UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **LIBERTY SUPPLY CO., a corporation, also d/b/a Omni Services;** **MIA L. MCCRARY, individually and as an officer of Liberty Supply Co., also d/b/a Omni Services;** **JOHN B. HART, individually and as an officer of Liberty Supply Co., also d/b/a Omni Services;** **Defendants, and** **NOR-JAY ENTERPRISES, INC., a corporation,** **Relief Defendant.**	**Case No. ____________** **FILED UNDER SEAL**

COMPLAINT FOR PERMANENT INJUNCTION
AND OTHER EQUITABLE RELIEF

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

1. The FTC 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, the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), 15 U.S.C. §§ 6101-6108, and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, the 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), the FTC's Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310, and the Unordered Merchandise Statute, 39 U.S.C. § 3009.

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), 53(b), 6102(c), and 6105(b).

3. Venue is proper in this district under 28 U.S.C. § 1391(b), (c), and (d), 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 Telemarketing Act. 15 U.S.C. §§ 6101-6108. In accordance with the Telemarketing Act, the FTC promulgated and enforces the TSR, which prohibits deceptive and abusive telemarketing acts or practices. 16 C.F.R. Part 310. In addition, the FTC enforces the Unordered Merchandise Statute. 39 U.S.C. § 3009.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, the TSR, and the Unordered Merchandise Statute, 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), 56(a)(2)(A), 56(a)(2)(B), 57b, 6102(c), and 6105(b).

DEFENDANTS

6. Defendant Liberty Supply Co., also doing business as Omni Services (Omni), is a Texas corporation with its principal place of business at 4241 E Hwy 82, Gainesville, Texas 76240. Omni has marketed, sold, or offered to sell nondurable office supplies to organizations, such as schools, churches, and small businesses. Omni transacts or has transacted business in this district and throughout the United States.

7. Defendant Mia L. McCrary (McCrary) is an owner and president of Omni. 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 Omni, including the acts or practices set forth in this Complaint. Defendant McCrary 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.

8. Defendant John B. Hart (Hart) is a vice president of Omni. 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 Omni, including the acts or practices set forth in this Complaint. Defendant Hart 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. Relief Defendant Nor-Jay Enterprises, Inc., (Nor-Jay) is a Texas Corporation with its principal place of business at 3809 East Highway 82, Suite B, Gainesville, Texas 76240. Nor-Jay has received funds that can be traced directly to Defendants' deceptive acts or practices alleged below, and it has no legitimate claim to those funds. Nor-Jay transacts or has transacted business in this district and throughout the United States.

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. Omni is a seller of nondurable office supplies, such as highlighters, pens, Post-it notes, paper clips, and binder clips. Omni is also a telemarketer that initiates outbound telephone calls to consumers in the United States to induce the purchase of Omni's goods or services.

12. Since at least 2012, Defendants have engaged in a plan, program, or campaign conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

13. Defendants cold call organizations, such as churches, schools, and small businesses (hereinafter, consumers), by telephone to sell or offer to sell nondurable office supplies. During telemarketing calls, Defendants regularly employ several tactics to sell nondurable office supplies.

14. Defendants' telemarketers often state or imply that Defendants are a local company that is going out of business. Defendants almost always claim to be offering nondurable office supplies at prices below normal retail rates, often touting that the goods are on sale, clearance, or are being liquidated at rock bottom prices. Defendants claim that consumers will not be able to obtain similar deals from other sellers and that their prices are lower than can be found elsewhere.

15. When describing their sales offer to consumers, Defendants' telemarketers typically use vague or confusing terms about the cost or quantity of goods offered. Defendants

often quote the cost per unit offered for sale even though Defendants are selling the items in multi-unit bulk boxes or packages. Defendants' telemarketers cause consumers to believe that the price quoted applies to a package of items, instead of each individual unit. This results in prices or quantities of goods that are substantially higher than consumers agreed to pay for or receive. For example, Defendants tell consumers that they are offering highlighters, 12 to a box, for $0.69 each, but fail to clearly explain that the $.69 cost refers to each highlighter, not each box of highlighters. Thus, some consumers agree to order "twelve" items expecting to receive one box of 12 highlighters and to be invoiced $.69. Instead consumers receive either one box of 12 highlighters and are invoiced $8.28 or receive 12 boxes containing a total of 144 highlighters for $99.36. Still other consumers order "twelve boxes" expecting to receive 144 highlighters at a cost of $8.28, and instead receive those items at a cost of $99.36.

16. Defendants' telemarketers fail to adequately disclose during the calls the cost or quantity associated with Defendants' sales offer. During telemarketing calls, Defendants' telemarketers do not disclose to consumers the final price or quantity of any nondurable office supplies ordered or shipped. Even when asked, Defendants refuse to disclose total cost and quantity. Defendants' telemarketers frequently tell consumers that they cannot calculate a final price for the office supplies because shipping costs cannot be determined until after the supplies are packed and weighed.

17. Defendants ship nondurable office supplies to consumers at prices or quantities that greatly exceed the amount agreed upon by consumers. Moreover, contrary to Defendants' telemarketers' claims that the goods are being offered at below retail prices, Defendants' prices are typically higher than prices for similar products available to consumers in the retail marketplace.

18. Defendants routinely ship nondurable office supplies to consumers without an invoice. Defendants' shipments of office supplies typically contain a packing slip that only lists the quantities of supplies without disclosing any prices. Consumers initially learn from Defendants' packing slips that consumers who want to return any supplies must obtain express written authorization within a short timeframe in order to do so. Defendants typically do not send an invoice disclosing the prices of their nondurable office supplies until after the timeframe for returns has elapsed.

19. Despite the fact that consumers did not agree to purchase the office supplies shipped to them at the prices or in the quantities that Defendants claim, Defendants aggressively attempt to collect from consumers the full cost of the goods shipped. Consumers who do not promptly pay Defendants' invoices are frequently contacted by Defendants' telemarketers who falsely claim that consumers owe payment for the unordered office supplies. Many consumers have paid Defendants' invoices under a mistaken belief that they were obligated to do so.

20. When consumers pay the full amount on invoices, Defendants sometimes call these consumers to thank them for the prior purchase by offering a free gift, such as a candle. Afterward, Defendants send those consumers the free gift plus unordered merchandise and then an invoice for the unordered merchandise.

21. On other occasions, consumers explain they lack purchasing authority until a written purchase order or estimate is received and approved by their organization's administration and request a written purchase order. However, instead of sending a written purchase order or estimate, Defendants ship unordered merchandise and later send an invoice as if the consumers had ordered the products.

22. When consumers challenge Defendants' practices and assert that they received unordered merchandise, Defendants' telemarketers falsely claim that the merchandise was ordered. Defendants' telemarketers routinely make further attempts to deceive consumers into paying for unordered merchandise by representing that they have a transcript of the conversation in which the order was placed. Defendants frequently refuse to produce such a transcript, however. Defendants insist on payment for their unordered merchandise but purport to offer a "discount" that would allow the consumer to pay less than the amount on the original invoice.

23. Defendants routinely deny consumers' attempts to return unordered merchandise unless consumers comply with Defendants' return policy, which Defendants first disclose verbally over the phone and in their return authorization forms once consumers seek to return the merchandise. Consumers then learn that they must pay a restocking fee, typically 15% of the invoice price, and shipping costs in order to return the unordered merchandise. Along with Defendants' onerous return policy, Defendants also negotiate lower prices on their unordered goods to further coerce consumers into keeping and paying for the goods. Due to the burden or expense of complying with Defendants' return policy, many consumers pay the "negotiated" rate for Defendants' unordered merchandise. However, even when negotiated, Defendants' prices typically remain higher than originally represented to consumers.

24. Since at least 2012, Omni has received millions of dollars from its deceptive office supply sales. Omni regularly transfers funds derived from its operations to Nor-Jay Enterprises, Inc.

25. Many consumers, from locations across the nation, have filed complaints with the Dallas Better Business Bureau (BBB). Defendants have often allowed consumers who contact

the BBB to return merchandise. When Defendants' telemarketers have claimed to have proof of duly authorized orders, Defendants have not provided any such proof to consumers or the BBB.

26. The BBB has notified Omni regarding the BBB's observation of a pattern of consumer complaints concerning the Corporate Defendant's deceptive practices. Despite the BBB's efforts, the observed pattern of consumer complaints regarding Corporate Defendants' deceptive practices continues.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

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

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

Count I: Failure to Disclose

29. In numerous instances, in connection with the marketing, selling, offering for sale, or distribution of nondurable office supplies, Defendants have represented, expressly or by implication, that Defendants are offering a package of items at a particular price per unit.

30. In numerous instances, Defendants have failed to disclose, or failed to disclose adequately, to consumers material terms and conditions of their offer, including:

(a) that the package of items contains numerous units; and

(b) the total amount Defendants will charge to consumers.

31. The Defendants' failure to disclose or disclose adequately the material information described in Paragraph 30, in light of the representation described in Paragraph 29, above, constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count II: Misrepresenting Consumer Agreement to Cost and Quantity

32. In numerous instances in connection with the marketing, selling, offering for sale, or distribution of nondurable office supplies, Defendants have represented, directly or indirectly, expressly or by implication that:

(a) consumers agreed to pay the total cost of goods shipped in the amount billed by Defendants; and

(b) consumers ordered the quantity of goods that Defendants shipped.

33. In truth and in fact, in numerous instances in which Defendants have made the representations set forth in Paragraph 32 of this Complaint:

(a) consumers did not agree to pay the total cost of goods shipped in the amount billed by Defendants; and

(b) consumers did not order the quantity of goods that Defendants shipped.

34. Therefore, Defendants' representations as set forth in Paragraph 32 of this Complaint are false and misleading and constitute a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE TELEMARKETING SALES RULE

35. 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. The FTC adopted the original TSR in 1995, extensively amended it in 2003, and amended certain provisions thereafter.

36. Defendants are "sellers" and/or "telemarketers" engaged in "telemarketing," as defined by the TSR, 16 C.F.R. § 310.2 (aa), (cc), and (dd).

37. Under the TSR, an "outbound telephone call" means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution. 16 C.F.R. § 310.2(v).

38. Telephone calls between a telemarketer and a business that involve the retail sale of nondurable office supplies are subject to the TSR's prohibitions against deceptive and abusive telemarketing acts or practices. 16 C.F.R. § 310.6(b)(7). In its Statement of Basis and Purpose for the TSR, the Commission stated:

> [T]he Commission's enforcement experience against deceptive telemarketers indicates that office . . . 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).

39. The TSR prohibits sellers and telemarketers from failing to disclose truthfully, in a clear and conspicuous manner, before a customer consents to pay for goods or services offered, the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer. 16 C.F.R. § 310.3(a)(1)(i).

40. The TSR prohibits sellers and telemarketers from misrepresenting, directly or by implication, in the sale of goods or services, the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2)(i).

41. 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).

Count III: Failure to Disclose Total Cost and Quantity

42. In numerous instances, in connection with the telemarketing of nondurable office supplies, Defendants have failed to disclose truthfully, in a clear and conspicuous manner, before a customer consents to pay for goods or services offered, the total cost to purchase and the quantity of goods that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(1)(i).

43. Defendants' practice as alleged in Paragraph 42 is a deceptive telemarketing practice that violates Section 310.3(a)(1)(i) of the TSR, 16 C.F.R. § 310.3(a)(1)(i).

Count IV: Misrepresenting Total Cost and Quantity

44. In numerous instances, in connection with the telemarketing of nondurable office supplies, Defendants have misrepresented, directly or by implication, the total cost to purchase and the quantity of goods that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2)(i).

45. Defendants' practice as alleged in Paragraph 44 is a deceptive telemarketing practice that violates Section 310.3(a)(2)(i) of the TSR, 16 C.F.R. § 310.3(a)(2)(i).

VIOLATIONS OF THE UNORDERED MERCHANDISE STATUTE

46. The Unordered Merchandise Statute, 39 U.S.C. § 3009, generally prohibits mailing unordered merchandise, unless such merchandise is clearly and conspicuously marked as a free sample, or is mailed by a charitable organization soliciting contributions. The statute also prohibits mailing consumers bills for unordered merchandise or dunning communications.

47. In accordance with Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a), a violation of the Unordered Merchandise Statute constitutes an unfair method of competition and an unfair trade practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Count V: Sending and Billing for Unordered Merchandise

48. In numerous instances, in connection with the marketing of nondurable office supplies, Defendants, who are not a charitable organization soliciting contributions, have shipped nondurable office supplies without the prior express request or consent of the recipients, or without identifying the products as free samples, thereby violating subsection (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a).

49. In numerous instances, in connection with the marketing of nondurable office supplies, Defendants have sent to the recipients of such goods one or more bills or dunning communications for such goods, thereby violating subsections (a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a) and (c).

50. Defendants' practices, as alleged in Paragraphs 48 and 49, are unfair trade practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

RELIEF DEFENDANT

Count VI

51. Relief Defendant Nor-Jay Enterprises, Inc., has received, directly or indirectly, funds and/or other assets from Defendants that are traceable to funds obtained from Defendants' customers through the deceptive acts or practices described herein.

52. Relief Defendant is not a bona fide purchaser with legal and equitable title to Defendants' customers' funds and other assets, and Relief Defendant will be unjustly enriched if it is not required to disgorge the funds or the value of the benefit received as a result of Defendants' deceptive acts or practices.

53. By reason of the foregoing, Relief Defendant holds funds and assets in constructive trust for the benefit of Defendants' customers.

CONSUMER INJURY

54. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act, the TSR, and the Unordered Merchandise Statute. 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. This Court, in the exercise of its equitable jurisdiction, may 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.

56. 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 resulting from Defendants' violations, including the rescission or reformation of contracts, and the refund of money.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b; Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b); the Unordered Merchandise Statute, 39 U.S.C. § 3009; and the Court's own equitable powers, requests that the Court:

A. 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, including but not limited to, temporary and preliminary injunctions, appointment of a receiver, and an order freezing assets;

B. Enter a permanent injunction to prevent future violations of the FTC Act, the TSR, and the Unordered Merchandise Statute by Defendants;

C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act, the TSR, and the Unordered Merchandise Statute, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;

D. Enter an order requiring Relief Defendant to disgorge all funds and assets, or the value of the benefit received from the funds and assets, which are traceable to Defendants' deceptive acts or practices;

E. 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.

Dated: December 4, 2015

Respectfully submitted,

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