

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK'S OFFICE
TAMPA, FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SPECIAL DATA PROCESSING CORPORATION,

Defendant.

CIVIL ACTION NO.

8:04-CV-1955-T-23EAJ

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

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

1. The Commission brings this 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 *et seq.*, to secure permanent injunctive relief, rescission of contracts, restitution, disgorgement, and other equitable relief against Defendant for engaging in unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and for engaging in deceptive or abusive telemarketing acts or practices in violation of the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310.

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 Middle District of Florida is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b) and (c).

PLAINTIFF

4. Plaintiff, the Federal Trade Commission, is an independent agency of the United States Government created by the FTC Act, 15 U.S.C. §§ 41 *et seq.* The Commission is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive or abusive telemarketing acts or practices. The Commission is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the Telemarketing Sales Rule, and to secure such equitable relief as is appropriate in each case, including restitution for injured consumers and disgorgement. 15 U.S.C. §§ 53(b), 57b and 6105(b).

DEFENDANT

5. Defendant Special Data Processing Corporation (“SDP”), also d/b/a National Magazine Exchange, NME, and National Publishers Exchange, is a Florida corporation with its principal place of business at 16120 U. S. Highway 19N, Clearwater, Florida 33764. SDP transacts or has transacted business in this district.

COMMERCE

6. At all times material hereto, Defendant has been engaged in the business of offering for sale and selling magazines and buying service memberships, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANT’S COURSE OF CONDUCT

7. At least since 1997, Defendant has marketed and sold magazine subscriptions, typically in packages consisting of three to seven magazine subscriptions for terms of one to four years each. The magazine subscription packages cost up to several hundred dollars each, depending on the length of service. From around January 1998 through August 1999, Defendant marketed the third party Triad Discount Buying Service, which purportedly enables its members to purchase various goods at discount prices. Since 1999, Defendant has also marketed several other buying services. The annual fee for these buying service memberships has ranged from about \$50 to \$100. Defendant has engaged in telemarketing throughout the United States to promote its magazines and third party buying service memberships to consumers.

8. Defendant has solicited consumers to telephone it by sending out millions of direct mail pieces offering a chance to enter Defendant’s sweepstakes. In addition, the mail pieces have disclosed that the recipient has been approved to receive Defendant’s magazine offer on credit. The mail pieces do not disclose that recipients who call Defendant to enter the sweepstakes receive a sales pitch for additional goods or services.

9. Consumers who received these mailings called Defendant to enter the sweepstakes and then received a sales pitch. During these calls, Defendant initially entered the consumers into the Defendant's sweepstakes and then offered to sell magazine subscriptions to the consumers.

10. In addition to having used direct mail solicitations to solicit inbound telephone calls, Defendant has arranged to have telephone calls transferred to it by third parties also engaged in telemarketing various goods or services.

11. Defendant also has made "outbound" telemarketing calls, *i.e.*, calls initiated by Defendant, to market magazines. In some instances, Defendant has started these outbound calls by describing its sweepstakes, checking on consumer satisfaction with previous magazine orders, or asking survey questions. Only then has the Defendant identified the seller and made clear the call also is to market magazines.

12. Generally, once consumers ordered magazines, Defendant has asked them to provide billing information, such as a credit card number, to pay for the magazines. At the time Defendant has asked for the consumers' billing information, Defendant did not disclose that the consumers' billing information might be turned over to a third party or used to pay for other goods or services.

13. After obtaining the billing information to process the initial sales transaction, Defendant has then attempted to "upsell" the buying service membership. "Upselling" is a telemarketing technique where one seller sells its products or services through inbound or outbound telemarketing calls, and then offers a second seller's goods or services after the

consumer has already provided a credit card number to purchase the product or service initially offered by the telemarketer.

14. In numerous upsell sales pitches during 1998 and 1999, Defendant represented that consumers will receive a “no obligation” 30-day membership in the Triad discount buying service through which consumers can purchase various goods at discount prices. Defendant then stated that if the consumer chooses to continue as a member, the service would cost a specified amount per month, “billed annually in advance.”

15. In numerous instances when making upsell pitches for buying service memberships, Defendant did not disclose, in a manner consumers are likely to notice and understand, that: (a) the Triad or other buying service would charge the consumer’s credit card the annual membership fee shortly after the 30-day membership ended, unless the consumer called the buying service within 30 days to cancel the membership; and (b) the Triad or other buying service would charge the consumer’s credit card the annual membership fee every year thereafter, unless the consumer called the buying service to cancel the membership. In some instances, Defendant completely failed to disclose the above facts regarding the terms of the Triad or other buying service membership.

16. In numerous instances, at the end of the telemarketing call during which Defendant promoted magazines and Triad or other buying service memberships, Defendant explained the billing arrangements for the magazine order, including the number of months of magazine service and the number and amount of monthly credit card charges. Defendant also stated that the consumer is paid in full after the last monthly payment for the magazine

order. Defendant did not at this time mention any credit card charges relating to the Triad or other buying service membership.

17. If consumers agreed or purportedly agreed to the trial memberships, and in some instances, even if consumers did not agree, Defendant provided the consumers' names and credit card numbers or other billing information to the buying service. Shortly after consumers signed up for the trial memberships, the Triad or other buying service mailed, by third-class bulk mail, materials to consumers about the buying service memberships and the trial offers. These materials disclosed that the consumer must call to cancel to avoid a credit card charge, and the telephone number that the consumer must call to cancel the membership. Numerous consumers, however, may not have opened these mailings because they appeared to be unsolicited promotional or sales materials.

18. Within about 45 days after receiving the consumer's name and billing information, the Triad or other buying service charged each such consumer's credit card, unless the consumer notified the buying service by calling a toll-free number that the consumer wishes to cancel the membership. The buying service's toll-free telephone number appeared on the consumer's credit card statement along with the charge for the buying service membership. Unless the consumer called to cancel, the Triad or other buying service also automatically renewed the membership and processed a charge to the consumer's credit card in each subsequent year.

THE FEDERAL TRADE COMMISSION ACT

19. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.”

VIOLATION OF SECTION 5(a) OF THE FTC ACT

COUNT I

20. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale, or distribution of Triad and other buying service memberships, Defendant has represented, expressly or by implication, that consumers who agree to Defendant’s offer of a 30 day trial membership in a buying service incur no obligation to take any action to avoid having their credit cards charged for the membership.

21. In truth and in fact, consumers who agree to the trial offer must call a toll-free telephone number within 30 days to cancel to avoid having their credit cards charged a fee for the buying service membership.

22. Therefore, the representation set forth in paragraph 20 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

23. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale, or distribution of Triad and other buying service memberships, Defendant has represented, expressly or by implication, that consumers who agree to Defendant’s offer will receive a “no obligation” trial membership.

24. Defendant has failed to disclose or to disclose adequately to consumers:

- A. That a consumer who fails to contact the buying service within 30 days and cancel the trial membership is automatically enrolled as a member in the buying service and the consumer's credit card is charged an annual fee; and
- B. That a member's credit card is charged a renewal fee each subsequent year unless the member cancels the membership.

These facts would be material to consumers in their decision to accept a trial membership offer or purchase a membership.

25. In light of the representation set forth in paragraph 23, Defendant's failure to disclose or to disclose adequately the material information set forth in paragraph 24 is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT III

26. In numerous instances, in connection with the advertising, promotion, marketing, offering for sale, sale, or distribution of Triad and other buying service memberships, Defendant has caused a charge to be submitted for payment for such memberships without the express informed consent of the consumer.

27. Defendant's practice of causing charges to be submitted for payment for buying service memberships without the consumer's express informed consent causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.

28. Therefore, Defendant's practice, as alleged in Paragraph 26 is unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE TELEMARKETING SALES RULE

29. In the Telemarketing Act, 15 U.S.C. § 6101 *et seq.*, Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices. On August 16, 1995, the Commission promulgated the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, with a Statement of Basis and Purpose, 60 Fed. Reg. 43842 (Aug. 23, 1995). The Rule became effective on December 31, 1995, and was amended on March 31, 2003. The provisions of the Rule discussed below have remained in full force and effect since December 31, 1995.

30. Defendant is a "seller" or "telemarketer" engaged in "telemarketing," as those terms are defined in the TSR, 16 C.F.R. §§ 310.2(r), (t) and (u). These definitions were renumbered §§ 310.2(z), (bb), and (cc) and the definition of telemarketing was modified as part of the March 31, 2003 amendments to the TSR.

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

32. The TSR's Statement of Basis and Purpose explains that, in the case of negative option plans, the disclosure requirements of § 310.3(a)(1)(i) are satisfied "if the seller or telemarketer discloses, before a customer pays for any of the goods or services

offered, the total costs and quantity of goods or services that are part of the initial offer of the plan, the total quantity of additional goods or services, if any, that the customer must purchase over the duration of the plan, and the cost, or range of costs, to purchase each individual additional good or service.” 60 Fed. Reg. 43842, 43847 (Aug. 23, 1995).

33. The TSR requires telemarketers in outbound telephone calls to disclose promptly and in a clear and conspicuous manner to the person receiving the call, the following information:

- A. the identity of the seller,
- B. that the purpose of the call is to sell goods and services, and
- C. the nature of the goods or services.

16 C.F.R. § 310.4(d)(1), (2) and (3).

37. The TSR’s Statement of Basis and Purpose explains that, in the case of “multiple purpose” outbound telephone calls, “where the seller or telemarketer plans, in at least some of those calls, to sell goods or services, the disclosures required by this section of the Rule [§ 310.4(d)] must be made ‘promptly,’ during the first part of the call, before the non-sales portion of the call takes place.” 60 Fed. Reg. at 43856.

38. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the TSR constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

COUNT IV

39. In numerous instances, in connection with the telemarketing of Triad and other buying service memberships, Defendant has failed to disclose, in a clear and conspicuous manner, before consumers pay for the buying service memberships, all material restrictions, limitations or conditions to purchase, receive or use the goods or services that are the subject of the offers, including, but not limited to:

- A. That a consumer who fails to contact the buying service within 30 days and cancel the trial membership is automatically enrolled as a member in the buying service and the consumer's credit card is charged an annual fee; and
- B. That a member's credit card is charged a renewal fee each subsequent year unless the member cancels the membership.

40. Therefore, Defendant's acts and practices as set forth in paragraph 39 violate Section 310.3(a)(1)(ii) of the TSR, 16 C.F.R. § 310.3(a)(1)(ii).

COUNT V

41. In numerous instances, in connection with the telemarketing of magazines, Defendant in "outbound telephone calls," as that term is defined in the TSR, 16 C.F.R. § 310.2(n) (this definition was renumbered § 310.2(u) and modified as part of the March 31, 2003 amendments to the TSR), has failed to disclose promptly and in a clear and conspicuous

manner to the person receiving the call: (a) the identity of the seller; and (b) that the purpose of the call is to sell magazines.

42. Therefore, Defendant's acts and practices as set forth in paragraph 41 violate Sections 310.4(d)(1) and (2) of the TSR, 16 C.F.R. § 310.4(d)(1) and (2).

CONSUMER INJURY

43. Consumers throughout the United States have suffered substantial monetary loss as a result of Defendant's unlawful acts and practices. In addition, Defendant has been unjustly enriched as a result of its unlawful acts and practices. Absent injunctive relief by this Court, Defendant is likely to continue to injure consumers, reap unjust enrichment, and harm the public.

THIS COURT'S POWER TO GRANT RELIEF

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

45. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers or other persons resulting from Defendant's violations of the TSR, including the rescission or reformation of contracts, and the refund of money.

PRAYER FOR RELIEF

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

1. Permanently enjoin and restrain Defendant from engaging or assisting others in engaging in violations of the FTC Act and the TSR;
2. Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from Defendant's violations of the FTC Act and the TSR, including, but not limited to, rescission of contracts and restitution, other forms of redress, and the disgorgement of ill-gotten monies; and
3. Award Plaintiff the costs of bringing this action, as well as such additional equitable relief as the Court may determine to be just and proper.

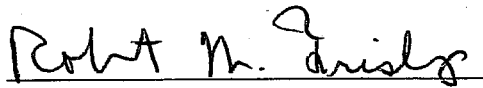
Dated: August 25, 2004

Respectfully submitted,

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