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12 UNITED STATES OF AMERICA

13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA**

15
16 UNITED STATES OF AMERICA,
17 Plaintiff,

18 v.

19
20 FMFG, Inc., a Nevada corporation, also d/b/a
21 American Adjustable Beds, Tranquility
22 Adjustable Beds, and California Sleep
23 Research; and

24 KURT G. CUDDY, individually and as an
25 officer or director of FMFG, Inc.,

26 Defendants.

Civil No. _____

**COMPLAINT FOR
CIVIL PENALTIES,
PERMANENT INJUNCTION,
AND OTHER RELIEF**

1 Plaintiff, the United States of America, acting upon notification and authorization to the
2 Attorney General by the Federal Trade Commission (“FTC” or “Commission”), pursuant to
3 Section 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 56(a)(1), for its
4 complaint alleges:

5 1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the
6 FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b, and Section 6 of the
7 Telemarketing and Consumer Fraud and Abuse Prevention Act (the “Telemarketing
8 Act”), 15 U.S.C. § 6105, to obtain monetary civil penalties, consumer redress, a
9 permanent injunction, and other equitable relief for Defendants’ violation of Section 5(a)
10 of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule (the “TSR”
11 or “Rule”), 16 C.F.R. Part 310, as amended by 68 Fed. Reg. 4580, 4669 (January 29,
12 2003).

13 **JURISDICTION AND VENUE**

14 2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331,
15 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a) and 57b. This
16 action arises under 15 U.S.C. § 45(a).

17 3. Venue is proper in this District under 28 U.S.C. §§ 1391(b)-(c) and 1395(a), and 15
18 U.S.C. § 53(b).

19 **DEFENDANTS**

20 4. Defendant FMFG, Inc. (“FMFG”) is a Nevada corporation with its principal place of
21 business at 1553 Hwy 395, Suite B, Minden, NV 89423. FMFG is both a telemarketer
22 and a seller of goods or services, including adjustable beds, to consumers. FMFG
23 transacts or has transacted business in this District.
24
25
26

5. Defendant Kurt Cuddy is an officer, director, or manager of FMFG. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices of FMFG, including the acts and practices set forth in this Complaint. He has resided or transacted business in the District of Nevada.

THE TELEMARKETING SALES RULE
AND THE NATIONAL DO NOT CALL REGISTRY

6. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108, in 1994. On August 16, 1995, the FTC adopted the Telemarketing Sales Rule (the "Original TSR"), 16 C.F.R. Part 310, which became effective on December 31, 1995. On January 29, 2003, the FTC amended the TSR by issuing a Statement of Basis and Purpose ("SBP") and the final amended TSR (the "Amended TSR"). 68 Fed. Reg. 4580, 4669.

7. Among other things, the Amended TSR established a "do-not-call" registry, maintained by the Commission (the "National Do Not Call Registry" or "Registry"), of consumers who do not wish to receive certain types of telemarketing calls. Consumers can register their telephone numbers on the Registry without charge either through a toll-free telephone call or over the Internet at donotcall.gov.

8. Consumers who receive telemarketing calls to their registered numbers can complain of Registry violations the same way they registered, through a toll-free telephone call or over the Internet at donotcall.gov, or by otherwise contacting law enforcement authorities.

1 9. Since September 2, 2003, sellers, telemarketers, and other permitted organizations have
2 been able to access the Registry over the Internet at *telemarketing.donotcall.gov* to
download the registered numbers.

3 10. Since October 17, 2003, sellers and telemarketers have been prohibited from calling
4 numbers on the Registry in violation of the Amended TSR. 16 C.F.R.
5 § 310.4(b)(1)(iii)(B).

6 11. Under the Amended TSR, telemarketing is defined as a plan, program, or campaign
7 which is conducted to induce the purchase of goods or services or a charitable
8 contribution, by use of one or more telephones and which involves more than one
9 interstate telephone call. 16 C.F.R. § 310.2(cc). Calling simply to conduct an
10 informational survey is not telemarketing. However, a dual-purpose plan, program, or
11 campaign conducted to take a purported survey but also to induce the purchase of goods
12 or services or charitable contributions is telemarketing (assuming it is by use of one or
13 more telephones and which involves more than one interstate telephone call).

14
15
16 Consequently, surveying consumers for solicitation may violate the National Do Not Call
17 Registry.

18 12. Telemarketing includes telephone calls in which the sale of goods or services or
19 charitable solicitation is not completed, and payment or authorization of payment is not
20 required, until after a face-to-face sales or donation presentation by the seller or
21 charitable organization. Such calls are exempt from some requirements of the TSR, but
22 not the privacy-related requirements of 16 C.F.R. §§ 310.4(a)(7), (b) and (c). See 16
23 C.F.R. § 310.6(b)(3). In particular, telemarketing to schedule a face-to-face sales
24 presentation may violate the National Do Not Call Registry.
25

13. Since October 1, 2003, sellers and telemarketers have been prohibited from abandoning any outbound telephone call by not connecting the call to a representative within two (2) seconds of the consumer's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv).

14. Since October 17, 2003, sellers and telemarketers have been generally prohibited from calling any telephone number within a given area code unless the seller first has paid the annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry. 16 C.F.R. § 310.8(a) and (b).

15. 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), a violation of the TSR 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).

DEFENDANTS' BUSINESS ACTIVITIES

16. Defendants are "sellers" or "telemarketers" engaged in "telemarketing," as defined by the Amended TSR, 16 C.F.R. § 310.2.

17. FMFG is both a seller and telemarketer. As a seller, FMFG provides or offers to provide the adjustable beds to consumers sold through telemarketing. As its own telemarketer, FMFG initiates outbound telemarketing calls to consumers to sell adjustable beds.

18. Defendants have engaged in telemarketing by a plan, program, or campaign conducted to induce the purchase of adjustable beds by use of one or more telephones and which involves more than one interstate telephone call. As a part of the telemarketing campaign, Defendants have called consumers to take purported informational surveys but also to induce consumers to purchase Defendants' goods. For example, Defendants have called consumers asking to take a survey of their sleep habits and then attempted to sell

1 them adjustable beds. As a part of the telemarketing campaign, Defendants have called
2 consumers to schedule sales presentations in the consumers' homes before the sale is
3 completed.

4 19. On or after October 17, 2003, Defendants have called at least 900,000 telephone numbers
5 that are on the National Do Not Call Registry.

6 20. On or after October 1, 2003, Defendants have abandoned outbound telephone calls to
7 consumers by failing to connect the call to a representative within two (2) seconds of the
8 consumer's completed greeting.

9 21. On or after October 17, 2003, Defendants have called telephone numbers in various area
10 codes without first paying the annual fee for access to the telephone numbers within such
11 area codes that are included in the National Do Not Call Registry.

12 22. At all times relevant to this complaint, Defendants have maintained a substantial course
13 of trade or business in the offering for sale and sale of goods or services via the
14 telephone, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC
15 Act, 15 U.S.C. § 44.
16

17 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

18 **Count I**

19 **Violating the National Do Not Call Registry**

20 23. In numerous instances, in connection with telemarketing, Defendants engaged in or
21 caused others to engage in initiating an outbound telephone call to a person's telephone
22 number on the National Do Not Call Registry in violation of the TSR, 16 C.F.R.
23 § 310.4(b)(1)(iii)(B).
24
25
26

**Count II
Abandoning Calls**

1 24. In numerous instances, in connection with telemarketing, Defendants have abandoned, or
2 caused others to abandon, an outbound telephone call by failing to connect the call to a
3 sales representative within two (2) seconds of the completed greeting of the person
4 answering the call, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iv) and § 310.4(b)(4).

5
6 **Count III
Failing to Pay National Registry Fees**

7
8 25. In numerous instances, in connection with telemarketing, Defendants have initiated, or
9 caused others to initiate, an outbound telephone call to a telephone number within a given
10 area code without Defendants, either directly or through another person, first paying the
11 required annual fee for access to the telephone numbers within that area code that are
12 included in the National Do Not Call Registry, in violation of the TSR, 16 C.F.R.
13 § 310.8.

14
15 **CONSUMER INJURY**

16 26. Consumers in the United States have suffered and will suffer injury as a result of
17 Defendants' violations of the TSR. Absent injunctive relief by this Court, Defendants are
18 likely to continue to injure consumers and harm the public interest.

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

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

23
24 28. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4
25 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as
26

1 amended, and as implemented by 16 C.F.R. § 1.98(d) (1997), authorizes this Court to
2 award monetary civil penalties of not more than \$11,000 for each violation of the TSR.
3 Defendants' violations of the TSR were committed with the knowledge required by
4 Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

5 29. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant such relief as
6 the Court finds necessary to redress injury to consumers or other persons resulting from
7 Defendants' violations of the Rule, including the rescission and reformation of contracts,
8 and the refund of money.

9 30. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to
10 remedy injury caused by Defendants' violations of the Rule and the FTC Act.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a),
13 5(m)(1)(A), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b) and 57b, and
14 pursuant to its own equitable powers:

- 15
- 16 A. Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in
17 this complaint;
 - 18 B. Award Plaintiff monetary civil penalties from each Defendant for every violation of the
19 TSR;
 - 20 C. Permanently enjoin Defendants from violating the TSR and the FTC Act;
 - 21 D. Award such relief as the Court finds necessary to redress injury to consumers resulting
22 from Defendants' violations of the Rule, including but not limited to, rescission of
23 contracts, refund of monies paid, and disgorgement of ill-gotten gains; and
24
- 25
26

E. Award Plaintiff such other and additional relief as the Court may determine to be just and proper.

Dated: December 29, 2005

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA:

OF COUNSEL:

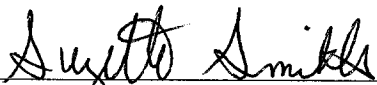
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