Thomas W. McNamara
mcnamarat@ballardspahr.com
655 West Broadway, Suite 1600
San Diego, California 92101-8494
Telephone: 619-696-9200
Facsimile: 619-696-9269

Temporary Receiver

Andrew W. Robertson (*Pro Hac Vice Pending*)
robertsona@ballardspahr.com
BALLARD SPAHR LLP
655 West Broadway, Suite 1600
San Diego, California 92101-8494
Telephone: 619-696-9200
Facsimile: 619-696-9269

Colleen M. Reider (027260)
reiderc@ballardspahr.com
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602-798-5400
Facsimile: 602-798-5595

Attorneys for Temporary Receiver

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Ambrosia Web Design LLC, an Arizona limited liability company, also d/b/a AWD; Concord Financial Advisors LLC, an Arizona limited liability company; CAM Services Direct LLC, an Arizona limited liability company; AFB LLC, an Arizona limited liability company; Western GPS LLC, an Arizona limited liability company; Chris Ambrosia, individually and as a manager of Ambrosia Web Design LLC, AFB LLC, and CAM Services Direct LLC; and LeRoy Castine, a/k/a Lee Castine, individually and as a manager of Ambrosia Web Design LLC, Concord Financial Advisors LLC, AFB LLC, and Western GPS LLC,

Defendants.

CASE NO. CV-12-2248-PHX-FJM

PRELIMINARY REPORT OF TEMPORARY RECEIVER

JUDGE: Hon. Frederick J. Martone
CTRM: 506

TABLE OF CONTENTS

Page

PRELIMINARY REPORT OF TEMPORARY RECEIVER

I.

Introduction

On October 22, 2012, this Court entered a Temporary Restraining Order with an Asset Freeze and Appointment of Receiver ("TRO") which appointed me, Thomas W. McNamara, Temporary Receiver ("Receiver"), for the business activities of Receivership Defendants.

Receivership Defendants are defined in the TRO (Paragraph H, page 4) as the entities named as Corporate Defendants (Ambrosia Web Design LLC d/b/a AWD, Concord Financial Advisors LLC, CAM Services Direct LLC, AFB LLC, and Western GPS LLC) and "any affiliates and subsidiaries that conducted any business related to the Corporate Defendants' credit card interest rate reduction services and that the Temporary Receiver has reason to believe are owned or controlled in whole or in part by any of the Defendants." I have identified one additional Receivership Defendant not named in the Complaint which falls within this extended definition – Max Direct LLC, formed and owned by Defendant Chris Ambrosia.

I submit this Preliminary Report to advise the Court of my initial actions and document my preliminary observations. In short, we have taken possession of the one Receivership Defendant currently in business – Western GPS LLC ("Western GPS") – and have suspended its operations consistent with the terms of the TRO.

Western GPS, owned by Defendant LeRoy Castine ("Castine"), operates a telephone sales boiler room selling credit card interest rate reduction assistance to consumers driven to its Tempe phone room by high volume robocalls orchestrated by third-party vendors. The business is at once unlawful and unprofitable. Unlawful at the threshold because the source of incoming consumer calls are illegal robocalls. Unlawful in implementation as some of the techniques deployed to "sell" consumers cross the line into deception and violate the Federal Trade Commission ("FTC") Act and the FTC's Telemarketing Sales Rules ("TSR"). It does appear, however, that some consumers did receive some assistance with their credit card situations and that Castine had initiated some efforts to improve operations, training, and compliance. These changes do not, however, in my view, alter the fundamental illegality of the operation.

Western GPS's operations are also currently unprofitable with revenues from the Tempe "room" falling short of related expenses. Losses have been offset somewhat by a side business, also unlawful as a form of bank fraud, of "selling" access to Western GPS's merchant account to other telemarketers, each with their own universe of questionable practices, who could not qualify for their own merchant accounts. Losses have also been reduced nominally by revenue from various fulfillment services provided to other interest rate reduction telemarketers.

Section XX of the TRO specifically directs that I report to the Court on five specific topics prior to the date set for the hearing to Show Cause regarding the Preliminary Injunction. As to those topics, I can report as follows:

(1) **Steps taken by the Temporary Receiver to implement the terms of this Order.** I have indefinitely suspended operations at the East Baseline Street site. The practices prohibited by the TRO are so ingrained in the operations that this is the only feasible vehicle for immediate implementation. A fundamental go-forward challenge for this receivership is whether this temporary suspension of operations must evolve into a wind down. For this business to be a lawful business compliant with the TRO and any follow-up Preliminary Injunction, it must adopt a business model free of robocalls, deceptive and illegal practices, and unauthorized merchant account sharing. At this early juncture, it appears that such paradigm shifts would be nearly impossible to implement, would require new capital, and would render the business even more unprofitable.

(2)-(3) **The assets and liabilities of Receivership Defendants.** Based on financial records found on site, we have been able to construct a rough profit and loss profile which indicates that this business is not presently profitable and that it has few assets beyond the funds frozen in bank and merchant accounts. (*See* Section II(B) below. We do not yet have a calculation for overall liabilities, but estimate that liabilities are not substantial. *See* further discussion at Sections II(B) and IV(E)).

(4) **Steps Temporary Receiver intends to take in the future to prevent any diminution in Receivership Defendants' assets, pursue receivership assets from third parties, and adjust Receivership Defendants' liabilities.** Implementation of the asset freeze is my primary immediate vehicle to protect assets. Whether or not third parties have assets which can be claimed by the receivership, or Defendants' liabilities can be adjusted, are matters which will require further investigation.

(5) **Other matters the Temporary Receiver believes should be brought to the Court's attention.** These matters are set forth below in this Preliminary Report.

II.

Receivership Activities

A. Receivership Defendants' Sites

My team secured the Receivership Defendant premises identified in the TRO – 123 East Baseline Street in Tempe – commencing at 10:00 a.m. on Wednesday October 24, 2012. We coordinated our initial efforts with uniformed police from the Tempe Police Department. Once we secured the premises, we provided access to the FTC pursuant to the TRO. The locks on all four entry doors were changed.

Western GPS is the only Receivership Defendant presently conducting business at this site. It operates from four contiguous suites (D204, D206, D207, D208). The only identifiable signage is an "AFB LLC" sign on the entry door to Suite D208. We have found no evidence of any other operating sites for Western GPS or any other Receivership Defendant.

Upon our arrival, the offices were occupied by 37 staff – 20 "Qualifiers" who field consumer calls generated by robocalls with automated messages; three "Closers;" five "Financial Advisors;" six customer service personnel; two accounting and administrative staff; and Castine, the on-site proprietor and owner of Western GPS. The overall space is approximately 4,000 square feet with monthly rental at $6,900. The 24 cubicles for the

Qualifiers (4 of which were unoccupied when we arrived) are each equipped with a telephone and the cubicles and desks for all other staff are equipped with computers and telephones. Castine has a designated office.

An inventory of furniture and equipment on site and a rough schematic of the premises are at Appendix, Exhibit 1.

B. Financial Accounts of Receivership Defendants

Beginning October 24, 2012, my team, and FTC staff, served the TRO on banks, including merchant account operators, where Receivership Defendants were known to have accounts. The following accounts with positive balances have been frozen: [1]

Account Holder	Financial Institution	Account No. Ending	Amount Frozen
CAM Services Direct LLC	Global Payments	8962	$112,479.45
Western GPS LLC	BBVA Compass Bank	2924	$160,498.39
Western GPS LLC	BBVA Compass Bank	6707	$20,893.82
Western GPS LLC	BBVA Compass Bank	2819	$6,748.98
Western GPS LLC	Global Payments	2429	$758,352.82
Western GPS LLC	Global Payments	3156	$75,258.27
Lee Castine d/b/a Western GPS LLC	Global Payments	9917	$26,169.56
Max Direct LLC	BBVA Compass Bank	6741	$6,468.51
Max Direct LLC	BBVA Compass Bank	4094	$63,039.43
	TOTAL		**$1,229,909.23**

Other than the money in these accounts, Receivership Defendants do not appear to have substantial other liquid assets, but our investigation as to assets is still in its

1 We did learn of one attempt to violate the asset freeze. BBVA Compass Bank reported to us that on the afternoon of Wednesday, October 24, 2012, Defendant Chris Ambrosia, just after being served with the TRO notifying him of the TRO and asset freeze, entered a local BBVA Compass branch and attempted to set up a wire transfer from one or two accounts in the name of Max Direct on which Ambrosia is the designated signatory. Seeing the accounts were frozen, the bank teller contacted a supervisor who confirmed the assets were frozen and the wires could not take place. When Ambrosia met with me on Friday, October 26, 2012, he denied vehemently that he attempted to so access the account.

preliminary stages. The most significant assets are funds held as reserves in the credit card merchant accounts maintained by Global Payments. These are not traditional bank accounts, but funds held as reserve by the merchant account which processes credit card payments.

C. Cooperation and Interviews

In general, the employees were very cooperative, provided contact information, and departed. The two primary floor managers stayed on-site, met with us and were cooperative and helpful in describing the operations. The office manager met with us on the day of entry, has returned in the days after, and has also been very helpful. Castine also met with us at the time of our entry and then again the following day and has been extremely cooperative, responded to all our questions, and provided requested information. On Friday, October 26, Defendant Chris Ambrosia, who does not appear to have any active role in the current business, accepted our invitation to meet. He met with us for approximately 30 minutes and was generally cooperative.

D. Documents/Information/Electronic Data

Upon taking possession, my team confirmed that all hard copy documents were secure and terminated all access to computers and electronic data. I retained a forensic computer firm – Forentech, based in Phoenix – which supervised the FTC-retained forensic firm in making mirror images of the computers on site. We also provided notice of the TRO to all identified hosts of websites and electronic data.

E. Forensic Accountants

I retained David Birdsell, a CPA and experienced Bankruptcy trustee based in Phoenix, to review the financial activity of Receivership Defendants. The results of his preliminary analysis are presented in Section IV(E) below.

F. Compliance with TRO

Once we secured the premises and completed a basic review of the business, I took immediate steps to insure compliance with the TRO by suspending operations. As noted above, at page 2, lines 13-22, it is likely that this suspension must evolve into a wind down and shut down of the business because it simply cannot be operated lawfully and profitably.

I have activated a Receivership website, www.AWDReceiver.com which will serve as a vehicle to communicate with clients and consumers and have taken steps to have Receivership Defendants' websites roll over to this website.

III.

Receivership Defendants

While Western GPS is the only currently active operation at the East Baseline Street site, it appears clear that its business evolved from Receivership Defendant businesses previously operated from the same site.

AFB LLC ("AFB")

AFB was the first Receivership Defendant to be formed, incorporated in January, 2010 by Castine, with offices at the East Baseline Street site. Its name is still displayed on the window of Suite D208. AFB appears to be the initial moniker by which Castine conducted an interest rate reduction telemarketing business from East Baseline. One of AFB's early employees was Defendant Ambrosia who was hired as a "Closer" in late 2010. Over time, AFB also served as an administrative arm for Castine-related ventures, handling payroll, customer service, responding to charge-backs, and basic administrative functions. AFB appears to have been active at some level from January, 2010 through the end of 2011.

Ambrosia Web Design LLC, also d/b/a AWD ("AWD")

AWD was one of three entities formed by Castine and/or Ambrosia in Spring, 2011. The other two – Concord Financial and CAM Services - are described below. AWD was formed by Ambrosia on March 31, 2011. Despite its name, its business did not involve web design in any manner. Our investigation indicates that it was formed for the sole purpose of securing a merchant account that could serve Castine's telemarketing business. Apparently, Ambrosia's credit worthiness was superior to Castine's. AWD ultimately secured a merchant account which then processed card payments for Castine. Invoicing was done under the name of AWD, in many cases with fictional references to web design services. For this, Castine paid Ambrosia a fee of 4% of the revenues flowing through the merchant account. Ambrosia reported to us he received $5,000 - $12,000 a month from the merchant account, prompting him to retire from his position as a Closer for AFB. Administration of the AWD merchant account appears to have been handled entirely by Castine and his team. Ambrosia made no effort to supervise or monitor the account activity, including chargebacks. In November, 2011, AWD lost the merchant account which Castine reported to Ambrosia was caused by other Florida-based telemarketers who were also using the AWD merchant account.

<u>Concord Financial Advisors LLC (“Concord”)</u>

Concord was formed by Castine on March 30, 2011 and operated at some level from the East Baseline site. Our investigation indicates that it provided primarily “fulfillment” services for other interest rate telemarketers, primarily “financial advisors” who communicated with the consumer and their credit card company about interest rate issues, and the mailing of report packets to consumers. Concord was active from approximately March 30, 2011 until November 22, 2011. We found no signs of any current business operations.

<u>CAM Services Direct LLC (“CAM Services”)</u>

CAM Services was formed by Ambrosia on April 21, 2011. Like AWD, its sole purpose appears to have been to host a merchant account for Castine’s telemarketing business. The CAM Services merchant account appears to have been used by Castine intermittently at various levels until late 2011. That merchant account has a present balance in its reserve account of $112,000.

<u>Max Direct LLC (“Max Direct”)</u>

Max Direct LLC was formed by Ambrosia in October, 2011. It does not appear to have operated any actual business, except to serve as the payee recipient of the royalty due from Castine to Ambrosia for setting up the AWD and CAM Services merchant accounts.

Ambrosia, through Max Direct, also made small loans to Castine in late 2011 and early 2012, as to which Western GPS is still making monthly payments.

Given that the merchant accounts provided by Ambrosia were crucial to Castine's ability to stay in business and that Max Direct was the entity upon which Ambrosia participated in the business, Max Direct is a "Receivership Defendant" as an entity directly owned and controlled by Ambrosia which "conducted any business related to the Corporate Defendants' credit card interest rate reduction services." (TRO, ¶ H, page 4.)

Western GPS LLC ("Western GPS")

Western GPS was formed by Castine in February, 2012 and became the new name for his telemarketing business. It was ultimately able to secure more than one merchant account in its own name. It is the only Receivership Defendant currently in operation. Those operations are more fully described below.

IV.

Summary of Business Operations

The Western GPS business evolved from previous businesses of Castine. By late 2011, AWD had lost its merchant account and AWD, Concord, and CAM Services were swimming in customer complaints, formal and informal. In January, 2012, Castine was forced to mothball operations as he had no available merchant account. At that point, Ambrosia (flush with his "royalty" from the merchant account) loaned Castine approximately $30,000 which was used to tide the business over. In February, 2012, Castine formed Western GPS which became just another name for a familiar business.

The FTC's Complaint and TRO application allege multiple specific violations of the FTC Act and the TSR. We have not conducted an audit to confirm the nature and extent of each such violation. Given that the core business is unprofitable and is predicated on two illegal practices – robocalls and unauthorized merchant account factoring – we do not need to navigate to a conclusion on all the allegations raised by the FTC in order to conclude that this business could not operate lawfully and profitably in the context of this receivership.

We summarize below the basic components of the business based on our investigation to date.

A. <u>Marketing</u>

Western GPS deployed a one-dimensional marketing strategy – retain third-party vendors to drive in-bound phone traffic to the Tempe call room through robocalls, delivering pre-recorded messages inviting the consumer to press "1" to speak to a representative. Such a use of robocalls is a direct violation of the TSR, 16 C.F.R. § 310.4(b)(1).

Western GPS paid dearly for these robocalls. Its primary vendor – City Tech Guys ("City Tech") – charged $125 per day "per seat" (defined as an occupied sales/qualifier desk), regardless of actual results. The Tempe room had a capacity for 24 Qualifiers, but has recently been operating with less due to variations by day depending on illness, vacation, and other workplace issues. Over the last several months, Western GPS has paid City Tech approximately $2,000-$2,500 per day for robocalls. Payment procedures were unorthodox – <u>daily</u> cash deposits were made to City Tech's bank account by Western GPS personnel. The primary contact person at City Tech was Mohammed Ullah, with whom Western GPS personnel were in contact each day about the details of call flow, volume, and technical quality.

A second vendor – identified to us only as "Charlie" – had also provided robocalls in earlier versions of Castine's business.

These robocalls had two serious defects as a marketing tool – they were illegal at the threshold and they were not very cost effective. The TSR is explicit that robocalls are illegal absent written consent from the consumer. Castine suggested that he relied on the vendors to insure that these incoming calls were "scrubbed" sufficiently to avoid any issues as to the Do Not Call Registry or robocalls. He suggested that incoming calls were linked to various vendors for whom consumers had "checked the box" that they did not object to the sharing of their information. We did not, of course, find any evidence that the flood of consumers being sent to the Tempe call room had "consented in writing" to receive robocalls as required by the TSR.[2]

It is difficult to quantify overall call activity because it varied over time subject to multiple variables and we have no hard information about earlier time periods. We can, however, roughly estimate activity in the period immediately up to the time of our entry. Approximately 4,500 calls were coming into the room daily. We do not know how many robocalls were necessary to generate these 4,500 calls, but we suspect the number is huge. The actual conversion rate on those calls was, however, low. On a good day, 20 consumers would be transferred to a Closer and the conversion rate from Qualifiers to Closers to Financial Advisors to actual payment was in the range of 40-45% of those transfers. This was the rate identified by Larry Penman, the Qualifiers' floor manager, who carefully tracked this information daily.

We were able to confirm this rough conversion rate by spreadsheets maintained by the office manager. For example, on October 23, 2012, 24 calls were transferred from Qualifiers to a Closer. Of those, Closers sent 20 calls on to the Financial Advisors. Of those 20, ten were actually charged for total revenues of $8,750. Similar results were achieved on October 18, when 24 calls were transferred from Qualifiers to a Closer with 16 of those going on to the Financial Advisors, with six actually being charged for total revenues of $6,670.

Castine also reported to us that he was actively exploring alternative means to drive call volume – primarily targeted leads through Google and other advertising – but had not yet begun implementation.

---

2 In addition, we did find an electronic copy of a complaint filed in late 2011 by the U.S. Department of Justice and the FTC against robocallers on Castine's smartphone. *See United States v. Roy M. Cox, et al.*, Appendix, Exhibit 2. The robocalling complained of in the *Cox* case is strikingly similar to that occurring at Western GPS through its robocalling service providers. Indeed, *Cox* involved robocalling for "credit card interest rate reduction programs," among others, using the names "Card Services" and "Credit Services," much like that which was taking place in this operation. When asked, Castine did not have a recollection of the complaint but only surmised that he may have gotten it while tracking a case against another telemarketer on the east coast a few months ago.

B. <u>Sales – Qualifiers, Closers, Financial Advisors</u>

The sales operations of Western GPS was composed of Qualifiers, Closers, and Financial Advisors, all of whom were incentivized to move consumers to the next step and close the deal.

Qualifiers, also referred to as "fronters," worked a basic shift of 10:00 a.m. to 7:00 p.m. Qualifiers were paid a nominal hourly wage (in most cases, $8 per hour), plus incentives for calls transferred to a Closer. A Qualifier's mission was to successfully transfer a consumer to a Closer. Qualifiers were closely tracked by the floor manager as to calls taken, average time on the phone, transfers to a Closer, and the number of transferred calls that resulted in actual payments to Western GPS. On average, Qualifier's took 350-425 calls per day with an average duration of 40 seconds to one minute. A good day for a Qualifier, at least in the current time frame, was to transfer 3 calls to a Closer, resulting in 1-2 actual sales.

Qualifiers operated off simple scripts prepared by management. In general, there was minimal training, except that a new training procedure had just recently been implemented. Turnover was generally high.

A Closer's mission was to confirm the details of the consumer's credit card situation – balances, minimum payments, past-due history, etc. – and set the pricing ($595, $995, $1,495, or $1,995) supposedly based on the projected savings, the target being that the new arrangements would save at least 2½ times the charge. Closers also worked off a script and were incentivized based on actual sales. Certain experienced Qualifiers were also permitted to perform Closer functions, if necessary.

The current practice appears to be that Closers did not generally process credit card charges for consumers. Actual charging was processed by the office manager after the Financial Advisor confirmed that the consumer had achieved actual savings. We have not conducted an audit to confirm instances when the Closer or other personnel processed charges before any assistance had been provided or was still pending. We have learned, however, that current practices were not necessarily reflective of how the business was operated in the past.

In response to sales declines, Castine had recently retained an expert telemarketing sales consultant – Miguel Correa – who had been on-site since October 8, 2012. He had been tasked to improve sales, tighten operations, and improve training. Under his direction, scripts had been re-worked and updated, a more orderly training regimen installed, and Qualifiers were evaluated for sales skills. The sales floor manager reported to us that pre-Correa there had been virtually no training. While the retention of Mr. Correa may have reflected a desire to run a better business, it did not necessarily translate to a more lawful business, given that the source of calls remained illegal robocalls. The hiring of Mr. Correa, a sales expert and motivator, also confirms that the business of Western GPS was to <u>sell</u>, not to improve the plight of Americans overburdened with credit card debt.

Western GPS did have in place a limited infrastructure to process interest rate reduction assistance and did, in fact, successfully assist some consumers in improving their credit card arrangements. Consumers who cleared the Closer stage were transferred to one of five Financial Advisors ("FAs") who occupied cubicles in the boiler room. Their job was to secure these consumers the "savings" that had been promised by the Qualifiers and Closers. They pursued two primary tactics: (1) convince the card company to reduce the operative interest rate; (2) apply for new no balance cards to which balances on the old cards could be transferred. Our investigation indicated that the success rate on interest rate reduction was relatively low and that transfers to new cards received most of the focus of the FAs.

FAs were also incentivized based on actual consumer payments. Over time, Castine had provided the Tempe FAs to other call rooms as a "fulfillment service."

The FTC Complaint and evidence in support of the TRO allege multiple violations of the FTC Act and the TSR by these sales operatives, including misrepresentation, unauthorized billing, premature billing, false promises, and refusals to give refunds. We have seen evidence of some of these specific practices, but we have not sought to evaluate each of the FTC's allegations specifically. My review does leave no question, however, that this was a sales company with Qualifiers, Closers, and FAs incentivized to sell loosely-described interest rate reduction assistance. Compensation was based on sales, the training focused on closing deals, and the overall environment emphasized sales:

- The room was decorated with motivational materials from John Wooden's Pyramid of Success to quotes from Gandhi, Arthur Clarke, and Magic Johnson.
- Whiteboards situated around the office kept track of results by Qualifiers, Closers, and FAs. One very large whiteboard exhorted "Goal 30 Transfers Double Spiffs $$." Appendix, Exhibit 3.
- Top Qualifier every week gets a $200 bonus, plus a trophy. Appendix, Exhibit 4.
- Qualifiers were generally paid $8 an hour, plus a "potential" for a $10 spiff for a closed deal. Ten spiffs would bump the effective rate to $14 an hour. Appendix, Exhibit 5.
- Qualifiers operated from a management-provided script and rebuttals which had recently been updated after the arrival of sales consultant, Miguel Correa. Appendix, Exhibit 6.
- Qualifiers were provided a list of the "12 Most Powerful Words in the Sales Language" to help them close consumers. Appendix, Exhibit 7.
- Qualifiers who failed to meet the minimum target of ten qualified prospects per week could be subject to termination. Appendix, Exhibit 8.
- Closers had their own "Closing Script" and "Closer Rebuttals." Appendix, Exhibit 9.
- Castine was exploring the inclusion of corporate gift items with each price point to give the consumer a sense they were getting something tangible. Appendix, Exhibit 10.

These represent a sampling of sales materials found at the site. The original FTC submission and its recent supplemental filing include multiple additional examples.

C. <u>Customer Service</u>

We found two separate customer service operations on-site in Tempe. One group of three processed refunds, complaints, and responded to basic customer service questions from customers of Western GPs and of a limited number of other "rooms" for which

Castine had subcontracted to provide customer service. Billing and chargeback questions also came into this group, including questions from consumers who had purchased services from rooms that used the Western GPS merchant account.

A second group of three serviced the consumers who had been "closed" by the Tempe room. They input these consumers' financial data into a program labeled "Zilch" and then printed out a hard copy report titled, "Guide to Personal Savings" which was sent to the consumer. This same service was provided to some other rooms as a fulfillment service.

D. <u>Credit Card Processing/Merchant Account Factoring</u>

Our investigation indicates that variants of merchant account fraud and manipulation have been key components of Castine's businesses. For telemarketing entrepreneurs, access to a merchant account for credit card payment processing is essential. They perceive merchant accounts as "assets" unto themselves. Opportunistic owners of these accounts make them available, for a fee, to members of the telemarketing fraternity who cannot secure them because of their bad credit, prior chargeback history, or because the industry is pre-disposed against merchant accounts for telemarketers in general. Defendant Castine played both sides of this scenario – as needed, he has piggy-backed the merchant accounts of other telemarketers; and once Western GPS secured its own merchant account, he has allowed others, for a fee, to process their charges through the Western GPS account.

This practice has been labeled "factoring" of merchant accounts. It is a form of bank fraud and illegal at multiple levels. In *United States v. Dabbs*, 134 F.3d 1071, 1074-75 (11th Cir. 1998), the court found that such factoring was a bank fraud scheme to use "unauthorized access device[s]" in violation of 18 U.S.C. § 1029(a). The court provided this on-point summary of the business environment:

> The nature of telemarketing companies makes it difficult for those businesses to find merchant banks willing to accept their credit card transactions. Because these businesses conduct sales over the telephone, telemarketers cannot provide merchant banks with a signed sales slip or other documented

> customer authorization for a sale. Moreover, studies have shown that telemarketing companies generate a substantially greater risk of charge-backs. As a result, VISA-associated banks prohibit telemarketers from directly depositing credit card transactions.
>
> This policy led to the development of 'factoring.' The telemarketer uses a third-party, non-telemarketing business (factoring merchant) as a conduit for depositing credit card sales. The factoring merchant processes the transaction either through an existing merchant account or through a separate merchant account created for the telemarketing company. The merchant bank processes the transaction as a standard credit card sale and deposits the amount of the sale into the factoring merchant's account. The factoring merchant then retains a fee for the use of the account and disburses the remainder to the telemarketer. VISA-affiliated banks include a provision in their merchant account contracts forbidding factoring.

134 F.3d at 1074-1075.

Factoring merchant accounts has been held to be unlawful in multiple reported decisions. *See F.T.C. v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000) ("unfair business practice" in violation of the FTC Act); *United States v. Sealander*, 91 F.3d 160, at *5 (10th Cir. 1996) (defendants' attempt to secure a merchant account based on false statements as to the nature of the business constituted bank fraud); *United States v. Mason*, 902 F.2d 1434, 1443 (9th Cir. 1990) (bank fraud where evidence clearly showed that Wells Fargo Bank would not have opened the merchant account had it known defendant would process third-party credit card slips or was laundering credit charges for prostitution). Under 18 U.S.C. § 1344, it is bank fraud to knowingly execute, or attempt to execute, a scheme or artifice to defraud a financial institution or use false or fraudulent pretenses, representations, or promise.

Mr. Castine has been versatile in finding and providing access to merchant accounts. From approximately June 2011 through November 2011, under the names of AFB and Concord, he ran charges through the AWD and CAM Services merchant accounts arranged by Ambrosia. But, in November 2011, AWD's merchant account was shut down and shortly thereafter the CAM Services account was also closed. This left

Western GPS with no way to conduct business and it actually ceased operations for several weeks as it scrambled to find a vehicle to process consumer payments.

GPS found a temporary solution through Mr. Wayne Norris, owner of two Florida entities involved in similar interest rate telemarketing ventures – W&M Enterprises ("W&M") and WM&T Enterprises ("WM&T"). Both were formed in February, 2012 and promptly secured merchant accounts which Mr. Norris made available to Western GPS. From approximately February, 2012 through April, 2012, Western GPS ran their charges through these merchant accounts, paying a 37% fee for the privilege. These accounts, however, were shut down in April, 2012.

For a period of two months, March-April 2012, Western GPS appears to have had its own merchant account through Century Bankcard, but that account was short-lived, closed by the provider on April 30, 2012.

On April 17, 2012, Western GPS was able to open the first of two merchant accounts at Global Payments which remained active until the asset freeze. In the beginning, Western GPS was the only company using these merchant accounts, but Castine soon struck a deal with WM&T to allow its related rooms to run their charges through the Western GPS account. Castine remitted the cash from these charges to WM&T almost immediately via wire transfers, sent several times weekly, to its accounts in Orlando. But, he withheld 37%, which he advised us covered the chargeback reserve, the merchant's fees, and the Western GPS fee of 8-10%. This fee thus became immediate free cash flow to Western GPS. Castine also advised us that Western GPS would retain any unused portion of the amount withheld to cover the reserve.

Not only was this arrangement unlawful merchant account factoring, it was also bad business. The rooms associated with WM&T experienced high chargeback volumes which placed the merchant account in jeopardy. It also put Western GPS in close association with other telemarketers over whom it had no direct control and who were regarded by most of the Tempe staff as particularly unscrupulous.

///

By mid-2012, some six other ventures were running their charges through the Western GPS merchant accounts with roughly the same 37% arrangement. In most cases, the Tempe office manager would make weekly bank deposits into their accounts to cover their charges, less 37%.

For Western GPS to have a compliant future, these variants of merchant account factoring would have to be eliminated. My initial investigation indicates that this would be terminal to the business plan as the revenue from this factoring has kept the business afloat. As a practical matter, Western GPS will also no longer have any capacity to secure a merchant account at any level even if it were to zealously limit its use to its own operations.

E. <u>Financial</u>

Western GPS does not utilize any accounting software for the maintenance of financial records, but deploys an informal checkbook system which permits only a cursory cash in/cash out analysis based on checking account activity. Many transactions are also loosely categorized which makes precise allocation to traditional profit and loss categories difficult. As such, any effort at this early stage to reconstruct and/or summarize the financial results must be qualified as preliminary only and subject to further review.

The financial summary prepared by the receivership's forensic accountant is at Appendix, Exhibit 11.

///

///

///

///

///

///

///

///

///

Based on our review of the available records, we can estimate that from February 1, 2012 to September 31, 2012 revenues flowing into Western GPS totaled $3,963,607, sourced as follows:

Direct Western GPS Sales:[1]	$965,811
Other Processing Revenues:[2]	$2,837,855
Other Cash Receipts:	$159,942
Total Cash Receipts:	$3,963,608

Against those revenues, we estimate expenses of $3,887,098 broken down as follows:

Payments to Third Parties from Processing Receipts:[3]	$1,804,766
Payments for Robocalling Services:	$177,626
Charges made by Credit Card Servicing Agencies:[4]	$660,330
Bounced check fees and other bank service fees:	$77,946
Chargebacks charged directly from company accounts:	$361,157
Payroll and burden:	$425,919
Other administrative expenses:	$208,638
Owner use of cash proceeds:	$170,716
Total Expenses:	$3,887,098

<u>Notes</u>:

1. Represents gross revenues from actual sales made by the Tempe call room.
2. Represents total gross revenue for charges processed through the Western GPS merchant account by other call rooms using the Western GPS merchant account.
3. Represents payments made from Western GPS to the other call room operators which processed charges through the Western GPS merchant account. This was generally calculated as gross sales less 37%. Most of these payments ($1.3 million) were made to WM&T Enterprises in Florida, which we believe either owned and/or operated three rooms in Florida.
4. Represents fees charged by the merchant account, including reserve funds withheld to cover future chargebacks.

This was not a profitable business. Absent the free cash flow provided by the other telemarketers who were running their charges through the Western GPS account, it would run at large monthly negatives.

///

V.
Conclusion

Western GPS, the only Receivership Defendant currently in operation, is an unlawful business. The consumer calls coming into its Tempe call room are driven there by illegal robocalls. Its processing of credit card charges has, and does, include multiple variants of illegal merchant account factoring. Moreover, given that the business of the call room is not now profitable, I do not, at this juncture, see a viable means by which this business could proceed as a lawful and profitable venture in the context of this receivership.

Dated: October 29, 2012

THOMAS W. MCNAMARA

By: /S/ Thomas W. McNamara
Thomas W. McNamara
Temporary Receiver

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2012, I electronically transmitted the foregoing document and any attachments to the U.S. District Court Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

A copy of the foregoing document and any attachments were mailed this same date to:

Chris Ambrosia
2335 West Nopal Avenue
Mesa, AZ 85202

LeRoy Castine
123 East Baseline Road, Suite D-204
Tempe, AZ 85283

JILL JACOBS