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U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

BY _____

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8
9 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 _____)
11 FEDERAL TRADE COMMISSION)
12)
13 Plaintiff,)
14)
15 v.)
16)
17 CONVERSION MARKETING, INC., dba)
NATIONAL HEALTH SUPPORT CENTER,)
18 NATURAL BRIGHT, and POUNDS OFF)
PATCH; and)
19)
ADAM TYLER MACDONALD, dba)
FAST WHITE;)
20)
21 Defendants.)
22 _____)

SACV. 04-1264 JVS (JTLx)

AMENDED COMPLAINT FOR INJUNCTIVE
AND OTHER EQUITABLE RELIEF

21 1. Plaintiff, Federal Trade Commission ("FTC") brings this
22 action under Section 13(b) of the Federal Trade Commission Act
23 ("FTC Act"), 15 U.S.C. § 53(b), and the Telemarketing and Consumer
24 Fraud and Abuse Prevention Act, 15, U.S.C. §§ 6101 et seq., to
25 secure a permanent injunction, rescission of contracts and
26 restitution, disgorgement of ill-gotten gains, and other equitable
27 relief against the defendants for engaging in unfair or deceptive
28

1 acts or practices in violation of Sections 5(a) and 12 of the FTC
2 Act, 15 U.S.C. §§ 45(a) and 52, and the FTC's Telemarketing Sales
3 Rule ("TSR"), 16 C.F.R. Part 310.

4 **JURISDICTION AND VENUE**

5 2. This Court has subject matter jurisdiction over the
6 FTC's claims pursuant to 15 U.S.C. §§ 45(a), 52, 53(b), 57b,
7 6102(c), and 6105(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

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

10 **PLAINTIFF**

11 4. Plaintiff, the FTC, is an independent agency of the
12 United States government created by statute, 15 U.S.C. §§ 41 et
13 seq. The Commission enforces Sections 5(a) and 12 of the FTC Act,
14 15 U.S.C. §§ 45(a) and 52, which prohibit, respectively, unfair or
15 deceptive acts or practices, and false advertisements for food,
16 drugs, devices, services, or cosmetics in or affecting commerce.
17 The Commission is authorized to initiate federal district court
18 proceedings by its own attorneys to enjoin violations of the FTC
19 Act and the TSR to secure such equitable relief as may be
20 appropriate in each case, and to obtain consumer redress.
21 15 U.S.C. §§ 53(b), 57b, 6102(c), and 6105(b).

22 **DEFENDANTS**

23 5. Conversion Marketing, Inc. ("Conversion Marketing"), dba
24 National Health Support Center, Natural Bright, and Pounds Off
25 Patch, is a California corporation. It was incorporated by
26 Defendant MacDonald in May 2002. Conversion Marketing's principal
27 place of business is 1182 South East Bristol Street, Santa Ana,
28

1 California 92707. Conversion Marketing transacts or has transacted
2 business in this district and throughout the United States.

3 6. Adam Tyler MacDonald ("MacDonald") is the CEO, president,
4 and owner of Conversion Marketing, Test Marketing Group, LLC
5 ("TMG"), and Take 2 Direct, LLC. MacDonald also does business as
6 Fast White and Test Consulting. The principal place of business
7 for each of these entities is 1182 South East Bristol Street, Santa
8 Ana, California 92707. Individually or in concert with others,
9 MacDonald directs, controls, formulates, or participates in the
10 acts and practices as set forth herein. MacDonald resides in this
11 district and transacts, or has transacted business in this district
12 and throughout the United States.

13 COMMERCE

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

18 DEFENDANTS' BUSINESS PRACTICES

19 "FAST WHITE" TOOTH WHITENING KIT

20 8. Beginning in approximately late 2002, MacDonald, through
21 his direct control of TMG, began telemarketing Fast White, a tooth
22 whitening kit. TMG's telemarketers made outbound calls to
23 consumers and represented that they could obtain a "free trial" or
24 a "free sample" of the Fast White tooth whitening kit at no cost or
25 obligation except for a small payment, typically \$7.95, to cover
26 shipping and handling costs. Consumers also had the opportunity to
27 enroll in TMG's continuity plan and receive additional shipments of
28 the Fast White kit upon payment of a monthly fee.

1 9. In early 2003, TMG hired ABI Marketing ("ABI"), to make
2 Fast White outbound telemarketing calls to consumers. The ABI
3 telemarketers represented that consumers could obtain a "free
4 trial" or a "free sample" of the Fast White tooth whitening kit at
5 no obligation. In numerous instances, the ABI telemarketers failed
6 to disclose: (a) the shipping and handling fee; (b) that they
7 intended to enroll the consumers in the Fast White continuity plan;
8 and (c) that they already possessed the consumer's credit account
9 or debit account information. In numerous instances, consumers
10 agreed to accept a free sample of the Fast White kit, but they did
11 not agree to pay any fee, through their debit or credit accounts or
12 otherwise. Also, consumers did not agree to enroll in a continuity
13 plan and pay additional fees to receive additional Fast White kits.

14 10. In numerous instances, ABI's telemarketers falsely
15 reported to TMG that consumers: (a) had agreed to accept the Fast
16 White free trial offer and pay the shipping and handling fee; and
17 (b) had agreed to enroll in the Fast White continuity plan and make
18 automatic payments to TMG to pay for periodic shipments of the Fast
19 White kit.

20 11. Subsequently, in numerous instances, MacDonald and TMG
21 assessed charges against the financial accounts of Fast White
22 consumers and enrolled them in the Fast White continuity plan
23 without obtaining valid authorization from the consumers.

24 12. Thereafter, TMG shipped Fast White "free sample" kits to
25 consumers and assessed shipping and handling charges, typically
26 \$7.95, against consumers who had not agreed to pay any charge. TMG
27 also sent continuity plan shipments of Fast White to these same
28

1 consumers and typically billed them in excess of \$34 for each
2 shipment.

3 13. Upon receiving their credit card bills or account
4 statements, these consumers, who had not authorized charges against
5 their accounts, contacted TMG to question the Fast White charges
6 and shipments. In numerous instances, TMG advised consumers that
7 they had authorized the charges by using their credit cards or
8 debit accounts for previous purchases from third parties, which
9 allegedly enabled the defendants: (a) to legally obtain consumers'
10 account information from third parties; and (b) to legally bill
11 consumers' accounts for the Fast White tooth whitening kits.

12 14. In other instances, TMG authorized refunds to consumers
13 who claimed they had been billed without authorization. In July
14 2003, under MacDonald's specific direction, TMG severed its
15 business relationship with ABI after receiving notifications from
16 the Better Business Bureau and TMG's merchant bank that numerous
17 consumers had not authorized Fast White charges against their
18 accounts.

19 15. In late 2003, TMG filed for bankruptcy. At that time
20 MacDonald transferred TMG's operations to Conversion Marketing.
21 For example, Conversion Marketing took over the telephone account
22 that MacDonald had originally opened for TMG in November 2002, and
23 used it to make and receive telemarketing calls. In August 2004,
24 over 484,000 calls were made and received by Conversion Marketing
25 through this telephone account. In addition, Conversion Marketing
26 publicly acknowledged responsibility for the TMG-Fast White
27 telemarketing campaign.
28

1 "POUNDS OFF" AND "CARBS OFF" WEIGHT LOSS PATCHES

2 16. In or around September 2003, MacDonald and Conversion
3 Marketing began marketing two weight loss patches, the "Pounds Off
4 Patch" and "Carbs Off Patch," to consumers via telemarketing, the
5 Internet (through websites such as www.poundsoffpatch.com and
6 www.freetvproducts.com), and television commercials. The weight
7 loss representations made by MacDonald and Conversion Marketing
8 about the Pounds Off Patch and the Carbs Off Patch include, but are
9 not limited to, the following:

10 • "[The Pounds Off Patch/Carbs Off Patch] will work
11 for anyone, but we recommend that children under 12 years old do
12 not use them";

13 • "Both men and women have reported that they have
14 safely lost up to 28 pounds in just 3 months when supplementing
15 their fitness program with the Pounds Off Patch";

16 • "The product we are offering is the Carbs Off Patch.
17 It's a topical patch that helps you lose weight by blocking out 35%
18 of the carbohydrates that are entering your system and it will also
19 decrease your appetite and help you with the cravings you may
20 have";

21 • "Right away you should start feeling your appetite
22 decrease and your energy level should go through the roof";

23 • "By helping to reduce your appetite, the Pounds Off
24 Patch helps you consume less calories. And by helping to boost
25 your energy, the Pounds Off Patch helps you remain more active.
26 The Result: you get help burning fat FASTER, which means a
27 HEALTHIER, HAPPIER YOU."
28

1 The advertisements also represent that the "active ingredient"
2 in the Pounds Off Patch is Fucus Vesiculosus, which "regulates
3 hormones that may help to burn fat more quickly." Similarly, the
4 advertised "main ingredient" in the Carbs Off Patch is Phaseolus
5 Vulgaris, which "helps stop the absorption of carbohydrates."

6 17. Consumers who view the Pounds Off Patch television
7 commercials are directed to defendants' www.poundsoffpatch.com
8 website. The television commercials and website offer "two months
9 of the Pounds Off Patch for the price of one" or \$36.98 (\$29.99
10 plus \$6.99 for shipping and handling) for two shipments.

11 18. Alternatively, defendants' telemarketers offer consumers
12 the opportunity to participate in a study or 12-day free trial of
13 the Pounds Off Patch or the Carbs Off Patch. However, the study or
14 free trial also requires the payment of shipping and handling
15 charges that range from \$7.95 to \$12. If consumers do not cancel
16 within the trial period, they are automatically enrolled in
17 defendants' continuity plan. Under the plan consumers receive
18 additional patches each month for \$19.95.

19 **VIOLATIONS OF SECTIONS 5 and 12 OF THE FTC ACT**

20 19. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits
21 unfair or deceptive acts or practices in or affecting commerce.
22 Section 12(a) of the FTC Act, 15 U.S.C. § 52(a), prohibits the
23 dissemination of any false advertisement in or affecting commerce
24 for the purpose of inducing, or which is likely to induce, the
25 purchase of food, drugs, devices, services, or cosmetics. For
26 purposes of Section 12 of the FTC Act, the Pounds Off Patch and
27 Carbs Off Patch are "drugs" or "devices" as defined in Section 15
28 of the FTC Act, 15 U.S.C. § 55. As set forth below, defendants

1 have engaged in such unlawful practices in connection with the
2 marketing and sale of the Pounds Off Patch and the Carbs Off Patch.

3 **COUNT I - False Representations**

4 20. In numerous instances in connection with the marketing of
5 their tooth whitening kit, MacDonald and Conversion Marketing have
6 represented, expressly or by implication, that:

7 a. consumers could obtain a "free sample" of the tooth
8 whitening kit at no cost or obligation; and

9 b. consumers have purchased or agreed to purchase one or
10 more tooth whitening kits from defendants, and therefore owe
11 money to defendants.

12 21. In truth and in fact:

13 a. consumers do not obtain a free sample of the tooth
14 whitening kit at no cost or obligation. Defendants assess
15 recurring charges against consumers' credit accounts and debit
16 accounts when consumers agree to accept a free sample of the
17 tooth whitening kit; and

18 b. consumers did not purchase or agree to purchase one
19 or more tooth whitening kits from defendants, and therefore do
20 not owe money to defendants.

21 22. Therefore, the representations set forth in paragraph 20,
22 were, and are, deceptive acts or practices in or affecting commerce
23 in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

24 **COUNT II - False Representations**

25 23. In numerous instances in connection with the marketing of
26 their weight loss patches, MacDonald and Conversion Marketing have
27 represented, expressly or by implication, that:
28

1 a. defendants' weight loss patches cause substantial
2 weight loss for all users;

3 b. users of defendants' weight loss patches will lose
4 substantial weight by applying the patches to their skin; and

5 c. defendants' weight loss patches cause substantial
6 weight loss by blocking the absorption of carbohydrates.

7 24. In truth and in fact:

8 a. defendants' weight loss patches do not cause
9 substantial weight loss for all users;

10 b. users of defendants' weight loss patches will not
11 lose substantial weight by applying the patches to their skin;
12 and

13 c. defendants' weight loss patches do not cause
14 substantial weight loss by blocking the absorption of
15 carbohydrates.

16 25. Therefore, the representations set forth in paragraph 23,
17 were, and are, deceptive acts or practices in or affecting commerce
18 in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C.
19 §§ 45(a) and 52.

20 **COUNT III - Unfair Practices**

21 26. In numerous instances in connection with the marketing of
22 their tooth whitening kit, MacDonald and Conversion Marketing have:

23 a. enrolled consumers in continuity plans, causing
24 periodic shipments to be sent to consumers and charges to be
25 assessed against consumers' credit accounts and debit
26 accounts, without obtaining the express, informed consent of
27 the consumers to enroll them in defendants' continuity plan;
28 and

1 b. assessed monthly charges against consumers' credit
2 and debit accounts without obtaining the express, informed
3 consent of the consumers to assess such charges.

4 27. Defendants' practices:

5 a. of enrolling consumers in continuity plans without
6 obtaining the express, informed consent of the consumers; and

7 b. assessing monthly charges against consumers' credit
8 and debit accounts without obtaining the express, informed
9 consent of the consumers cause or are likely to cause
10 substantial injury to consumers that is not reasonably
11 avoidable by consumers themselves and is not outweighed by
12 countervailing benefits to consumers or competition.

13 28. Therefore, defendants' practices as alleged in paragraph
14 26, are unfair in violation of Section 5(a) of the FTC Act, 15
15 U.S.C. § 45(a).

16 **COUNT IV - Unsubstantiated Claims**

17 29. Through the means described in paragraphs 16, defendants
18 have represented, expressly or by implication, that:

19 a. the Pounds Off Patch and Carbs Off Patch cause weight
20 loss;

21 b. the Pounds Off Patch and Carbs Off Patch reduce
22 consumers' appetites;

23 c. the Pounds Off Patch regulates hormones and may help
24 to burn fat more quickly; and

25 d. the Pounds Off Patch can help consumers lose up to 28
26 pounds in 3 months.

27 30. Defendants did not possess and rely on a reasonable basis
28 that substantiated the representations set forth in paragraph 29 at

1 the time the representations were made. Therefore, the
2 representations set forth in paragraph 29 constitute deceptive acts
3 or practices, and the making of false advertisements, in or
4 affecting commerce, in violation of Sections 5(a) and 12 of the FTC
5 Act, 15 U.S.C. §§ 45(a) and 52.

6 **THE TELEMARKETING SALES RULE**

7 31. In the Telemarketing Act, 15 U.S.C. §§ 6101 et seq.,
8 Congress directed the Commission to prescribe rules prohibiting
9 deceptive and abusive telemarketing acts or practices. On August
10 16, 1995, the Commission promulgated the Telemarketing Sales Rule,
11 16 C.F.R. Part 310. The Rule became effective December 31, 1995.
12 On January 29, 2003, the Commission adopted an amended TSR with the
13 amendments becoming effective on March 31, 2003.

14 32. MacDonald, Conversion Marketing, and TMG are
15 "telemarketers" or "sellers" engaged in "telemarketing," as those
16 terms are defined in the Rule, 16 C.F.R. § 310.2(z), (bb),
17 and (cc).

18 33. The Rule prohibits telemarketers and sellers from causing
19 billing information to be submitted for payment, directly or
20 indirectly, without the express informed consent of the customer,
21 from charging the customer for goods or services without the
22 express informed consent of the customer to be charged, and from
23 assessing charges against any account other than those that are
24 specifically identified. 16 C.F.R. § 310.4(a)(6).

25 34. The Rule prohibits telemarketers or sellers from
26 misrepresenting any aspect of a negative option offer, including
27 that consumers' accounts will be charged unless consumers take
28 affirmative action to avoid the charges, the dates the charges will

1 be submitted, and the specific steps consumers must take to avoid
2 the charges. 16 C.F.R. § 310.3(a)(2)(ix).

3 35. The Rule prohibits telemarketers and sellers from failing
4 to clearly and conspicuously disclose, before the customer pays,
5 the total cost to purchase the goods or services offered. 16
6 C.F.R. § 310.3(a)(1)(i).

7 36. Pursuant to Section 3(c) of the Telemarketing Act, 15
8 U.S.C. § 6102(c) and Section 18(d)(3) of the FTC Act, 15 U.S.C.
9 § 57a(d)(3), violations of the TSR constitute unfair or deceptive
10 acts or practices in or affecting commerce, in violation of Section
11 5(a) of the FTC Act, 15 U.S.C. § 45(a).

12 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

13 **COUNT V - Unauthorized Billing**

14 37. In numerous instances in connection with the marketing of
15 their tooth whitening kit, MacDonald and Conversion Marketing have
16 caused charges to be billed to consumers' credit card accounts and
17 debit card accounts, without obtaining consumers' express informed
18 consent.

19 38. Defendants' practice as alleged in paragraph 37 is an
20 abusive telemarketing practice in violation of Section 310.4(a)(6)
21 of the TSR, 16 C.F.R. § 310.4(a)(6).

22 **COUNT VI - Misrepresenting Negative Option**

23 39. In numerous instances in connection with the marketing of
24 their tooth whitening kit, MacDonald and Conversion Marketing have
25 misrepresented material aspects of a negative option feature,
26 including the facts that consumers' accounts will be charged unless
27 the consumers take affirmative actions to avoid the charges, the
28

1 date the charges will be submitted for payment, or the specific
2 steps consumers must take to avoid the charges.

3 40. Defendants' practice as alleged in paragraph 39 is a
4 deceptive telemarketing practice in violation of Section
5 310.3(a)(2)(ix) of the TSR, 16 C.F.R. § 310.3(a)(2)(ix).

6 **COUNT VII - Failure to Disclose Total Cost**

7 41. In numerous instances in connection with the marketing of
8 their tooth whitening kit, MacDonald and Conversion Marketing have
9 failed to clearly and conspicuously disclose, before consumers pay
10 for the product, the total cost to purchase, receive, or use the
11 product.

12 42. Defendants' practice as alleged in paragraph 41 is a
13 deceptive telemarketing practice in violation of Section
14 310.3(a)(1)(i) of the TSR, 16 C.F.R. § 310.3(a)(1)(i).

15 **CONSUMER INJURY**

16 43. Defendants' violations of Sections 5 and 12 of the FTC
17 Act as set forth above, have caused and continue to cause
18 substantial injury to consumers. Absent injunctive relief by this
19 Court, defendants are likely to continue to injure consumers.

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

21 44. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers
22 this Court to grant injunctive and such other relief as the Court
23 may deem appropriate to halt and redress violations of the FTC Act.
24 The Court, in the exercise of its equitable jurisdiction, may award
25 other ancillary relief, including but not limited to, rescission of
26 contracts and restitution, and the disgorgement of ill-gotten
27 gains, to prevent and remedy injury caused by defendants' law
28 violations.

1 45. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section
2 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this
3 Court to grant such relief as the Court finds appropriate to halt
4 and redress injury resulting from defendants' violations of the
5 TSR, including rescission and reformation of contracts, and the
6 refund of monies.

7 46. This Court, in the exercise of its equitable
8 jurisdiction, may award other ancillary relief to remedy injury
9 caused by defendants' law violations.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff FTC, pursuant to Sections 13(b) and 19
12 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 6(b) of the
13 Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own
14 equitable powers, requests that this Court:

15 1. Award plaintiff such preliminary injunctive and ancillary
16 relief as may be necessary to avert the likelihood of consumer
17 injury during the pendency of this action and to preserve the
18 possibility of effective final relief;

19 2. Permanently enjoin defendants from violating Sections 5
20 and 12 of the FTC Act, and the Telemarketing Act as alleged in this
21 complaint;

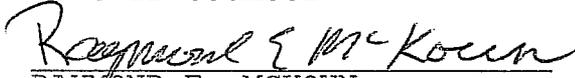
22 3. Award such relief as the Court finds necessary to redress
23 injury to consumers resulting from defendants' violations of
24 Sections 5 and 12 of the FTC Act, and the Telemarketing Act,
25 including but not limited to, rescission of contracts and
26 restitution, and the disgorgement of ill-gotten gains by the
27 defendants; and

28 4. Award Plaintiff the costs of bringing this action, as

1 well as such other and additional relief as the Court may
2 determine to be just and proper.

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4 Dated Jan. 4, 2006 Respectfully submitted,

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6 WILLIAM BLUMENTHAL
General Counsel

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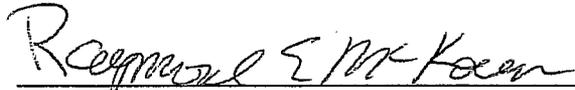
1 CERTIFICATE OF SERVICE

2 My name is Raymond E. McKown. I am an attorney employed
3 by the Federal Trade Commission, 10877 Wilshire Blvd., Ste.
4 700, Los Angeles, California 90024. On January 4, 2006, I
5 placed the document captioned: "AMENDED COMPLAINT FOR
6 INJUNCTIVE AND OTHER EQUITABLE RELIEF" in the first class
7 United States mail, postage prepaid, addressed to the
8 following:

9 Linda A. Goldstein, Esq.
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17 Los Angeles, CA 90064

18 I declare under penalty of perjury that the foregoing is
19 true and correct. Executed this 4th day of January 2006, at Los
20 Angeles, California.

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Raymond E. McKown