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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,
Plaintiff,

v.

OXMOOR HOUSE, INC.
a corporation, and,
SOUTHERN PROGRESS CORPORATION
a corporation,
Defendants.

Civil Action No.:

CV-02-E-2735-S

COMPLAINT

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), 5(m)(1)(A), 13(b), 16(a) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101, et seq., and the Unordered Merchandise Statute, 39 U.S.C. § 3009, to obtain monetary civil penalties and injunctive and other relief for defendants' violations of the FTC's Trade Regulation Rule entitled "Use of Prenotification Negative Option Plans" ("Prenotification Negative Option Rule"), 16 C.F.R. Part 425; the FTC's Rule entitled "Telemarketing Sales Rule," 16 C.F.R. Part 310; and the Unordered Merchandise Statute.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1339, 1345, and 1355 and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 57b, and 6105(b).

3. Venue in the United States District Court for the Northern District of Alabama is proper under 15 U.S.C. § 53(b) and 28 U.S.C. § 1391(b) and (c), and 1395(a).

DEFENDANTS

4. Defendant Oxmoor House, Inc. ("Oxmoor House") is an Alabama corporation with its office and principal place of business located within the Northern District of Alabama at 2100 Lakeshore Drive, Birmingham, Alabama 35209. Oxmoor House is a wholly owned subsidiary of Southern Progress Corporation. Oxmoor House transacts business in the Northern District of Alabama.

5. Defendant Southern Progress Corporation ("SP") is an Alabama corporation with its office and principal place of business located within the Northern District of Alabama at 2100 Lakeshore Drive, Birmingham, Alabama 35209. SP transacts business in the Northern District of Alabama.

COMMERCE

6. At all times relevant to this Complaint, Oxmoor House's and SP's course of business, including the acts and practices alleged herein, has been and is in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS

7. Oxmoor House is the book publishing division of SP, a magazine publisher (hereafter Oxmoor House and SP will be referred to collectively as "Oxmoor"). Since 1977, in connection with the sale, offering for sale, or distribution of its books, Oxmoor has marketed numerous books or books series through negative option marketing methods including continuity programs and negative option plans within the meaning of the Prenotification Negative Option Rule.

8. Oxmoor's continuity programs typically include a binder with an introductory set of materials, *e.g.*, an album with a few pages and other accessories to create a memory book ("Memories in the Making"). Later, consumers that become members of the continuity program periodically receive additional materials, *e.g.*, more album pages and accessories for the memory book, unless the consumer calls to cancel.

9. Oxmoor's prenotification negative option plans focus on book series. Oxmoor offers consumers the opportunity to review books for a 30-day free trial period before deciding to buy. In the five year period from January 1996 through December 2000, Oxmoor marketed at least 39 different book series including: Best of Martha Stewart; Southern Living Christmas; Cooking Light Cookbook Series; Great American Quilts; Southern Living Gardening; and, Weight Watchers Planner.

10. In connection with its prenotification negative option plans, Oxmoor has disseminated direct mail solicitations and has made or caused to be made outbound, unsolicited telemarketing calls to hundreds of thousands of consumers throughout the United States. The direct mail solicitations and the telemarketing calls offer consumers an initial book for a free, 30-day trial period ("Initial-offer Book").

Direct Mail Solicitations

11. In numerous instances from January 1997 to March 1998 Oxmoor's direct mail solicitations consisted of a package of promotional material. The package typically contained a one-page document with a picture of the book, a brief description of the book and a tear-off order card; a sales letter describing the book and including commitment copy for the series; a brochure displaying and describing the book; and a business reply envelope. The artwork and sales pieces varied depending on the book series being offered. The commitment copy was the same in every Oxmoor promotion.

12. The one-page document that contained the tear-off order card was the first document in the package. It offered consumers the opportunity to review a book for 30 days before deciding to buy. The order card explained that consumers who keep an Initial-offer Book must pay \$19.96 in four payments of \$4.99 each, plus shipping and handling charges. In addition, the order card stated that if the consumer keeps the book the consumer "will have all the series preview privileges described in the accompanying letter with absolutely no obligation to buy." To order the Initial-offer Book, consumers returned the order card by mail.

13. The direct mail solicitation promotion package also contained a sales letter, which usually was placed behind the one-page document with the tear-off order card in the package. This letter was typically four-pages long and described the Initial-offer Book in detail. Page four of the letter contained the following information:

You'll also be entitled to a free preview of future [books] in our [book series title] as soon as they are published. You'll always be notified in advance. Always with the same 30-day free-preview guarantee. Never an obligation to buy.

14. Oxmoor enrolled all consumers who kept an Initial-offer Book beyond the 30-day trial period and who made partial or full payment as members of its prenotification negative option plans. Oxmoor then sent additional promotional materials ("Subsequent Announcements") to all plan members. Oxmoor's Subsequent Announcements offered consumers other books in the series for 30-day free trial periods ("Subsequent-offer Books").

15. Oxmoor's Subsequent Announcements contained rejection forms that consumers had to return to Oxmoor to reject the Subsequent-offer Books ("negative option rejection forms").

16. Oxmoor's order card stated that consumers who kept an Initial-offer Book would "have all the series preview privileges described in the accompanying letter with absolutely no obligation to buy." It did not disclose that Subsequent Announcements would include negative option rejection forms. It also did not explain that the "series preview privileges" actually imposed obligations on the consumer to return a negative option rejection form to avoid future shipments of books. Further, the order card did not disclose the amount of time consumers would have to return the negative option rejection forms.

17. The information contained on page four of the sales letter stated that consumers would be "entitled to a free preview of future" books. It also did not disclose that consumers would be required to return a negative option rejection form to avoid being shipped future books. Further, the sales letter did not disclose the amount of time consumers would have to return the form. Finally, Oxmoor did not disclose on the order card or in the letter that consumers had to pay shipping and handling for Subsequent-offer Books.

18. The forms included in Oxmoor's Subsequent Announcements did not instruct consumers how they could use the forms to reject the offered merchandise and did not specify a date by which consumers had to mail them or a date by which Oxmoor had to receive them.

Revised Direct Mail Solicitations

19. In March 1998 Oxmoor revised the sales letter that it included in its direct mail solicitation promotion package. The revised sales letter was in use from March 1998 through September 2001. Page four of the revised sales letter contained the following information regarding Oxmoor's prenotification negative option plans:

Later on, you'll be entitled to a free preview of additional volumes in the [book title] series (no more than two times per year). You can say "no" simply by returning the advance announcement card within 30 days – guaranteed! If you ever have less than 30 days, simply return the book at our expense. There is never an obligation to buy, and you may cancel at any time.

20. The order card was not revised and nothing in the order card or the first three and a half pages of the letter suggested that material terms and conditions regarding the sales offer for the Initial-offer Book were contained on page four of the letter. Further, the sales letter still failed to disclose whether consumers had to pay shipping and handling for Subsequent-offer Books. As a result, consumers were not informed at the time they consented to receive an Initial-offer Book that: 1) if they chose to keep and pay for the Initial-offer Book, they would be enrolled in a prenotification negative option plan; 2) they had to return negative option rejection forms to reject Subsequent-offer Books; and, 3) Oxmoor would automatically ship Subsequent-offer Books if it did not receive the negative option rejection forms.

Telemarketing Sales

21. Since at least 1989 Oxmoor also has offered consumers a 30-day free trial of Initial-offer Books through unsolicited, outbound telemarketing sales calls. In the beginning of the call the sales representative briefly describes the Initial-offer Book to the consumer. The representative then explains to the consumer that if the consumer keeps the book the cost is payable in "4 easy installments of \$6.24, plus postage and handling." Next, the representative seeks the consumer's verbal consent to send the book.

22. After the representative obtains the consumer's consent to send the Initial-offer Book, he then asks the consumer to verify his or her address. The representative concludes the call by reiterating that Oxmoor is going to send the Initial-offer Book and explaining for a second time the payment terms if the consumer decides to keep the book. The representative then explains, for the first time, that if the consumer keeps the Initial-offer Book beyond the free-trial period he will also receive a "free preview of future editions of [book series title] as soon as they are published no more than 2 times per year." The representative explains that the consumer can "say 'no' by simply returning the advance announcement card within 30 days." The representative also tells the consumer that there is never an obligation to buy and consumers may cancel at any time.

23. This information about Subsequent-offer Books and negative option rejection forms is disclosed after the consumer has already consented to receive the Initial-offer Book. The telemarketing sales representatives do not solicit the consumer's verbal consent to receive Subsequent-offer Books after disclosing this information.

THE PRENOTIFICATION NEGATIVE OPTION RULE

24. The Prenotification Negative Option Rule, promulgated by the Commission on February 15, 1973, became effective on June 7, 1974. The Rule was amended by the Commission in 1998 under Section 18 of the FTC Act, 15 U.S.C. § 57a. The amended Rule became effective on August 20, 1998, and has since that date remained in full force and effect.

25. The Prenotification Negative Option Rule regulates sellers of merchandise that operate negative option plans. A negative option plan is defined by the Rule as "a contractual plan or arrangement under which a seller periodically sends to subscribers an announcement which identifies merchandise (other than annual supplements to previously acquired merchandise) it proposes to send to subscribers to such plan, and the subscribers thereafter receive and are billed for the merchandise identified in each such announcement, unless by a date or within a time specified by the seller with respect to each such announcement the subscribers, in conformity with the provisions of such plan, instruct the seller not to send the identified merchandise." 16 C.F.R. § 425.1(c)(1).

26. The Prenotification Negative Option Rule requires a seller to disclose all material terms of membership in a negative option plan in any promotional material that contains a device, such as an order form, that a consumer can return to the seller to subscribe to the plan. 16 C.F.R. § 425.1(a)(1).

27. The Prenotification Negative Option Rule also requires that a seller, prior to sending any selection of merchandise to a negative option plan subscriber, send a form to the subscriber that the subscriber can use to reject the merchandise offered for sale. 16 C.F.R. § 425.1(a)(2)(ii).

28. Specifically, the Prenotification Negative Option Rule contains the following provisions:

Sec. 425.1 The rule.

(a) . . . it is an unfair or deceptive act or practice, for a seller in connection with the use of any negative option plan to fail to comply with the following requirements:

(1) Promotional material shall clearly and conspicuously disclose the material terms of the plan, including:

(i) That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he does not wish to purchase the selection;

* * * * *

(iii) The right of a contract-complete subscriber to cancel his membership at any time;

(iv) Whether billing charges will include an amount for postage and handling;

(v) A disclosure indicating that the subscriber will be provided with at least ten (10) days in which to mail any form, contained in or accompanying an announcement identifying the selection, to the seller;

(vi) A disclosure that the seller will credit the return of any selections sent to a subscriber, and guarantee to the Postal Service or the subscriber postage to return such selections when the announcement and form are not

- received by the subscriber in time to afford him at least ten (10) days in which to mail his form to the seller;
- (vii) The frequency with which the announcements and forms will be sent to the subscriber and the maximum number of announcements and forms which will be sent to him during a 12-month period.
- (2) Prior to sending any selection, the seller shall mail to its subscribers, within the time specified by paragraph (a)(3) of this section:

* * * * *

- (ii) A form, contained in or accompanying the announcement, clearly and conspicuously disclosing that the subscriber will receive the selection identified in the announcement unless he instructs the seller that he does not want the selection, designating a procedure by which the form may be used for the purpose of enabling the subscriber so to instruct the seller, and specifying either the return date or the mailing date.

29. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the Prenotification Negative Option Rule are unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

30. Defendants are sellers that operate negative option plans within the meaning of the Commission's Prenotification Negative Option Rule, 16 C.F.R. § 425.1(c)(1).

COUNT I

31. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of prenotification negative

option plans for the sale of books, as described in paragraphs 7 through 23 above, Oxmoor has disseminated promotional material that failed to disclose clearly and conspicuously the information required by Section 425.1(a)(1) of the Prenotification Negative Option Rule.

COUNT II

32. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of its negative option plans for the sale of books, as described in paragraphs 7 through 23 above, Oxmoor disseminated Subsequent Announcements containing negative option rejection forms that (a) failed to designate a procedure by which the forms could be used by consumers to reject the merchandise advertised for sale and (b) failed to specify either a return date or a mailing date for the forms, thereby violating Section 425.1(a)(2)(ii) of the Prenotification Negative Option Rule.

TELEMARKETING SALES RULE

33. Pursuant to the Telemarketing Act, on August 16, 1995, the FTC 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 Rule became effective on December 31, 1995, and since that date has remained in full force and effect.

34. The Telemarketing Sales Rule prohibits deceptive and abusive telemarketing acts or practices. Specifically, the Telemarketing Sales Rule contains the following provisions:

Sec. 310.4 Abusive telemarketing acts or practices.

(d) *Required oral disclosures.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call to fail to disclose

promptly and in a clear and conspicuous manner to the person receiving the call, the following information:

* * * * *

(3) The nature of the goods or services;

* * * * *

35. 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 are unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

36. Defendants are sellers engaged in telemarketing within the meaning of the Telemarketing Sales Rule, 16 C.F.R. §§ 310.2(r) and (u).

COUNT III

37. In numerous instances since January 1997, in connection with the telemarketing of its books, as described in paragraphs 21 through 23 above, Oxmoor has failed to disclose promptly and in a clear and conspicuous manner, the nature of the goods or services including, without limitation: that Oxmoor automatically enrolls consumers who keep, and make partial or full payment for, Initial-offer Books in negative option plans, including prenotification negative option plans, thereby violating Section 310.4(d)(3) of the Telemarketing Sales Rule.

THE UNORDERED MERCHANDISE STATUTE

38. The Unordered Merchandise Statute was enacted in 1970 and since that date has remained in full force and effect. It prohibits the shipping and billing for unordered merchandise

that does not fall into narrow exceptions. The statute also prohibits sending dunning communications to recipients of unordered merchandise.

39. Specifically, the Unordered Merchandise Statute, 39 U.S.C. § 3009, reads as follows:

Sec. 3009. Mailing of unordered merchandise

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. . . .

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

40. Pursuant to Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a), violations of the Unordered Merchandise Statute are unfair or deceptive acts or practices in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1).

COUNT IV

41. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of its negative option plans and telemarketing of books, as described in paragraphs 7 through 23 above, Oxmoor has mailed Subsequent-offer Books to consumers without the prior expressed request or consent of the recipients, thereby violating Section (a) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a).

COUNT V

42. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books and in connection with the operation of its negative option plans and telemarketing of books, as described in paragraphs 7 through 23 above, Oxmoor has mailed bills and dunning communications to consumers to whom it has mailed books without the prior expressed request or consent of the recipients, thereby violating Sections (a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a) and (c).

THE FTC ACT

43. Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), provides that "unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

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

COUNT VI

45. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books, as described in paragraphs 7 through 23 above, Oxmoor has

represented expressly or by implication, that consumers who keep, and make partial or full payment, for Initial-offer Books will receive Subsequent Announcements to which they would be able to affirmatively respond to receive Subsequent-offer Books for a 30-day, trial period.

46. In truth and in fact, consumers who keep, and make partial or full payment, for Initial-offer Books do not have to respond affirmatively to the Subsequent Announcements in order to receive Subsequent-offer Books.

47. Therefore, the representation set forth in paragraph 45 was, and is, false and misleading and is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT VII

48. In numerous instances since January 1997, in connection with the sale, offering for sale, or distribution of books, as described in paragraphs 7 through 22 above, Oxmoor has failed to disclose clearly and conspicuously the material terms of membership in its prenotification negative option plans, including, without limitation, that consumers who keep Initial-offer Books beyond the 30-day, trial period and who make partial or full payment will be enrolled as members in Oxmoor's prenotification negative option plans and that such plans require consumers to return negative option forms within a specific time to avoid receiving and being billed for Subsequent-offer Books. These facts would be material to consumers in their decisions to purchase Initial-offer Books.

49. Oxmoor's failure to disclose these material facts is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

CONSUMER INJURY

50. Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of Oxmoor's unlawful acts or practices. In addition, Oxmoor has been unjustly enriched as a result of its unlawful practices. Absent injunctive relief by this Court, Oxmoor is likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

COURT'S POWER TO AWARD CIVIL PENALTIES, INJUNCTIVE AND OTHER RELIEF

51. Defendants have violated the Prenotification Negative Option Rule and the Telemarketing Sales Rule as described above with knowledge as set forth in Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

52. Each advertisement, promotional material or telemarketing call disseminated or made by the defendants during the five years preceding the filing of this complaint that failed to comply with the Prenotification Negative Option Rule and the Telemarketing Sales Rule in one or more of the ways described above constitutes a separate violation for which plaintiff seeks monetary civil penalties.

53. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), authorizes the Court to award monetary civil penalties of not more than \$10,000 for each such violation of the Prenotification Negative Option Rule and the Telemarketing Sales Rule. Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, Pub.L. 104-134, 110 Stat. 1321-373 § 31001, and Federal Trade Commission Rule 1.98(d), 16 C.F.R. § 1.98(d), 61 Fed. Reg. 54549 (Oct. 21, 1996),

authorizes the Court to award monetary civil penalties of not more than \$11,000 for each such violation of the Prenotification Negative Option Rule and the Telemarketing Sales Rule that occurred after November 20, 1996.

54. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to award such relief as is necessary to redress the injury to consumers or others resulting from defendants' violation of the Prenotification Negative Option Rule and the Telemarketing Sales Rule.

55. Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), this Court is authorized to enjoin the defendants from violating the Prenotification Negative Option Rule, the Telemarketing Sales Rule, the Unordered Merchandise Statute, and the FTC Act, as well as to grant plaintiff ancillary equitable relief.

PRAYER FOR INJUNCTIVE AND MONETARY RELIEF

WHEREFORE, Plaintiff requests that this Court, pursuant to 15 U.S.C. §§ 45(m)(1)(A), 53b, 57b, and the Court's own equity powers:

(1) Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in this Complaint;

(2) Enjoin Defendants from violating the Prenotification Negative Option Rule, the Telemarketing Sales Rule, the Unordered Merchandise Statute, and the FTC Act;

(3) Award Plaintiff monetary civil penalties from Defendants for each violation of the Prenotification Negative Option Rule and the Telemarketing Sales Rule alleged in this Complaint;

(4) For the period during which Defendants failed to comply with the Prenotification Negative Option Rule, the Telemarketing Sales Rule, or the Unordered Merchandise Statute,

grant Plaintiff rescission of contracts and restitution, other forms of redress, and the disgorgement of ill-gotten gains;

(5) Award Plaintiff such other and additional relief as the Court may deem just and proper.

DATED:

Of Counsel:

ELAINE D. KOLISH
Associate Director for Enforcement

JAMES REILLY DOLAN
Assistant Director for Enforcement

ROBIN ROSEN SPECTOR
EDWIN RODRIGUEZ
Attorneys
Bureau of Consumer Protection
Federal Trade Commission
Division of Enforcement
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

FOR THE UNITED STATES OF AMERICA:

ROBERT D. McCALLUM, Jr.
Assistant Attorney General
Civil Division
U.S. Department of Justice

ALICE H. MARTIN
United States Attorney
Northern District of Alabama
1801 Fourth Avenue, North
Birmingham, AL 35203-2101
(205) 244-2001



Herbert J. Lewis, III
Assistant United States Attorney

EUGENE M. THIROLF
Director
Office of Consumer Litigation



ELIZABETH STEIN
Attorney
Office of Consumer Litigation
Civil Division
U.S. Department of Justice
Washington, DC 20530
(202) 307-0486