

FILED
CLERK, U.S. DISTRICT COURT
JUN 19 2001
CENTRAL DISTRICT OF CALIFORNIA
BY

1 WILLIAM E. KOVACIC
General Counsel
2
3 THERESA M. MCGREW
WILLIAM J. HODOR
Federal Trade Commission
4 55 East Monroe Street, Suite 1860
Chicago, Illinois 60603
5 (312) 960-5634 [Ph.]
(312) 960-5600 [Fax]

6
7 KENNETH H. ABBE (CA Bar #172416)
Federal Trade Commission
10877 Wilshire Boulevard, Suite 700
8 Los Angeles, California 90024
(310) 824-4343 [Ph.]
9 (310) 824-4380 [Fax]

10 Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

11
12
13
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 FEDERAL TRADE COMMISSION,)
)
16 Plaintiff,) Civil No. 00-10335AHM (CTx)
)
17 v.) Judge A. Howard Matz
)
18 ALLSTATE BUSINESS DISTRIBUTION) FIRST AMENDED COMPLAINT
CENTER, INC., a California) FOR INJUNCTIVE AND OTHER
19 corporation doing business as) EQUITABLE RELIEF
PRIMARY DISTRIBUTION CENTER, and)
20)
ROBERT MATZ, individually and as)
21 an officer of the corporation,)
)
22 Defendants.)
)

23
24 Plaintiff, the Federal Trade Commission ("Commission"), by
25 its undersigned attorneys, alleges:

26 1. This is an action under Sections 13(b) and 19 of the
27 Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and
28 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention

1 Act ("Telemarketing Act"), 15 U.S.C. § 6101 et seq., to secure
2 permanent injunctive relief, rescission of contracts, restitution,
3 disgorgement, and other equitable relief for defendants' deceptive
4 acts or practices in violation of Section 5(a) of the FTC Act,
5 15 U.S.C. § 45(a), and the Commission's Trade Regulation Rule
6 entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310, in
7 connection with the sale of nondurable office supplies.

8 **JURISDICTION AND VENUE**

9 2. This Court has jurisdiction over this matter pursuant to
10 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b), and 28
11 U.S.C. §§ 1331, 1337(a), and 1345.

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

15 **PLAINTIFF**

16 4. Plaintiff, the Federal Trade Commission, is an
17 independent agency of the United States Government created by
18 statute. 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a)
19 of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or
20 deceptive acts or practices in or affecting commerce. The
21 Commission also enforces the Telemarketing Sales Rule, 16 C.F.R.
22 Part 310, which prohibits deceptive or abusive telemarketing
23 practices. The Commission may initiate federal district court
24 proceedings by its own attorneys to enjoin violations of the FTC
25 Act and the Telemarketing Sales Rule and to secure such equitable
26 relief as may be appropriate in each case, including restitution
27 for injured consumers. 15 U.S.C. §§ 53(b), 57b, and 6105(b).

28 //

1 **DEFENDANTS**

2 5. Defendant Allstate Business Distribution Center, Inc.,
3 doing business as Primary Distribution Center (jointly referred to
4 hereinafter as "Primary"), is a California corporation. At all
5 times material to this Complaint, Primary has held itself out as
6 transacting business in the Central District of California from a
7 location at 2020 Pico Boulevard, Santa Monica, California.

8 6. Defendant Robert Matz ("Matz") is an officer of
9 Defendant Primary. At all times material to this Complaint,
10 acting alone or in concert with others, he has formulated,
11 directed, controlled, or participated in the acts and practices of
12 Defendant Primary, including the acts and practices set forth in
13 this Complaint. Defendant Matz resides and transacts or has
14 transacted business in the Central District of California.

15 **COMMERCE**

16 7. At all times material hereto, defendants' course of
17 business, including the acts and practices alleged herein have
18 been and are in or affecting commerce, as "commerce" is defined in
19 Section 4 of the FTC Act, 15 U.S.C. § 44.

20 **DEFENDANTS' BUSINESS PRACTICES**

21 8. Since at least January 1, 1998, and continuing
22 thereafter, the defendants have been in the business of working
23 with telemarketers in a deceptive scheme to sell nondurable office
24 supplies, including photocopier toner and dry ink cartridges
25 ("toner"), to consumers throughout the United States.

26 9. The defendants have contracts with several "Independent
27 Sales Companies" that handle the initial calls to consumers.
28 These telemarketers place the initial sales call to consumers, but

1 all of consumers' subsequent contacts are with Primary.

2 Consumer's make payments to Primary, which in turn pays a
3 percentage of the sale to the telemarketers.

4 10. During the initial sales calls telemarketers employ
5 several tactics. Many times they pretend to be the consumers'
6 regular supplier of toner. Building on this supposed prior
7 relationship, they also often claim that the price of toner is
8 going to increase, and offer to sell it to consumers at the
9 "current" price. Those consumers that accept shipments of toner
10 are often sent additional shipments of toner the consumers did not
11 order, along with invoices billing consumers for the shipments.

12 11. The telemarketers transmit the orders to defendants.
13 Defendants ship the toner to consumers. Consumers receive an
14 invoice on Primary's letterhead. Among other things, the invoice
15 contains Primary's address and telephone number. Consumers are
16 instructed to send payment to Primary. No other company or entity
17 is listed on the invoice, and consumers have no way of knowing
18 that anyone except defendants was ever involved in these
19 transactions. Defendants never inform consumers that there are
20 separate telemarketing companies or that any other business entity
21 except themselves are involved in these transactions.

22 12. The toner defendants ship is not sold at a discount.
23 Consumers are charged prices that are much higher than they
24 typically pay for toner from their regular suppliers.

25 13. Consumers often mistakenly pay defendants for toner
26 because they believe it was ordered from the consumers' regular
27 supplier, or from a supplier associated with the consumers'
28 photocopier manufacturer. In those instances where consumers

1 receive unordered shipments of toner from the defendants, they
2 often believe that one of their own employees did order the toner,
3 but that it was a mistake or mix up. Thus consumers sometimes pay
4 for the toner believing that they are themselves partially at
5 fault for the "mistake."

6 14. Consumers who discover that defendants are not their
7 regular supplier of toner, or that they did not order these goods,
8 telephone defendants to arrange to return the supplies, cancel
9 their orders, or request a refund.

10 15. Defendants typically tell consumers that it is too late
11 to return the toner and refuse to accept the return of the toner.
12 Defendants also typically refuse to issue refunds to consumers.
13 In some instances, the defendants tell consumers that they are
14 obligated to pay because they signed a contract for the toner.
15 When consumers request a copy of the contract, the defendants
16 refuse to produce it. Defendants have and exercise the authority
17 to decide whether to issue refunds to consumers.

18 16. The services that defendants perform in these
19 transactions are integral to this fraudulent scheme. Defendants
20 handle all of the customer service functions associated with the
21 sale and shipment of toner to consumers. The defendants handle
22 all returns of toner, requests for refunds, consumer complaints,
23 and the collection of payment on delinquent accounts. When the
24 defendants refer the accounts of consumers who refuse to pay for
25 toner they were deceived into purchasing, or that they did not
26 order, to collection agencies, the defendants identify Primary as
27 the "creditor."

28 //

1 17. The defendants have received numerous complaints from
2 consumers who allege that they were deceived. As a result
3 defendants are on notice of the deceptive claims made by
4 telemarketers. Despite the fact that consumers have informed
5 defendants of the deceptive and illegal telemarketing claims,
6 defendants have continued to provide the services that are
7 essential to their ability to conduct the fraud. Similarly, the
8 entire business of defendants is the immediate result of deceptive
9 claims made by the telemarketers, and defendants enjoy a direct
10 financial benefit from deceptive claims.

11 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

12 **COUNT I**

13 18. In numerous instances, in connection with the
14 telemarketing, advertising, offering for sale, sale, or
15 distribution of nondurable office supplies, including photocopier
16 toner and dry ink cartridges, defendants, or those acting jointly
17 with them or on their behalf, have represented, expressly or by
18 implication, through, *inter alia*, telephone calls, that they are
19 the consumers' regular supplier or are associated with the
20 consumers' regular supplier or the consumers' photocopier
21 manufacturer.

22 19. In truth and in fact, defendants, or those acting
23 jointly with them or on their behalf, are not the consumers'
24 regular supplier and are not associated with the consumers'
25 regular supplier or the consumers' photocopier manufacturer.

26 20. Therefore, the representations set forth in Paragraph 18
27 are false and misleading and constitute deceptive acts or

28 //

1 practices in violation of Section 5(a) of the FTC Act, 15 U.S.C.
2 § 45(a).

3 **COUNT II**

4 21. In numerous instances, in connection with the
5 telemarketing, advertising, offering for sale, sale, or
6 distribution of nondurable office supplies, including photocopier
7 toner and dry ink cartridges, defendants, or those acting jointly
8 with them or on their behalf, have represented, expressly or by
9 implication, through, *inter alia*, telephone calls, that defendants
10 will charge consumers the same price consumers have been paying
11 for photocopier toner.

12 22. In truth and in fact, defendants, or those acting
13 jointly with them or on their behalf, do not charge consumers the
14 same price as consumers have been paying for photocopier toner.
15 Defendants charge consumers substantially more than they have been
16 paying for photocopier toner.

17 23. Therefore, the representations set forth in Paragraph 21
18 are false and misleading and constitute deceptive acts or
19 practices in violation of Section 5(a) of the FTC Act, 15 U.S.C.
20 § 45(a).

21 **COUNT III**

22 24. In numerous instances, in connection with the
23 telemarketing, advertising, offering for sale, sale, or
24 distribution of nondurable office supplies, including photocopier
25 toner and dry ink cartridges, defendants, or those acting jointly
26 with them or on their behalf, have represented, expressly or by
27 implication, through, *inter alia*, telephone calls, letters,
28 invoices, packing slips, or shipment of office supplies, that

1 consumers ordered the office supplies that were shipped and/or
2 billed to them by defendants.

3 25. In truth and in fact, consumers did not order the office
4 supplies that were shipped and/or billed to them by defendants.

5 26. Therefore, the representations set forth in Paragraph 24
6 are false and misleading and constitute deceptive acts or
7 practices in violation of Section 5(a) of the FTC Act, 15 U.S.C.
8 § 45(a).

9 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

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

18 28. Telephone calls between a telemarketer and a business
19 that involve the retail sale of nondurable office supplies are
20 subject to the Telemarketing Sales Rule's prohibitions against
21 deceptive and abusive telemarketing acts or practices. 16 C.F.R.
22 § 310.6(g). In its Statement of Basis and Purpose for the
23 Telemarketing Sales Rule, the Commission stated:

24 [T]he Commission's enforcement experience against
25 deceptive telemarketers indicates that office and
26 cleaning supplies have been by far the most
27 significant business-to-business problem area: such
28 telemarketing falls within the Commission's

1 definition of deceptive telemarketing acts or
2 practices.

3 60 Fed. Reg. 43842, 43861 (Aug. 23, 1995).

4 29. The Telemarketing Sales Rule requires telemarketers in
5 outbound telephone calls to disclose promptly and in a clear and
6 conspicuous manner the identity of the seller. 16 C.F.R.
7 § 310.4(d)(1).

8 30. The Telemarketing Sales Rule prohibits sellers and
9 telemarketers from making a false or misleading statement to
10 induce any person to pay for goods or services. 16 C.F.R.
11 § 310.3(a)(4).

12 31. Pursuant to Section 3(c) of the Telemarketing Act,
13 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act,
14 15 U.S.C. § 57a(d)(3), violations of the Telemarketing Sales Rule
15 constitute unfair or deceptive acts or practices in or affecting
16 commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C.
17 § 45(a).

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

21 33. Defendants engaged in "assisting and facilitating" as
22 that phrase is defined in the Telemarketing Sales Rule, 16 C.F.R.
23 § 310.3(b).

24 **COUNT IV**

25 **FALSE AND MISLEADING STATEMENTS TO INDUCE PAYMENT**

26 34. In numerous instances, in connection with the
27 telemarketing of nondurable office supplies, including photocopier
28 toner and dry ink cartridges, defendants engaged or assisted and

1 facilitated others who made false or misleading statements to
2 induce consumers to pay for photocopier toner, including, but not
3 limited to, misrepresenting directly or by implication, that (a)
4 defendants are consumers' regular supplier or are associated with
5 either the consumers' regular supplier or the consumers'
6 photocopier manufacturer; (b) the defendants will charge consumers
7 the same price consumers have been paying for photocopier toner;
8 and (c) consumers ordered the photocopier toner that was shipped
9 and/or billed to consumers by defendants, thereby violating 16
10 C.F.R. § 310.3(a)(4) and/or 310.3(b).

11 **COUNT V**

12 **FAILURE TO DISCLOSE THE IDENTITY OF THE SELLER**

13 35. In numerous instances, in connection with the
14 telemarketing of nondurable office supplies, including photocopier
15 toner and dry ink cartridges, defendants in "outbound telephone
16 calls," as that term is defined in the Telemarketing Sales Rule,
17 16 C.F.R. § 310.2(n), engaged or assisted and facilitated others
18 who failed to disclose promptly and in a clear and conspicuous
19 manner their identity to the person receiving the call, thereby
20 violating 16 C.F.R. § 310.4(d)(1) and/or 310.3(b).

21 **CONSUMER INJURY**

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

28 //

1 **THIS COURT'S POWER TO GRANT RELIEF**

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

7 2. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes
8 this Court to award such relief as is necessary to redress the
9 injury to consumers or others resulting from defendants'
10 violations of the Telemarketing Sales Rule, including the
11 rescission and reformation of contracts and the refund of monies.

12 3. The Court, in the exercise of its equitable
13 jurisdiction, may award other ancillary relief to remedy injury
14 caused by defendants' violations.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, plaintiff requests that this Court, as authorized
17 by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and
18 57b, Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b),
19 and pursuant to its own equitable powers:

20 1. Permanently enjoin defendants from violating the
21 Telemarketing Sales Rule and the FTC Act, as alleged herein;

22 2. Award such relief as the Court finds necessary to
23 redress injury to consumers resulting from defendants' violations
24 of the Telemarketing Sales Rule and the FTC Act, including, but
25 not limited to, rescission of contracts, the refund of monies
26 paid, and the disgorgement of ill-gotten monies; and

27 //

28 //

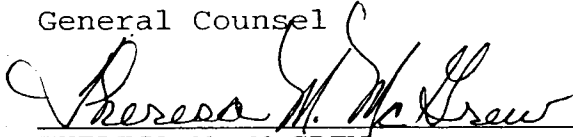
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

DATED June 15, 2001



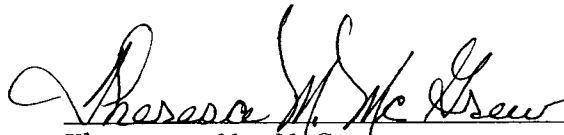
THERESA M. MCGREW
WILLIAM J. HODOR
Attorneys for Plaintiff
Federal Trade Commission
55 East Monroe Street, Suite 1860
Chicago, Illinois 60603
(312) 960-5634 [Ph.]
(312) 960-5600 [Fax]

KENNETH H. ABBE (CA Bar #172416)
Federal Trade Commission
10877 Wilshire Boulevard, Suite 700
Los Angeles, California 90024
(310) 824-4343 [Ph.]
(310) 824-4380 [Fax]

CERTIFICATE OF SERVICE

I, Theresa M. McGrew, hereby certify that on this day I caused to be served a true copy of the Stipulation To The Filing Of Plaintiff's First Amended Complaint, Plaintiff's First Amended Complaint For Injunctive And Other Equitable Relief, and the Stipulated Permanent Injunction and Final Judgment Order, on the defendants, by Federal Express Mail sent to Laurence D. Merritt, Esq., 5850 Canoga Avenue, Suite 400, Woodland Hills, California 91367.

Dated: June 15, 2001


Theresa M. McGrew
Attorney for Plaintiff
Federal Trade Commission