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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, v. DISCOUNTMETALBROKERS, INC., a corporation, f/k/a Discount Gold Brokers, Inc. and Discount Metal Brokers, Inc. and d/b/a Discount Gold Brokers and North American Discount Gold.com,	**Case No. 2:16-cv-2112** **COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF**

DONALD LEE DAYER, a/k/a Lee Dayer, individually and as an officer of DISCOUNTMETALBROKERS, INC.,

KATHERINA DAYER, individually and as an officer of DISCOUNTMETALBROKERS, INC., and

MICHAEL BERMAN, individually and as an officer of DISCOUNTMETALBROKERS, INC.,

Defendants.

Plaintiff, the Federal Trade Commission ("FTC"), for its Complaint alleges:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and the Mail, Internet, or Telephone Order Merchandise Rule ("Merchandise Rule"), 16 C.F.R. Part 435, to obtain permanent injunctive relief, restitution, refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) and in violation of the Merchandise Rule.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

3. Venue is proper in this district under 28 U.S.C. § 1391(b)(1), (b)(2), (c)(1), and (c)(2) and 15 U.S.C. § 53(b).

PLAINTIFF

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC 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 FTC also enforces the Merchandise Rule, 16 C.F.R. Part 435, which requires mail-, Internet-, or phone-based sellers to have a reasonable basis for advertised shipping times, and, when sellers cannot meet promised shipping times or ship within 30 days, to obtain the buyer's consent for a delay or provide a refund.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the Merchandise Rule and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. § 53(b); 16 C.F.R. Part 435.

DEFENDANTS

6. Defendant DiscountMetalBrokers, Inc., f/k/a Discount Gold Brokers, Inc. and Discount Metal Brokers, Inc. and d/b/a Discount Gold Brokers and North American Discount Gold.com ("DGB"), is a California corporation with its

principal place of business at 4924 Balboa Boulevard, Suite 632, Encino, California. DGB transacts or has transacted business in this district and throughout the United States. At all times material to this Complaint, acting alone or in concert with others, DGB has advertised, marketed, distributed, or sold gold or silver to consumers throughout the United States.

7. Defendant Donald Lee Dayer, also known as Lee Dayer ("Donald Dayer"), was President, Secretary, and an officer of DGB at times material to this Complaint. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of DGB set forth in this Complaint. Specifically, Donald Dayer signed a DGB corporate filing as President, CEO, and Secretary, opened bank accounts under the names Discount Metal Brokers, Inc. (later changed to Discount Gold Brokers, Inc.) and North American Discount Gold.com, and had signatory authority on another Discount Gold Brokers, Inc. bank account. He placed television advertisements on DGB's behalf, signed checks from DGB bank accounts for payroll and other expenses, was one of the registrants of the DGB website, and signed "welcome letters" to consumers as Vice President. Defendant Donald Dayer resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States. Defendant Donald Dayer was a Defendant in a prior

FTC action, *FTC v. Bell Connections, Inc. et al*, No. 96-0455-KMW (C.D. Cal. 1996).

8. Defendant Katherina Dayer was President, Secretary, and an officer of DGB at times material to this Complaint. At all times material to this Complaint, acting alone or in concert with others, she has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of DGB set forth in this Complaint. Specifically, Defendant Katherina Dayer incorporated DGB (as Discount Metal Brokers, Inc.) and filed a name change to Discount Gold Brokers, Inc. in 2008. She opened bank accounts on behalf of DGB, listing herself as DGB's owner, and was a signatory on additional DGB bank accounts, including one in the name of North American Discount Gold.com. She sent wire transfers from these accounts to pay for DGB television advertisements, signed checks for payroll and other expenses, and was one of the registrants for the DGB website. Defendant Katherina Dayer resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

9. Defendant Michael Scott Berman ("Berman"), was President, Secretary, and an officer of DGB at times material to this Complaint. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the

acts and practices of DGB set forth in this Complaint. Defendant Berman signed a DGB corporate filing as President and Secretary, filed the name change to DiscountMetalBrokers, Inc. in 2014, and opened a DGB bank account that was used to deposit funds from consumers. Defendant Berman placed television advertisements on DGB's behalf and signed checks from a DGB bank account for payroll and other expenses. Berman held himself out as DGB's manager to consumers, took orders over the phone, and answered calls from consumers inquiring about their unshipped orders. Defendant Berman resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States. Defendant Berman was a Defendant in a prior FTC action, *FTC v. Bell Connections, Inc. et al*, No. 96-0455-KMW (C.D. Cal 1996).

COMMERCE

10. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

11. From at least January 2012 to February 2014, Defendants marketed themselves as legitimate sellers of gold and silver. Defendants ran national advertising campaigns touting "discounted gold and silver at discounted prices"

and portraying gold and silver as a safe retirement investment. Based on Defendants' representations, consumers placed orders for gold and silver, often using their retirement savings. Defendants collected more than $33 million from consumers, but failed to deliver the promised gold or silver in numerous instances.

12. Defendants disseminated, or caused to disseminate, prominent advertisements in national media, including CNN, Fox News, Fox Business Network, and various radio programs.

13. Defendants' television advertisements ran multiple times each weekday, often during programs covering business and investment news.

14. Defendants' advertisements claimed that Defendants sold "discounted gold and silver at discounted prices," with "zero commissions, fees, or expenses" and at "zero percent above dealer cost."

15. Defendants' advertisements urged consumers to be "smart investors" and "protect themselves" by purchasing gold and silver. The advertisements also touted Defendants' "IRA specials."

16. Defendants' advertisements urged consumers to "call now," and repeatedly flashed a telephone number and a website address.

17. Defendants also maintained a website, www.discountgoldbrokers.com, that claimed they "ship Gold Coins" and provide "trained experts" to help consumers with their "investment strategy."

18. Defendants' website portrayed gold and silver as a safe investment through purported articles with titles such as "Why Invest in Gold?" "Gold Preserves Wealth," and "Gold as a Hedge against a Declining U.S. Dollar and Rising Inflation."

19. After seeing or hearing Defendants' advertisements, or visiting their website, consumers contacted Defendants, usually by phone, to purchase gold or silver.

20. Defendants required consumers to pay a deposit, usually $250, before they could place an order for gold or silver with DGB.

21. Consumers often paid the deposit by credit card.

22. After consumers paid the deposit, Defendants instructed them to send the full amount owed for the gold or silver by wire or check to DGB bank accounts maintained by Defendants.

23. Consumers sent personal checks, bank checks, cashier's checks, or wired money directly to Defendants to place their orders. Some consumers directed funds to be transferred from family trust accounts or retirement accounts into DGB bank accounts.

24. Often, consumers used their retirement savings to purchase gold and silver from Defendants.

25. Individual orders ranged from approximately $1,000 to $300,000 each.

26. Upon receiving consumers' checks, Defendants immediately deposited them into DGB bank accounts.

27. After consumers placed their orders, Defendants usually sent consumers a confirmation email, which told them to "allow a minimum of 2-4 weeks for delivery of your product upon the clearing of your funds." The email also included a customer ID and an invoice, through a link.

28. These invoices listed the type and amount of gold or silver consumers had ordered and the amount consumers had paid. The invoices often indicated that the ordered gold or silver was "due for delivery."

29. Defendants' website similarly told consumers to "[a]llow a minimum of approximately 2-4 weeks after the verification of your bank wire."

30. After weeks passed without receiving the gold or silver they ordered from Defendants, numerous consumers contacted Defendants, usually by phone, to inquire about the status of their order.

31. In numerous instances, Defendants, directly or through their representatives, told consumers that their gold or silver would "ship soon," but would not provide a shipment date or a reason for the delay.

32. Defendants, directly or through their representatives, gave consumers myriad excuses for why their gold and silver had not shipped, such as a "shipping mix-up" or that there was a "backlog."

33. Hundreds of consumers complained directly to Defendants by phone about their unfulfilled orders, and many demanded refunds.

34. Consumers often reported difficulty reaching Defendants by phone. Some consumers were only able to reach Defendants if they called from a phone number different from their own.

35. Despite consumers' complaints and demands for refunds, in numerous instances, Defendants failed to send consumers any of the gold or silver they ordered and refused to provide refunds.

36. Many consumers also filed complaints against Defendants with the Better Business Bureau, local law enforcement, their state's attorney general, and federal law enforcement, including the FTC. Some consumers hired attorneys to threaten legal action and filed lawsuits seeking the return of the money they lost to Defendants.[1]

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[1] *See, e.g.*, *Trickel v. Discount Gold Brokers, Inc., et al.*, No. 3:2014-cv-01916 (M.D. Pa. Sept. 30, 2014); *Christian v. Discount Gold Brokers, Inc., et al.*, No. 2:2014-cv-03082-CAS-JCG (C.D. Cal. Aug. 25, 2014) (default judgment); *Hendrix v. Discount Gold Brokers, Inc., et al*, No. 2:2014-cv-00737 (C.D. Cal. July 21, 2014) (default judgment); *Amaretti v. Discount Gold Brokers, Inc., et al.*, No. 2:14-cv-01145-GAF-MRW (C.D. Cal. Mar. 4, 2014) (judgment).

37. In limited instances, these efforts resulted in Defendants providing gold and silver to consumers or providing refunds.

38. However, a significant number of consumers who paid Defendants for gold and silver received nothing in return.

39. From January 2012 to February 2014, consumers paid Defendants millions for orders of gold and silver that were never delivered.

VIOLATIONS OF THE FTC ACT

40. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce."

41. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

COUNT I

42. In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of gold and silver, Defendants represented, directly or indirectly, expressly or by implication, that they would ship the gold and silver that consumers ordered.

43. In truth and in fact, in numerous instances in which Defendants made the representation set forth in Paragraph 42, Defendants failed to ship the gold and silver consumers ordered or to refund consumers' money.

44. Therefore, Defendants' representation as set forth in Paragraph 42 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).

VIOLATIONS OF THE MAIL, INTERNET, OR TELEPHONE ORDER MERCHANDISE RULE

45. The Merchandise Rule, 16 C.F.R. Part 435, prohibits sellers from soliciting any order for the sale of merchandise ordered through the mail, via Internet or by telephone "unless at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer" either "[w]ithin that time clearly and conspicuously stated in any such solicitation; or [i]f no time is clearly and conspicuously stated, within 30 days after receipt of a properly completed order from the buyer." 16 C.F.R. § 435.2(a)(1).

46. "Receipt of a properly completed order" means "where the buyer tenders full or partial payment . . . the time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order." 16 C.F.R. § 435.1(c).

47. Where a seller is unable to ship merchandise within the seller's advertised time or within 30 days, if no time is given, the seller must offer to the buyer "clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund." 16 C.F.R. § 435.2(b)(1).

a. Any such offer "shall be made within a reasonable time after the seller first becomes aware of its inability to ship." 16 C.F.R. § 435.2(b)(1).

b. The offer must fully inform the buyer of the buyer's right to cancel and provide a definite revised shipping date or inform the buyer that the seller cannot make any representation regarding the length of the delay. 16 C.F.R. § 435.2(b)(1)(i).

48. A seller must "deem an order canceled and . . . make a prompt refund to the buyer whenever the seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option [under the Merchandise Rule] . . . [or] [t]he seller fails to offer the option [to consent to a delay or cancel required by § 435.2(b)(1)] and has not shipped the merchandise" within the time required by the Merchandise Rule. 16 C.F.R. § 435.2(c), (c)(1), (c)(5).

49. Pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a(d)(3) and 16 C.F.R. § 435.2, a violation of the Merchandise Rule constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

50. In numerous instances, Defendants failed to ship properly completed orders for merchandise within the timeframe required by the Merchandise Rule,

and failed to clearly and conspicuously offer consumers the opportunity to either consent to a delay in shipping or to cancel their order and receive a prompt refund.

51. Defendants' practices as alleged in Paragraph 50 violate the Merchandise Rule, 16 C.F.R. § 435.2(b)(1), and therefore are unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 5(a).

COUNT III

52. In numerous instances, when Defendants failed to ship orders within the timeframe required by the Merchandise Rule and failed to offer consumers the opportunity to consent to a delay in shipping or to cancel their order, they did not cancel those orders or provide consumers a refund. In addition, if buyers notified Defendants of an order cancellation pursuant to any option under the Merchandise Rule, Defendants did not deem those orders cancelled or provide a prompt refund.

53. Defendants' practices as alleged in Paragraph 52 violate the Merchandise Rule, 16 C.F.R. § 435.2(c), and therefore are unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 5(a).

CONSUMER INJURY

54. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act and the Merchandise Rule, 16 C.F.R. Part 435. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants

are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

55. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may also award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the Merchandise Rule, 16 C.F.R. Part 435, and the Court's own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act and the Merchandise Rule by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the Merchandise Rule, including but not limited to, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

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

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

Dated: 3/29/16

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