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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. MODERN CONCEPT MARKETING, INC., a California corporation, and JOSEPH MOADEB, individually and as an officer of MODERN CONCEPT MARKETING, INC., and SAM JENKALA, individually and as an officer of MODERN CONCEPT MARKETING, INC., Defendants.	CV-99-13003-HLH (Mcx) **FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF**

Plaintiff, the Federal Trade Commission ("Commission"), by its undersigned attorneys, alleges:

1. This is an action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, to secure preliminary and permanent injunctive relief including rescission of contracts, restitution, disgorgement, and other equitable relief for defendants' deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Trade Regulation Rule entitled "Telemarketing Sales Rule", 16 C.F.R. Part 310, in connection with the sale of nondurable office supplies.

JURISDICTION AND VENUE

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

3. Venue in the United States District Court for the Central District of California is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).

PLAINTIFF

4. Plaintiff Federal Trade Commission is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces 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 Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive or abusive telemarketing practices. The Commission may initiate federal district court proceedings by its own attorneys to enjoin violations of the FTC

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Act and the Telemarketing Sales Rule and to secure such equitable relief as may be appropriate in each case, including restitution for injured consumers. 15 U.S.C. §§ 53(b), 57b, and 6105(b).

DEFENDANTS

5. Defendant Modern Concept Marketing, Inc. is a California corporation with its offices and principal place of business located at 7154 Reseda Blvd, Reseda, California 91335. It does business under the names Central Data Supply Co. and Supreme Business Products. It transacts or has transacted business in the Central District of California.

6. Defendant Joseph Moadeb is the principal owner and president of the corporate defendant. Individually or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices of the corporate defendant, including the various acts and practices set forth herein. He resides in, and transacts or has transacted business in, the Central District of California.

7. Defendant Sam Jenkala is the co-owner and vice president of the corporate defendant. Individually or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices of the corporate defendant, including the various acts and practices set forth herein. He resides in, and transacts or has transacted business in, the Central District of California.

COMMERCE

8. At all times material hereto, defendants have been engaged in the business of offering for sale and selling, through telemarketers, nondurable office supplies, including laser printer toner cartridges and inkjet printer refills, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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DEFENDANTS' BUSINESS ACTIVITIES

9. Since at least 1995 and continuing thereafter, defendants have engaged in a plan, program, or campaign to sell nondurable office supplies, including laser printer toner cartridges, inkjet printer refills, and inkjet cartridges, via interstate telephone calls throughout the United States.

10. Defendants primarily target businesses, including small businesses and charitable or nonprofit entities such as churches and schools, for unsolicited telephone sales. Their sales representatives call prospective consumers and offer to sell them supplies for inkjet and laser printers.

11. Defendants' sales representatives make various representations to consumers, often varying them from one consumer to the next. One set of representations concerns the origin and qualities of their products. Typical representations may include that laser toner cartridges are based on new technology giving two or three times the normal life of standard cartridges and higher quality print output. In some instances, they represent that the cartridges are new and manufactured by Hewlett Packard or IBM Lexmark. In fact, defendants' laser toner cartridges are typically "remanufactured" by various companies other than Hewlett Packard or IBM Lexmark and use both old and new parts. They are not based on new technology, and do not provide multiples of a normal life span. In some cases they give poorer print quality than new cartridges and may leak excessive quantities of toner into the user's printer.

12. Defendants make similar representations about supplies for inkjet printers, misleadingly comparing their own refill kits in price and quality to new inkjet cartridges sold by other companies. These

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kits often provide substantially poorer performance than new cartridges while costing significantly more.

13. The long life claims are typically used to justify high prices, if the consumer is given price information at all. For example, defendants may convince some consumers to pay double the normal price of a new, original manufacturer’s brand laser cartridge based on a claim that defendants’ cartridge will supply double or triple the number of pages.

14. The prices of defendants’ products vary significantly from consumer to consumer. They frequently are substantially higher than prices the recipients would have paid for similar or better office supplies available from their regular suppliers. Defendants also often add a substantial and undisclosed charge for shipping and handling, sometimes hundreds of dollars, to the invoiced price of their products.

15. In some instances, defendants deliver a higher quantity of products than the consumer ordered and charge accordingly. Alternatively, they make additional shipments of products that the consumer did not order. Rather than accept returns of the unordered products, defendants may attempt to negotiate for payment of an amount less than stated on the invoice but more than the consumer originally agreed to.

16. Defendants often offer to send consumers a “free trial kit” or promise the consumers that they can try defendants’ products without being obligated to pay for them for some stated period, and without being obligated to pay at all if they are not satisfied with the product. In fact, defendants often insist on payment immediately and regardless of consumers’ dissatisfaction. In some cases,

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defendants ship additional merchandise to consumers who only agreed to receive free trial kits, and they bill the consumers for the unordered merchandise.

17. Defendants tell consumers they can easily return unsatisfactory or unwanted products and readily obtain refunds. However, defendants frequently fail to return consumers' complaint calls, fail to issue return authorizations, and fail to accept returns of unsatisfactory products, except when government agencies or Better Business Bureaus forward the complaints to the defendants.

18. Defendants regularly send accounts created through the deceptive and unlawful practices described above to collection agencies like Dun & Bradstreet, even if the consumer has canceled the order or otherwise disputed the alleged debt. The subsequent billing notices or oral statements made by the collection agency on behalf of defendants threaten the business credit rating of the consumers.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

COUNT I

19. In numerous instances, in connection with the sale, offering for sale, or distribution of nondurable office supplies, defendants have represented, expressly or by implication, through, *inter alia*, telephone calls, letters, invoices, packing slips, or shipment of goods, that their laser toner cartridges provide two to three times longer life than new, OEM (original equipment manufacturer) cartridges from the consumer's printer manufacturer, *e.g.*, Hewlett Packard and IBM Lexmark.

20. In truth and in fact, defendants' remanufactured cartridges do not provide two to three times longer life than new, OEM cartridges.

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21. Therefore, the representations set forth in Paragraph 18 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

22. In numerous instances, in connection with the sale, offering for sale, or distribution of nondurable office supplies, including laser toner cartridges and inkjet refills, defendants have represented, expressly or by implication, through, *inter alia*, telephone calls, letters, invoices, packing slips, or shipment of goods, that consumers who agree to try defendants' supplies can return those supplies, if dissatisfied, at no charge to the consumer and without obligation to purchase the supplies.

23. In truth and in fact, consumers cannot return the supplies if dissatisfied, at no charge and without obligation to purchase the supplies.

24. Therefore, the representations set forth in Paragraph 20 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

25. In numerous instances, in connection with the sale, offering for sale, or distribution of nondurable office supplies, including

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the quantity shipped by defendants and are therefore not obligated to pay the amount charged by defendants.

27. Therefore, the representations set forth in Paragraph 22 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

28. In the Telemarketing Act, 15 U.S.C. §§ 6101-6108, Congress directed the Commission to prescribe rules prohibiting deceptive and abusive telemarketing acts or practices. On August 16, 1995, the Commission promulgated the Telemarketing Sales Rule, 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed. Reg. 43842 (August 23, 1995). The Telemarketing Sales Rule became effective December 31, 1995, and since then has remained in full force and effect.

29. Telephone calls between a telemarketer and a business that involve the retail sale of nondurable office supplies are subject to the Telemarketing Sales Rule’s prohibitions against deceptive and abusive telemarketing acts or practices. 16 C.F.R. § 310.6(g). In its Statement of Basis and Purpose for the Telemarketing Sales Rule, the Commission stated that

> the Commission’s enforcement experience against deceptive telemarketers indicates that office and cleaning supplies have been by far the most significant business-to-business problem area: such telemarketing falls within the Commission’s definition of deceptive telemarketing acts or practices.

60 Fed. Reg. 43842, 43861 (Aug. 23, 1995).

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30. The Telemarketing Sales Rule prohibits sellers and telemarketers from making a false or misleading statement to induce any person to pay for goods or services. 16 C.F.R. § 310.3(a)(4).

31. The Telemarketing Sales Rule also prohibits sellers and telemarketers from misrepresenting specified items of material information regarding the goods or services that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2).

32. 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 Telemarketing Sales Rule 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. § 5(a).

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

COUNT IV

FALSE AND MISLEADING STATEMENTS TO INDUCE PAYMENT

34. In numerous instances, in connection with the telemarketing of nondurable office supplies, including laser toner cartridges and inkjet refills, defendants have made false or misleading statements to induce the consumer to pay for the supplies including, but not limited to, misrepresenting directly or by implication that (a) all of the supplies shipped or billed by defendants were ordered by the consumer; and (b) that the consumer has agreed to pay a certain price for supplies shipped by defendants, thereby violating 16 C.F.R. § 310.3(a)(4).

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COUNT V

MATERIAL MISREPRESENTATIONS ABOUT GOODS AND REFUND POLICY

35. In numerous instances, in connection with the telemarketing of nondurable office supplies, including laser toner cartridges and inkjet refills, defendants have misrepresented, directly or by implication, (a) the total costs to purchase, receive, or use the offered goods, including, but not limited to, shipping and charging for larger quantities of products than the consumer ordered and billing the consumer for additional previously undisclosed and substantial shipping, insurance, or handling costs, thereby violating 16 C.F.R. § 310.3(a)(2)(i); (b) material aspects of the performance, efficacy, nature, or central characteristics of the offered goods, including, but not limited to, misrepresenting that defendants' laser toner cartridges and inkjet refills last longer or are of higher quality than those usually used by the consumer or are OEM products, thereby violating 16 C.F.R. § 310.3(a)(2)(iii); and (c) material aspects of the nature or terms of defendants' refund, cancellation, exchange, or repurchase policy, including, but not limited to, misrepresenting that consumers can return supplies with no further obligation if they are not satisfied, thereby violating 16 C.F.R. § 310.3(a)(2)(iv).

CONSUMER INJURY

36. Consumers throughout the United States have suffered substantial monetary loss as a result of defendants' unlawful acts or practices. In addition, defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and to harm the public interest.

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THIS COURT'S POWER TO GRANT RELIEF

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

38. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes the Court to award such relief as is necessary to redress the injury to consumers or others resulting from defendants' violations of the

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to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten monies.

4. Award plaintiff the costs of bringing this action, as well

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CERTIFICATE RE SERVICE

__x__I am an attorney representing plaintiff Federal Trade Commission in this matter. My business address is 915 2nd Ave. Ste 2896, Seattle, WA 98174.

_____I am employed by the plaintiff Federal Trade Commission. My business address is 915 2nd Ave. Ste 2896, Seattle, WA 98174. I am acting under the direction of one of the attorneys assigned to this matter.

On October 16, 2000, I served a true and correct copy of the attached document on each of the defendants in this matter by sending it via U.S. mail and fax transmission to the following addresses.

Kenneth M. Barish
Kajan Mather and Barish
9777 Wilshire Blvd., Ste. 805
Beverly Hills, CA 90212

I certify that the foregoing is true and correct.

Executed on October 16, 2000, at Seattle, Washington.

____