

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LODGED
APR 28 2003
1329
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
DEPUTY

FILED
MAY - 5 2003
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
DEPUTY

- Priority
- Send
- Clsd
- Enter
- JS-5/JS-6
- JS-2/JS-3

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
GM FUNDING, INC.,
ROBERT DAMIAN KUTZNER,
GLOBAL MORTGAGE FUNDING,
INC., and
DAMIAN ROBERT KUTZNER,
Defendants.

SACV 02-1026 DOC (MLGx)

**STIPULATED JUDGMENT AND
ORDER FOR PERMANENT
INJUNCTION AS TO
DEFENDANTS GM FUNDING,
INC., ROBERT D. KUTZNER,
GLOBAL MORTGAGE FUNDING,
INC., AND DAMIAN R. KUTZNER**

Plaintiff Federal Trade Commission ("Commission" or "FTC") filed its complaint pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Sections 521(a) and 522(a) of the Gramm-Leach-Bliley Act ("GLB Act"), 15 U.S.C. §§ 6821(a) and 6822(a). The Commission and Defendants, as hereinafter defined, hereby stipulate to the entry of and request the Court to enter this Stipulated Judgment and Order for Permanent Injunction ("Order") to resolve all matters of dispute between them in this action.

IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:

ENTER ON ICMS
MAY - 6 2003
36

1 **FINDINGS**

2 1. This Court has jurisdiction over the subject matter and the parties pursuant
3 to 15 U.S.C. §§ 45(a), 53(b), 6821(a), and 6822(a), and 28 U.S.C. §§ 1331, 1337(a),
4 and 1345.

5 2. Venue is proper as to all parties in the Central District of California
6 pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c).

7 3. The activities of Defendants are in or affecting commerce, as defined in
8 Section 4 of the FTC Act, 15 U.S.C. § 44.

9 4. The facts that the FTC has stated in the complaint, if true, would state a
10 claim upon which relief may be granted against Defendants under Sections 5(a) and
11 13(b) of the FTC Act, 15 U.S.C. §§ 45(a) and 53(b), and under Sections 521(a) and
12 522(a) of the GLB Act, 15 U.S.C. §§ 6821(a) and 6822(a).

13 5. Defendants have entered into this Order freely and without coercion.
14 Defendants further acknowledge that they have read the provisions of this Order and
15 are prepared to abide by them.

16 6. The Plaintiff and Defendants, by and through their counsel, have agreed that
17 the entry of this Order resolves all matters of dispute between them arising from the
18 Complaint in this action, up to the date of entry of this Order. This Order, however,
19 shall have no preclusive effect as to any action brought by any other federal agency.
20 This Order supplants the Temporary Restraining Order and the Stipulated Preliminary
21 Injunction entered herein.

22 7. Defendants waive all rights to seek appellate review or otherwise challenge
23 or contest the validity of this Order. Defendants further waive and release any claim
24 they may have against the Commission, its employees, representatives, or agents.

25 8. Defendants agree that this Order does not entitle Defendants to seek or to
26 obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28
27 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and
28 Defendants further waive any rights to attorneys' fees that may arise under said

1 provision of law.

2 9. Entry of this Order is in the public interest.

3 10. Defendants deny all material allegations of the FTC's complaint and deny
4 that they have committed any wrongful act or omission. Nothing herein should be
5 deemed or construed to constitute any admission of wrongdoing on the part of any
6 Defendant, individually or jointly with any other individual or entity. Furthermore,
7 the fact that a specific course of conduct is enjoined herein shall not be deemed or
8 construed to constitute any admission that Defendants, or any of them, have engaged
9 in such course of conduct at any time prior to the date hereof.

10 **ORDER**

11 **Definitions**

12 A. "Assets" means any legal or equitable interest in, right to, or claim to,
13 any real and personal property, including but not limited to chattel, goods,
14 instruments, equipment, fixtures, general intangibles, effects, leaseholds, premises,
15 contracts, mail or other deliveries, shares of stock, lists of consumer names,
16 inventory, checks, notes, accounts, credits, receivables, funds, and all cash, wherever
17 located.

18 B. "Defendants" means GM Funding, Inc. ("GM"), Robert Damian Kutzner,
19 Global Mortgage Funding, Inc. ("Global Mortgage"), and Damian Robert Kutzner,
20 and their officers, agents, servants, employees, subsidiaries, affiliates, successors,
21 assigns, and all persons or entities in active concert or participation with them who
22 receive notice of this order by personal service or otherwise.

23 C. "Document" is synonymous in meaning and equal in scope to the usage
24 of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings,
25 graphs, charts, photographs, audio and video recordings, computer records, and other
26 data compilations from which information can be obtained and translated, if
27 necessary, into reasonably usable form through detection devices. A draft or non-
28 identical copy is a separate document within the meaning of the term.

1 D. "Plaintiff" means Federal Trade Commission.

2 E. "Spoofing" means the practice of disguising a commercial email to
3 make the email appear to come from an address from which it actually did not
4 originate. Spoofing involves placing in the "From" or "Reply-to" lines, or in other
5 portions of email messages, an email address other than the actual sender's address,
6 without the consent or authorization of the user of the email address whose address is
7 spoofed.

8 F. "Customer information of a financial institution" is synonymous in
9 meaning and equal in scope to the usage of the term in Section 527(2) of the GLB
10 Act, 15 U.S.C. § 6827(2).

11 G. "Unsolicited commercial email" means an electronic mail message that
12 consists of or contains a communication advertising, promoting, soliciting, offering,
13 or offering to sell any product or service, and that is not requested by the addressee or
14 recipient or sent pursuant to a pre-existing business or personal relationship between
15 the sender and the addressee or recipient of the email.

16 **Conduct Prohibitions**

17 **I. BAN REQUIREMENTS**

18 **IT IS THEREFORE ORDERED** that Defendants are hereby restrained and
19 enjoined from engaging, participating in, or assisting in any manner or in any
20 capacity whatsoever, whether directly or indirectly, in concert with others, or through
21 any intermediary, third party, business entity, or device, in the marketing, advertising,
22 promotion, or sending of unsolicited commercial email.

23 **II. INJUNCTION AGAINST MISREPRESENTATIONS**

24 **IT IS FURTHER ORDERED** that in connection with the advertising,
25 promotion, offering or sale of goods or services in commerce not covered by Section
26 I, above, Defendants are hereby restrained and enjoined from making any express or
27 implied misrepresentation or omission of material fact that is false or misleading, in
28 any manner, directly or indirectly, to any consumer or entity, including, but not

1 limited to, the following:

2 A. Misrepresenting that Defendants are affiliated with, or are calling from or
3 on behalf of, a financial institution, including, but not limited to, Radian, Prudential,
4 or Fannie Mae, or a company affiliated with these businesses;

5 B. Misrepresenting that the email addresses of email recipients will, upon
6 request of the email recipients, be removed from any lists of addresses to which future
7 email solicitations will be sent;

8 C. Placing the email addresses of consumers, without their authorization or
9 consent, in the "from" or "reply-to" portion of emails;

10 D. Inducing consumers to divulge their personal financial information by
11 misrepresenting that Defendants are affiliated with financial institutions; and

12 E. Misrepresenting any information material to a consumer's decision to
13 provide personal financial information.

14 **III. INJUNCTION AGAINST SPOOFING**

15 **IT IS FURTHER ORDERED** that in connection with the advertising,
16 promotion, offering or sale of goods or services in commerce not covered by Section
17 I, above, Defendants are hereby restrained and enjoined from the practice of
18 "spoofing."

19 **IV. INJUNCTION AGAINST GRAMM-LEACH-BLILEY ACT VIOLATIONS**

20 **IT IS FURTHER ORDERED** that in connection with the advertising,
21 promotion, offering or sale of goods or services in commerce not covered by Section
22 I, above, Defendants are hereby restrained and enjoined from obtaining or attempting
23 to obtain "customer information of a financial institution," including, but not limited
24 to, mortgage amount, rate, and type, by making false, fictitious, or fraudulent
25 statements or representations to consumers or financial institutions.

26 **V. MONETARY JUDGMENT**

27 **IT IS FURTHER ORDERED** that:

28 A. Judgment in the amount of Sixty Thousand Five Hundred Dollars

1 (\$60,500.00) is hereby entered against Defendants GM Funding, Inc., Robert D.
2 Kutzner, Global Mortgage Funding, Inc., and Damian R. Kutzner, jointly and
3 severally. This judgment is satisfied by the total, aggregate payment of Sixty
4 Thousand Five Hundred Dollars (\$60,500.00) by Defendants GM Funding, Inc.,
5 Robert D. Kutzner, Global Mortgage Funding, Inc., and Damian R. Kutzner made to
6 the Commission concurrently with their execution of this Order.

7 B. Defendants GM Funding, Inc., Robert D. Kutzner, Global Mortgage
8 Funding, Inc., and Damian R. Kutzner relinquish all dominion, control, and title to
9 the monies transferred to the FTC pursuant to this Section, and agree that all legal and
10 equitable title to those monies is vested in the Commission.

11 C. In accordance with 31 U.S.C. § 7701, Defendants GM Funding, Inc.,
12 Robert D. Kutzner, Global Mortgage Funding, Inc., and Damian R. Kutzner are
13 hereby required, unless they have done so already, to furnish to the Commission their
14 respective taxpayer identifying numbers (social security numbers or employer
15 identification numbers) which shall be used for purposes of collecting and reporting
16 on any delinquent amount arising out of Defendants' relationship with the
17 government.

18 D. Defendant Robert D. Kutzner and Damian R. Kutzner are further
19 required, unless they have done so already, to provide the Commission with clear,
20 legible and full-size photocopies of all valid driver's licenses they possess, which will
21 be used for reporting and compliance purposes.

22 E. Defendants agree that the facts as alleged in the Complaint filed in this
23 action shall be taken as true for the purpose of a nondischargeability complaint in any
24 bankruptcy proceeding.

25 F. Nothing herein should be deemed or construed to prevent the
26 Commission from initiating any appropriate proceeding or proceedings to enforce the
27 provisions of this Order.

28 ////

1 **VI. COMMISSION'S USE OF MONETARY JUDGMENT**

2 **IT IS FURTHER ORDERED** that all funds paid pursuant to Section V of this
3 Order shall be deposited into a fund administered by the Commission or its agent to
4 be used for equitable relief, including, but not limited to, consumer redress and any
5 attendant expenses for the administration of any redress fund. In the event that direct
6 redress to consumers is wholly or partially impracticable or funds remain after redress
7 is completed, the Commission may apply any remaining funds for such other
8 equitable relief (including consumer information remedies) as it determines to be
9 reasonably related to Defendants' practices alleged in the complaint. Any funds not
10 used for such equitable relief shall be deposited to the United States Treasury as
11 disgorgement. Defendants shall have no right to challenge the Commission's choice
12 of remedies under this Section.

13 **VII. ASSET FREEZE**

14 **IT IS FURTHER ORDERED** that, upon entry of this Order, Paragraphs IV
15 and XIII of the Stipulated Order of Preliminary Injunction shall be dissolved.

16 **VIII. COMPLIANCE MONITORING**

17 **IT IS FURTHER ORDERED** that, for the purpose of monitoring and
18 investigating compliance with any provision of this Order,

19 A. Within ten (10) days of receipt of written notice from a representative of
20 the Commission, Defendants GM Funding, Inc., Robert D. Kutzner, Global Mortgage
21 Funding, Inc., and Damian R. Kutzner each shall submit additional written reports,
22 sworn to under penalty of perjury; produce documents for inspection and copying;
23 appear for deposition; and/or provide entry during normal business hours to any
24 business location in such Defendant's possession or direct or indirect control to
25 inspect the business operation;

26 B. In addition, the Commission is authorized to monitor compliance with
27 this Order by all other lawful means, including but not limited to the following:

- 28 1. obtaining discovery from any person, without further leave of

1 court, using the procedures proscribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

2 2. posing as consumers and suppliers to: Defendants GM Funding,
3 Inc., Robert D. Kutzner, Global Mortgage Funding, Inc., and Damian R. Kutzner,
4 Defendants GM Funding, Inc.'s, Robert D. Kutzner's, Global Mortgage Funding,
5 Inc.'s, and Damian R. Kutzner's employees, or any other entity managed or
6 controlled in whole or in part by Defendants GM Funding, Inc., Robert D. Kutzner,
7 Global Mortgage Funding, Inc., and Damian R. Kutzner, without the necessity of
8 identification or prior notice;

9 *Provided* that nothing in this Order shall limit the Commission's lawful use of
10 compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49,
11 57b-1, to obtain any documentary material, tangible things, testimony, or information
12 relevant to unfair or deceptive acts or practices in or affecting commerce (within the
13 meaning of 15 U.S.C. § 45(a)(1)).

14 C. Defendants GM Funding, Inc., Robert D. Kutzner, Global Mortgage
15 Funding, Inc., and Damian R. Kutzner shall permit representatives of the Commission
16 to interview any employer, consultant, independent contractor, representative, agent,
17 or employee who has agreed to such an interview, relating in any way to any conduct
18 subject to this Order. The person interviewed may have counsel present.

19 **IX. COMPLIANCE REPORTING BY DEFENDANT**

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

22 A. For a period of five (5) years from the date of entry of this Order,

23 1. Defendants Robert D. Kutzner and Damian R. Kutzner shall notify
24 the Commission of the following:

25 a. Any changes in Defendant's residence, mailing addresses,
26 and telephone numbers, within ten (10) days of the date of such change;

27 b. Any changes in Defendant's employment status (including
28 self-employment) within ten (10) days of the date of such change. Such notice shall

1 include the name and address of each business that Defendant is affiliated with,
2 employed by, or performs services for; a statement of the nature of the business; and a
3 statement of Defendant's duties and responsibilities in connection with the business;

4 c. Any changes in Defendant's name or use of any aliases or
5 fictitious names; and

6 2. Defendants GM Funding, Inc., Robert D. Kutzner, Global
7 Mortgage Funding, Inc., and Damian R. Kutzner shall notify the Commission of any
8 changes in corporate structure that may affect compliance obligations arising under
9 this Order, including but not limited to a dissolution, assignment, sale, merger, or
10 other action that would result in the emergence of a successor corporation; the
11 creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or
12 practices subject to this Order; the filing of a bankruptcy petition; or a change in the
13 corporate name or address, at least thirty (30) days prior to such change, *provided*
14 that, with respect to any proposed change in the corporation about which the
15 Defendant learns less than thirty (30) days prior to the date such action is to take
16 place, Defendant shall notify the Commission as soon as is practicable after obtaining
17 such knowledge.

18 B. One hundred eighty (180) days after the date of entry of this Order,
19 Defendants GM Funding, Inc., Robert D. Kutzner, Global Mortgage Funding, Inc.,
20 and Damian R. Kutzner each shall provide a written report to the FTC, sworn to
21 under penalty of perjury, setting forth in detail the manner and form in which they
22 have complied and are complying with this Order. This report shall include, but not
23 be limited to:

24 1. Any changes required to be reported pursuant to subsection A
25 above; and

26 2. A copy of each acknowledgment of receipt of this Order obtained
27 by Defendant pursuant to Section XI.

28 C. For the purposes of this Order, Defendant shall, unless otherwise

1 directed by the Commission's authorized representatives, mail all written
2 notifications to the Commission to:

3 Associate Director, Division of Marketing Practices
4 Federal Trade Commission
5 600 Pennsylvania Ave. NW
6 Washington, DC 20580
7 Re: FTC v. GM Funding, et al., Civil Action No. SACV 02-1026

8 D. For purposes of the compliance reporting required by this Section, the
9 Commission is authorized to communicate directly with Defendants Robert D.
10 Kutzner and Damian R. Kutzner.

11 X. RECORD KEEPING PROVISIONS

12 **IT IS FURTHER ORDERED** that, for a period of eight (8) years from the
13 date of entry of this Order, in connection with any business where Defendant Robert
14 D. Kutzner or Damian R. Kutzner is the majority owner of the business or directly or
15 indirectly manages or controls the business, Defendants and their agents, employees,
16 officers, corporations, successors, and assigns, and those persons in active concert or
17 participation with them who receive actual notice of this Order by personal service or
18 otherwise, are hereby restrained and enjoined from failing to create and retain the
19 following records:

20 A. Accounting records that reflect the cost of goods or services sold,
21 revenues generated, and the disbursement of such revenues;

22 B. Personnel records accurately reflecting: the name, address, and
23 telephone number of each person employed in any capacity by such business,
24 including as an independent contractor; that person's job title or position; the date
25 upon which the person commenced work; and the date and reason for the person's
26 termination, if applicable;

27 C. Customer files containing the names, addresses, phone numbers, dollar
28 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;

1 D. Complaints and refund requests (whether received directly, indirectly or
2 through any third party) and any responses to those complaints or requests; and

3 E. Copies of all sales scripts, training materials, advertisements, or other
4 marketing materials.

5 **XI. DISTRIBUTION OF ORDER BY DEFENDANT**

6 **IT IS FURTHER ORDERED** that, for a period of five (5) years from the date
7 of entry of this Order,

8 A. Defendants GM Funding, Inc. and Global Mortgage Funding, Inc. shall
9 deliver a copy of a Summary of this Order, to be approved by counsel for Plaintiff, to
10 all principals, officers, directors, managers, employees, agents, and representatives
11 having responsibilities with respect to the subject matter of this Order, and shall
12 secure from each such person a signed and dated statement acknowledging receipt of
13 the Summary of the Order. Defendants GM Funding, Inc. and Global Mortgage
14 Funding, Inc. shall deliver this Summary of the Order to current personnel within
15 thirty (30) days after the date of service of this Order, and to new personnel within
16 thirty (30) days after the person assumes such position or responsibilities.

17 B. Defendants Robert D. Kutzner and Damian R. Kutzner shall deliver a
18 copy of a Summary of this Order, to be approved by counsel for Plaintiff, to the
19 principals, officers, directors, managers and employees under Defendants Robert D.
20 Kutzner's and Damian R. Kutzner's control for any business that (a) employs or
21 contracts for personal services from Defendants Robert D. Kutzner or Damian R.
22 Kutzner and (b) has responsibilities with respect to the subject matter of this Order.
23 Defendants Robert D. Kutzner and Damian R. Kutzner shall secure from each such
24 person a signed and dated statement acknowledging receipt of this Summary of the
25 Order within thirty (30) days after the date of service of the Order or the
26 commencement of the employment relationship.

27 ////

28 ////

1 **XII. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT**

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

5 **XIII. RETENTION OF JURISDICTION**

6 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this
7 matter for purposes of construction, modification and enforcement of this Order.

8 **XIV. MONITORING COMPLIANCE OF SALES PERSONNEL**

9 **IT IS FURTHER ORDERED** that Defendants GM Funding, Inc., Robert D.
10 Kutzner, Global Mortgage Funding, Inc., and Damian R. Kutzner, in connection with
11 any business where Defendant Robert D. Kutzner or Damian R. Kutzner is the
12 majority owner of the business or directly or indirectly manages or controls the
13 business, is hereby permanently restrained and enjoined from:

14 A. Failing to take reasonable steps sufficient to monitor and ensure that all
15 employees and independent contractors engaged in sales or other customer service
16 functions comply with Sections I, II, III, and IV of this Order. Such steps shall
17 include adequate monitoring of sales presentations or other calls with customers, and
18 shall also include, at a minimum, the following: (1) listening to the oral
19 representations made by persons engaged in sales or other customer service functions;
20 (2) establishing a procedure for receiving and responding to consumer complaints;
21 and (3) ascertaining the number and nature of consumer complaints regarding
22 transactions in which each employee or independent contractor is involved;

23 B. Failing promptly to investigate fully any consumer complaint received
24 by any business to which this Section applies; and

25 C. Failing to take corrective action with respect to any sales person whom
26 Defendant Robert D. Kutzner or Damian R. Kutzner determines is not complying
27 with this Order, which may include training, disciplining, and/or terminating such
28 sales person.

