card, which was used to purchase goods or services from a third-party, would be charged a fee unless the consumer cancels the membership; and c) the prescribed manner in which a consumer must cancel the trial membership, including the inception and expiration dates of the trial membership (all part of the "negative option"). In addition, the telemarketer did not clearly and conspicuously or promptly disclose the nature of the services being sold, or that a sale was taking place.

15. In numerous instances, defendants, through their telemarketer, simply announced that the consumer would receive a "free" trial membership and a membership kit in the mail or a "free" gift, and did not request the consumer's authorization either to send the membership kit or gift, or to charge the consumer's credit or debit card. Neither a consumer's willingness to receive a membership kit or a "free" gift nor the consumer's failure to object to receiving a trial membership, membership kit, or "free" gift constituted authorization to charge the consumer's credit or debit card.

16. In many instances, defendants' telemarketers completely failed to disclose the material facts regarding the terms of defendants' memberships.

17. If the consumer agreed to accept a trial membership, and in numerous instances, even if the consumer did not agree, the telemarketer provided, without the consumer's knowledge or authorization, the consumer's name and credit or debit card number and other billing information to defendants for the purpose of enrolling the consumer for a trial membership and billing their credit or debit card.

18. Shortly after receiving the consumer's name and billing information, defendants mailed a membership kit to the consumer. Many consumers, however, did not open the kit because the kit appeared to be unsolicited promotional or sales material from a

company whose identity was unfamiliar to the recipient (*i.e.*, "junk mail"). If the consumer opened defendants' membership kit, the consumer found a letter inside that stated that the recipient had agreed to defendants' trial offer and that his or her credit or debit card would be charged for \$99.95 at the end of the free-trial period. The letter did not disclose, however, that: (a) defendants already possessed the consumer's credit or debit card number and that defendants would use that number to charge the consumer for the membership fee; or (b) when the trial period began or ended.

19. Sometime after sending the membership kit, defendants often mailed additional junk mail that also stated that the recipient had agreed to defendants' trial offer and that his or her credit or debit card would be charged for \$99.95 at the end of the free-trial period. This junk mail also did not disclose, however, that: (a) defendants already possessed the consumer's credit or debit card number and that defendants would use that number to charge the consumer for the membership fee; or (b) when the trial period began or ended.

20. During the course of defendants' marketing and sale of memberships, directly and through third-party telemarketers, numerous consumers, though enrolled by defendants in their membership clubs, did not agree to accept trial memberships and did not recall receiving necessary information about cancellation

or the effective dates of the trial memberships. In some instances, consumers first learned of defendants' trial memberships when defendants placed charges for the memberships on consumers' credit or debit cards.

21. In numerous instances, defendants charged consumers' credit cards or debited consumers' bank accounts prior to the expiration of the free trial offers, often the same day that defendants mailed the membership kits to consumers. In some instances, defendants charged consumers' credit cards or debited consumers' bank accounts for multiple trial memberships.

22. Defendants received thousands of complaints from consumers who stated that they were signed up for trial memberships without their authorization or complained that they did not understand that they had to call and cancel the memberships to avoid charges to their credit or debit cards. Despite this, defendants continued to charge consumers' credit or debit cards without ensuring that their telemarketers obtained authorization from consumers for such charges and disclosed the membership and cancellation terms. Furthermore, numerous consumers complained to defendants that they did not know how defendants got their billing information and that they had never authorized defendants to obtain or use their billing information. Despite this, defendants failed to ensure that consumers were told that their credit or debit card numbers and other billing

information were being turned over by the telemarketers to defendants for the purposes of enrolling consumers in, and charging consumers for, defendants' memberships.

23. In many instances, defendants have failed to issue credits to consumers who were entitled to them in conformance with defendants' cancellation policy. In other instances, defendants have promised credits to consumers who requested them, but they failed to transmit the credits to the consumers' credit card accounts in a timely manner, often delaying for several months and only after repeated telephone calls from consumers.

VIOLATIONS OF THE FTC ACT

COUNT I

FAILURE TO DISCLOSE MATERIAL INFORMATION

24. In the course of advertising, marketing, telemarketing, promoting, offering for sale, selling, and distributing memberships in buying services and other services, in numerous instances, defendants, directly or through third-party telemarketers, have represented, expressly or by implication, that a consumer will receive a trial membership without risk or obligation.

25. Defendants have failed to disclose or to disclose adequately to the consumer the negative option features of the trial membership, including, but not limited to:

- a. That a consumer who fails to contact defendants within a specified period of time and cancel the trial membership is automatically enrolled as a GenesisCard or VacantSun Travel Discounts member;
- b. That a consumer's credit or debit card, which was used to purchase goods or services from a third-party, would be charged a fee unless the consumer cancels the membership; and
- c. The prescribed manner in which a consumer must cancel the trial membership, including the inception and expiration dates of the trial membership.

26. The information contained in Paragraph 25 is material to consumers in their decisions to accept, purchase, or cancel trial memberships.

27. Defendants' failure to disclose the material information described in Paragraph 25, in light of the representations made in Paragraph 24, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**COUNT II
UNAUTHORIZED BILLING**

28. In the course of advertising, marketing, telemarketing, promoting, offering for sale, selling, and distributing

memberships in buying services and other services, in numerous instances, defendants have caused charges for defendants' services to be billed to a consumer's credit card or debited from a consumer's checking account without the consumer's authorization.

29. Defendants' practice of causing charges to be billed to a consumer's credit card or debited from a consumer's checking account without the consumer's authorization causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.

30. Therefore, defendants' practice, as alleged in Paragraph 28, is unfair and violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE TELEMARKETING SALES RULE

31. In the Telemarketing Act, 15 U.S.C. §§ 6101 *et seq.*, Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices. On August 16, 1995, the Commission promulgated the TSR, 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed. Reg. 43842 (Aug. 23, 1995). The TSR became effective on December 31, 1995, and since then has remained in full force and effect.

32. Defendants are "sellers" or "telemarketers" engaged in "telemarketing" as those terms are defined in the TSR. 16 C.F.R. §§ 310.2(r), (t) and (u).

33. The TSR prohibits sellers and telemarketers "[b]efore a customer pays for goods or services offered ... from failing to disclose, in a clear and conspicuous manner ... [a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer." 16 C.F.R. § 310.3(a)(1)(ii).

34. 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), violations of the TSR constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATION OF THE TELEMARKETING SALES RULE

COUNT III

35. In the course of advertising, marketing, promoting, offering for sale, selling, and distributing memberships in buying services and other services through telemarketing, in numerous instances, defendants, directly or through third-party telemarketers, have failed to disclose, in a clear and conspicuous manner, before consumers pay for the memberships, all material restrictions, limitations or conditions to purchase,

receive or use the goods or services that are the subject of the offers, including, but not limited to:

- a. That a consumer who fails to contact defendants within a specified period of time and cancel the trial membership is automatically enrolled as a GenesisCard or VacantSun Travel Discounts member;
- b. That a consumer's credit or debit card, which was used to purchase goods or services from a third-party, would be charged a fee unless the consumer cancels the membership; and
- c. The prescribed manner in which a consumer must cancel the trial membership, including the inception and expiration dates of the trial membership.

36. Therefore, Defendants' acts and practices as set forth in paragraph 35 violate Section 310.3(a)(1)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(ii).

THE TRUTH IN LENDING ACT

37. Section 166 of the TILA, 15 U.S.C. § 1666e, requires creditors to promptly credit a consumer's credit card account upon acceptance of the return of goods or forgiveness of the debt for services. Section 226.12(e) of Regulation Z, which implements Section 166 of the TILA, requires creditors to credit

a consumer's credit card account within seven business days from accepting the return of property or forgiving a debt for services. 12 C.F.R. § 226.12(e).

VIOLATION OF THE TRUTH IN LENDING ACT

COUNT IV

38. Preferred Alliance is a creditor as that term is defined in Section 103(f) of the TILA, 15 U.S.C. § 1602(f), and Section 226.2(a)(17)(ii) of Regulation Z, 12 C.F.R. § 226.2(a)(17)(ii).

39. Since at least April 1998, in numerous instances, defendant Preferred Alliance has failed to credit promptly consumers' credit card accounts within seven business days from accepting the return of property or forgiving a debt for services and, therefore, has violated Section 166 of the TILA, 15 U.S.C. § 1666e, and Section 226.12(e) of Regulation Z, 12 C.F.R. § 226.12(e).

CONSUMER INJURY

40. Consumers throughout the United States have been injured as a result of defendants' unlawful acts or practices. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and to harm the public interest. By

granting the requested injunctive relief, the Court can permanently halt defendants' law violations.

THIS COURT'S POWER TO GRANT RELIEF

41. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief, including consumer redress, disgorgement, and restitution, to prevent and remedy any violations of any provision of law enforced by the FTC.

42. This Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, the Federal Trade Commission, requests that this Court, as authorized by 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), Section 108(c) of the TILA, 15 U.S.C. § 1607(c), and pursuant to its own equitable powers:

1. Permanently enjoin the defendants from engaging in or assisting others in engaging in violations of the FTC Act, the TSR, the TILA, and Regulation Z as alleged herein;

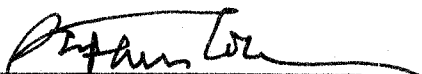
2. Award such relief as the Court finds necessary to redress injury to consumers resulting from the defendants' violations of the FTC Act, the TSR, the TILA, and Regulation Z including, but not limited to, refund of monies paid, redress, rescission of contracts, and the disgorgement of ill-gotten gains; and

3. Award plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: 2/4/03

Respectfully Submitted,

WILLIAM E. KOVACIC
General Counsel



Stephen L. Cohen
Attorney
Federal Trade Commission