

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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JUL 16 1993
U.S. DISTRICT COURT
ROBBINS
CLEARING

UNITED STATES OF AMERICA.

Plaintiff.

v.

NATIONWIDE INDUSTRIAL TECHNOLOGIES CO.,
INC., a/k/a NATION WIDE LIGHTING & SUPPLY
COMPANY, INC., a corporation, and

DARRELL J. CLARK, individually and as an officer
of Nationwide Industrial Technologies Co., Inc.,

Defendants.

99-5164

Civil Action No.

JUDGE KENNELLY

MAGISTRATE JUDGE ROSEBOND

X000013

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), for its Complaint alleges that :

1. Plaintiff brings this action under Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101, et seq., to obtain monetary civil penalties and injunctive and other equitable relief for defendants' violations of the FTC's Trade Regulation Rule entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310, and consumer redress, restitution, rescission of contracts, disgorgement and injunctive relief for defendants' deceptive acts or

practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), in connection with the sale of nondurable maintenance 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), 1345, and 1355.

3. Venue in this district is proper under 15 U.S.C. §§ 53(b) and 6103(e), as well as under 28 U.S.C. § 1391(b) - (c), and 1395(a).

DEFENDANTS

4. Defendant Nationwide Industrial Technologies Co., Inc., formerly known as Nation Wide Lighting & Maintenance Supply Co., Inc. ("Nationwide"), is an Illinois corporation with its office and principal place of business located at 14426 South Pulaski, Midlothian, Illinois 60445. Defendant Nationwide transacts or has transacted business in the Northern District of Illinois.

5. Defendant Darrell J. Clark ("Clark") is the principal owner, director, and president of Nationwide. At all times material to this Complaint, individually or in concert with others, Defendant Clark has formulated, directed, controlled, or participated in the acts and practices of the corporate defendant, including the acts and practices set forth herein. He resides at 20406 Frankfort Square Road, Frankfort, Illinois 60508, in the Northern District of Illinois. Defendant Clark transacts or has transacted business in the Northern District of Illinois.

COMMERCE

6. At all times material to this Complaint, defendants have been engaged in the business of offering for sale and selling, through telemarketers, maintenance supplies, including lightbulbs, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

7. Since at least 1990 and continuing thereafter, in connection with the sale or offering for sale of nondurable maintenance supplies, defendants have engaged in a plan, program, or campaign to sell such supplies, including lightbulbs, through interstate telephone calls.

8. Defendants, directly or through their sales representatives, have contacted various businesses and organizations by telephone. Defendants target both small and large businesses and organizations throughout the United States for these unsolicited telephone sales.

9. In numerous instances, defendants' sales representatives have called the targeted businesses and organizations and asked to speak with an officer or the individual responsible for ordering maintenance supplies. Defendants have then shipped unordered merchandise and later an invoice to these businesses and organizations, listing as the "contact name" the name of the officer or other individual responsible for ordering maintenance supplies. In some instances, defendants also have stated or implied during these telephone calls that they previously had done business with the business or organization or that they were the business' or organization's regular supplier of certain nondurable maintenance supplies.

10. After receiving an invoice from defendants, the recipients have in numerous

instances paid the invoice, mistakenly believing that someone in their business or organization had ordered supplies from defendants. The prices of defendants' products, reflected on the invoices, are substantially higher than prices for similar products available on the market.

11. Following receipt of payment for the first shipment, defendants in some instances have sent a second shipment of maintenance supplies to a recipient, followed by an invoice setting forth the additional amount due and representing that the second shipment was the back-ordered balance of the initial shipment.

12. After receiving an invoice, some recipients have called defendants to dispute that they ordered any supplies. In some instances, defendants have responded by representing that they have a tape recording of the conversation in which the order was placed. Defendants frequently have refused to produce such a tape recording for the recipient, however. In other instances, defendants have insisted on payment but have applied a discount that would allow the recipient to pay less than the amount on the original invoice.

VIOLATION OF SECTION 5 OF THE FTC ACT

COUNT ONE

13. In numerous instances, in connection with the sale, offering for sale, or distribution of maintenance supplies, defendants have represented, directly or by implication, through, inter alia, telephone calls, letters, invoices, packing slips, and/or the shipment of goods that consumers ordered the maintenance supplies that were shipped and/or billed to them by defendants.

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

15. Therefore, the representations set forth in Paragraph 13 were, and 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

16. In the Telemarketing Act, 15 U.S.C. §§ 6101, et seq., 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 (Aug. 23, 1995). The Telemarketing Sales Rule became effective December 31, 1995, and since then has remained in full force and effect.

17. Telephone calls between a telemarketer and a business that involve the retail sale of nondurable office or cleaning 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 explained 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).

18. 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).

19. 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).

20. The Telemarketing Sales Rule also requires telemarketers in outbound telephone calls to disclose promptly and in a clear and conspicuous manner that the purpose of the call is to sell goods or services. 16 C.F.R. § 310.4(d)(2).

21. 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. § 45(a).

COUNT TWO

22. In numerous instances, in connection with the telemarketing of nondurable maintenance supplies, 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:

- a. that the supplies shipped and/or billed by defendants were ordered by the consumer;
- b. that defendants previously have done business with the consumer or that they are the consumer's regular supplier of maintenance supplies;
- c. that defendants are calling the consumer merely to verify a previously placed order: or

d. that defendants have a tape recording of the consumer ordering the supplies;

thereby violating 16 C.F.R. § 310.3(a)(4).

COUNT THREE

23. In numerous instances, in connection with the telemarketing of nondurable maintenance supplies, defendants, in "outbound telephone calls," as that term is defined in the Telemarketing Sales Rule, 16 C.F.R. §310.2(n), have failed to disclose promptly and in a clear and conspicuous manner to the person receiving the call that the purpose of the call is to sell goods, thereby violating 16 C.F.R. 310.4(d)(2).

CONSUMER INJURY

24. Consumers in the United States have suffered and continue to suffer 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, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

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

26. 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 defendants' violations of the Telemarketing Sales Rule, including the rescission and reformation of contracts, and the refund of monies.

27. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d)(1997), authorizes this Court to award civil penalties of not more than \$11,000 for each violation of the Telemarketing Sales Rule occurring after November 20, 1996. The defendants' violations of the Rule were committed after that date and with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

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

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Sections 4(a) and 6(b) of the Telemarketing Act, 15 U.S.C. §§ 6103(a) and 6105(b), and pursuant to its own equitable powers:

1. Enter judgment against the defendants and in favor of the plaintiff for each violation alleged in this Complaint;
2. Award plaintiff such preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief;
3. Permanently enjoin the defendants from violating the FTC Act and the

Telemarketing Sales Rule;

4. Award plaintiff monetary civil penalties from each defendant for every violation of the Telemarketing Sales Rule;

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

6. 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.

DATED: 12-15-79

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

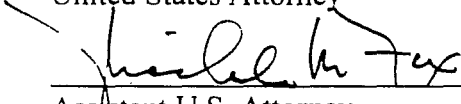
Of Counsel:

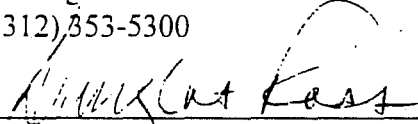
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