

FILED

2004 OCT 29 PM 1:40
U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

1 WILLIAM E. KOVACIC
General Counsel
2
3 RAYMOND E. MCKOWN, Bar # 150975
Federal Trade Commission
10877 Wilshire Blvd., Ste. 700
4 Los Angeles, CA 90024
(310) 824-4343 (voice)
5 (310) 824-4380 (fax)
6 Attorneys for Plaintiff FTC

7
8 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

9 FEDERAL TRADE COMMISSION)
10)
11 Plaintiff,)
12 v.)
13 CONVERSION MARKETING, INC., dba)
14 NATIONAL HEALTH SUPPORT CENTER,)
NATURAL BRIGHT, and POUNDS OFF)
PATCH;)
15 DRSHARP, INC., dba ORATECH, LC,)
FAST WHITE, and PRODUCT DESIGN)
16 CORP.;)
17 ADAM TYLER MACDONALD, dba)
FAST WHITE; and)
18)
19 DAVID R. SHARP,)
20 Defendants.)

CV. SACV04-1264 JVS (JTLx)

COMPLAINT FOR INJUNCTIVE AND
OTHER EQUITABLE RELIEF

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

1 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) and 52, and the
2 FTC's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.

3 **JURISDICTION AND VENUE**

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

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

9 **PLAINTIFF**

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

19 **DEFENDANTS**

20 5. Conversion Marketing, Inc. ("Conversion Marketing"), dba
21 National Health Support Center, Natural Bright, and Pounds Off
22 Patch, is a California corporation. It was incorporated by
23 Defendant MacDonald in May 2002. MacDonald, however, has not filed
24 a statement of officers as required by California law. Conversion
25 Marketing's principal place of business is 1182 South East Bristol
26 Street, Santa Ana, California 92707. Conversion Marketing
27 transacts or has transacted business in this district and
28 throughout the United States.

1 herein, is and has been in or affecting commerce, as "commerce" is
2 defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

3 DEFENDANTS' BUSINESS PRACTICES

4 10. Beginning in approximately 2002, MacDonald began
5 telemarketing Fast White, a tooth whitening kit, through TMG. Under
6 MacDonald's direction, TMG's telemarketers made outbound calls to
7 consumers and represented that they could obtain a "free trial" or
8 a "free sample" of the Fast White tooth whitening kit at no cost or
9 obligation. The telemarketers made this offer without requesting
10 disclosure of consumers' financial account or payment information.

11 11. In connection with these calls, TMG's telemarketers
12 failed to disclose that they already had consumers' credit account
13 or debit account information, which the telemarketers had
14 improperly obtained from third parties. When consumers agreed to
15 receive the Fast White kit, they were unaware of this fact.

16 12. MacDonald and TMG then shipped Fast White to consumers,
17 while simultaneously imposing unauthorized charges against
18 consumers' credit and debit accounts. They also enrolled consumers
19 in the Fast White continuity plan without obtaining authorization
20 from consumers. Pursuant to this continuity plan, MacDonald and
21 TMG shipped Fast White to consumers each month. MacDonald and TMG
22 typically billed consumers \$7.95 for the initial "free" shipment,
23 and in excess of \$34 for each subsequent unordered shipment. In
24 some instances consumers did not receive the subsequent shipments,
25 although they were billed for them.

26 13. Upon receiving their credit card bills or account
27 statements, consumers contacted MacDonald and TMG to question the
28 Fast White charges and shipments. MacDonald and TMG routinely

1 advised consumers that the consumers had authorized the charges by
2 using their credit cards or debit accounts for previous purchases
3 from third parties, which allegedly enabled the defendants (1) to
4 legally obtain consumers' account information from third parties,
5 and (2) to legally bill consumers' accounts for the Fast White
6 tooth whitening kits.

7 14. MacDonald and TMG also assessed unauthorized charges for
8 Fast White tooth whitening kits against consumers who had no prior
9 contact with them. Even in these circumstances, when responding to
10 consumers who requested refunds, MacDonald and TMG falsely asserted
11 that they had proof that these consumers had authorized the
12 transactions, in an effort to persuade them to accept and pay the
13 unauthorized charges.

14 15. In late 2003, TMG filed for bankruptcy. Thereafter,
15 TMG's operations were transferred to Conversion Marketing. For
16 example, Conversion Marketing began marketing the Fast White kit on
17 its website www.freetvproducts.com in September 2003. Also,
18 Conversion Marketing took over the telephone account that MacDonald
19 had originally opened for TMG in November 2002, and it uses that
20 account to make and receive telemarketing calls. In August 2004,
21 over 484,000 calls were made and received by Conversion Marketing
22 through that account at the South East Bristol Street address.

23 16. MacDonald and Conversion Marketing have also used
24 telemarketing, the Internet (through websites such as
25 www.poundsoffpatch.com and www.freetvproducts.com), and television
26 advertising to market other products, including the "Pounds Off
27 Patch" weight loss patch. As with the Fast White promotion,
28 consumers who participate in the Pounds Off Patch promotion are

1 assessed unauthorized charges for the patch that range from about
2 \$35 to \$111. Consumers are also enrolled in the Pounds Off Patch
3 continuity program without obtaining their consent.

4 17. During the Pounds Off Patch telemarketing calls,
5 consumers are asked if they would like to participate in a "study"
6 during which they would receive, for just the cost of shipping,
7 free samples of the patch. Other consumers are told that if they
8 purchase one set of patches they will receive a second set at "half
9 off." Consumers who disclose their credit and debit card
10 information to the telemarketers later discover that MacDonald and
11 Conversion Marketing have assessed unauthorized charges on their
12 accounts and have enrolled them in the Pounds Off Patch continuity
13 plan without obtaining their consent. Under the guise of the
14 continuity program, MacDonald and Conversion Marketing assess
15 additional unauthorized charges and send subsequent unauthorized
16 shipments.

17 18. Consumers who view the Pounds Off Patch television
18 infomercial are directed to the website www.poundsoffpatch.com,
19 which is operated by Conversion Marketing. The infomercial also
20 encourages consumers to call Pounds Off Patch at a Conversion
21 Marketing telephone number. The website offers consumers the same
22 "second set at half off" deal that is pitched to consumers who
23 receive the telemarketing calls. Consumers are asked for their
24 financial account numbers, which MacDonald and Conversion Marketing
25 then use to impose unauthorized charges against the consumers'
26 accounts.

27 19. In numerous instances and in connection with
28 telemarketing and Internet sales, consumers have disclosed their

1 personal financial information, including credit account and debit
2 account numbers, in response to MacDonald's and Conversion
3 Marketing's representations and assurances that they would only
4 assess charges against consumers' accounts in connection with
5 authorized purchases. In fact, in numerous instances these
6 defendants assessed additional charges against consumers' accounts
7 that were not authorized.

8 20. Since at least October 2002, Sharp and Drsharp have
9 provided substantial assistance to MacDonald and to TMG in their
10 operations. This assistance has included, but has not been limited
11 to, selling Fast White to MacDonald and TMG; providing telephonic
12 customer service to MacDonald and TMG in connection with the
13 marketing and sale of Fast White; and shipping Fast White to
14 customers on behalf of MacDonald and TMG. Sharp and Drsharp have
15 provided such assistance while having knowledge, or consciously
16 avoiding having knowledge, that MacDonald and TMG were imposing
17 unauthorized charges against customers' credit and debit accounts,
18 and improperly enrolling consumers in continuity plans.

19 VIOLATIONS OF SECTION 5 OF THE FTC ACT

20 COUNT I - False Representations

21 21. In numerous instances in connection with the marketing of
22 their tooth whitening kit, weight loss patch, and other products,
23 MacDonald and Conversion Marketing have represented, expressly or
24 by implication, that:

- 25 a. consumers could obtain a "free sample" of these
26 products at no cost or obligation; and
27
28

1 b. consumers have purchased or agreed to purchase goods
2 or services from defendants, and therefore owe money to
3 defendants.

4 22. In truth and in fact:

5 a. consumers do not obtain a free sample of these
6 products at no cost or obligation. Defendants assess
7 recurring charges against consumers' credit accounts and debit
8 accounts when consumers agree to accept the free product
9 samples; and

10 b. consumers did not purchase or agree to purchase goods
11 or services from defendants, and therefore do not owe money to
12 defendants.

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

16 **COUNT II - Unfair Practices**

17 24. In numerous instances in connection with the marketing of
18 their tooth whitening kit, weight loss patch, and other products,
19 MacDonald and Conversion Marketing have:

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

26 b. assessed monthly charges against consumers' credit
27 and debit accounts without obtaining the express, informed
28 consent of the consumers to assess such charges.

1 25. Defendants' practices:

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

4 b. assessing monthly charges against consumers' credit
5 and debit accounts without obtaining the express, informed
6 consent of the consumers;

7 c. cause or are likely to cause substantial injury to
8 consumers that is not reasonably avoidable by consumers
9 themselves and is not outweighed by countervailing benefits to
10 consumers or competition.

11 26. Therefore, defendants' practices as alleged in paragraph
12 24, are unfair in violation of Section 5(a) of the FTC Act, 15
13 U.S.C. § 45(a).

14 **THE TELEMARKETING SALES RULE**

15 27. In the Telemarketing Act, 15 U.S.C. § 6101 et seq.,
16 Congress directed the Commission to prescribe rules prohibiting
17 deceptive and abusive telemarketing acts or practices. On August
18 16, 1995, the Commission promulgated the Telemarketing Sales Rule,
19 16 C.F.R. Part 310. The Rule became effective December 31, 1995.
20 On January 29, 2003, the Commission adopted an amended TSR with the
21 amendments becoming effective on March 31, 2003.

22 28. MacDonald and Conversion Marketing, and their affiliate
23 TMG, are "telemarketers" or "sellers" engaged in "telemarketing,"
24 as those terms are defined in the Rule, 16 C.F.R. § 310.2(z), (bb),
25 and (cc).

26 29. The Rule prohibits telemarketers and sellers from causing
27 billing information to be submitted for payment, directly or
28 indirectly, without the express informed consent of the customer,

1 from charging the customer for goods or services without the
2 express informed consent of the customer to be charged, and from
3 assessing charges against any account other than those that are
4 specifically identified. 16 C.F.R. § 310.4(a)(6).

5 30. The Rule prohibits telemarketers and sellers from
6 receiving unencrypted consumer account numbers for use in
7 telemarketing. 16 C.F.R. § 310.4(a)(5).

8 31. The Rule prohibits telemarketers or sellers from
9 misrepresenting any aspect of a negative option offer, including
10 that consumers' accounts will be charged unless consumers take
11 affirmative action to avoid the charges, the dates the charges will
12 be submitted, and the specific steps consumers must take to avoid
13 the charges. 16 C.F.R. § 310.3(a)(2)(ix).

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

18 33. Pursuant to Section 3(c) of the Telemarketing Act, 15
19 U.S.C. § 6102(c) and Section 18(d)(3) of the FTC Act, 15 U.S.C.
20 § 57a(d)(3), violations of the TSR constitute unfair or deceptive
21 acts or practices in or affecting commerce, in violation of Section
22 5(a) of the FTC Act, 15 U.S.C. § 45(a).

23 VIOLETIONS OF THE TELEMARKETING SALES RULE

24 COUNT III - Unauthorized Billing

25 34. In numerous instances in connection with the marketing of
26 their tooth whitening kit, weight loss patch, and other products,
27 MacDonald and Conversion Marketing have caused charges to be billed
28

1 to consumers' credit card accounts and debit card accounts, without
2 obtaining consumers' express informed consent.

3 35. Defendants' practice as alleged in paragraph 34 is an
4 abusive telemarketing practice in violation of Section 310.4(a)(6)
5 of the TSR, 16 C.F.R. § 310.4(a)(6).

6 **COUNT IV - Receiving Unencrypted Account Information**

7 36. In numerous instances in connection with the marketing of
8 their tooth whitening kit, weight loss patch, and other products,
9 MacDonald and Conversion Marketing have received unencrypted
10 consumer account numbers that have been used in their telemarketing
11 scheme.

12 37. Defendants' practice as alleged in paragraph 36 is an
13 abusive telemarketing practice in violation of Section 310.4(a)(5)
14 of the TSR, 16 C.F.R. § 310.4(a)(5).

15 **COUNT V - Misrepresenting Negative Option**

16 38. In numerous instances in connection with the marketing of
17 their tooth whitening kit, weight loss patch, and other products,
18 MacDonald and Conversion Marketing have misrepresented material
19 aspects of a negative option feature, including the facts that
20 consumers' accounts will be charged unless the consumers take
21 affirmative actions to avoid the charges, the date the charges will
22 be submitted for payment, or the specific steps consumers must take
23 to avoid the charges.

24 39. Defendants' practice as alleged in paragraph 38 is a
25 deceptive telemarketing practice in violation of Section
26 310.3(a)(2)(ix) of the TSR, 16 C.F.R. § 310.3(a)(2)(ix).

1 **COUNT VI - Failure to Disclose Total Cost**

2 40. In numerous instances in connection with the marketing of
3 their tooth whitening kit, weight loss patch, and other products,
4 MacDonald and Conversion Marketing have failed to clearly and
5 conspicuously disclose, before consumers pay for the products, the
6 total cost to purchase, receive, or use the products.

7 41. Defendants' practice as alleged in paragraph 40 is a
8 deceptive telemarketing practice in violation of Section
9 310.3(a)(1)(i) of the TSR, 16 C.F.R. § 310.3(a)(1)(i).

10 **COUNT VII - Assisting and Facilitating**

11 42. In numerous instances in connection with the marketing of
12 the Fast White tooth whitening kit and other products, Sharp and
13 Drsharp have provided substantial assistance or support to a
14 telemarketer or seller while knowing or consciously avoiding
15 knowing that a telemarketer or seller routinely imposes
16 unauthorized charges against consumers' credit or debit accounts.

17 43. Defendants' practice as alleged in paragraph 42 is a
18 deceptive telemarketing practice in violation of Section 310.3(b)
19 of the TSR, 16 C.F.R. § 310.3(b).

20 **CONSUMER INJURY**

21 44. Defendants' violations of Section 5 of the FTC Act as set
22 forth above, have caused and continue to cause substantial injury
23 to consumers. Absent injunctive relief by this Court, defendants
24 are likely to continue to injure consumers.

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

26 45. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers
27 this Court to grant injunctive and such other relief as the Court
28 may deem appropriate to halt and redress violations of the FTC Act.

1 The Court, in the exercise of its equitable jurisdiction, may award
2 other ancillary relief, including but not limited to, rescission of
3 contracts and restitution, and the disgorgement of ill-gotten
4 gains, to prevent and remedy injury caused by defendants' law
5 violations.

6 46. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section
7 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this
8 Court to grant such relief as the Court finds appropriate to halt
9 and redress injury resulting from defendants' violations of the
10 TSR, including rescission and reformation of contracts, and the
11 refund of monies.

12 47. This Court, in the exercise of its equitable
13 jurisdiction, may award other ancillary relief to remedy injury
14 caused by defendants' law violations.

15 **PRAYER FOR RELIEF**

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

20 1. Award plaintiff such preliminary injunctive and ancillary
21 relief as may be necessary to avert the likelihood of consumer
22 injury during the pendency of this action and to preserve the
23 possibility of effective final relief;

24 2. Permanently enjoin defendants from violating Section 5 of
25 the FTC Act, and the Telemarketing Act as alleged in this
26 complaint;

27 3. Award such relief as the Court finds necessary to redress
28 injury to consumers resulting from defendants' violations of the

1 Section 5 and 12 of the FTC Act, and the Telemarketing Act,
2 including but not limited to, rescission of contracts and
3 restitution, and the disgorgement of ill-gotten gains by the
4 defendants; and

5 4. Award Plaintiff the costs of bringing this action, as
6 well as such other and additional relief as the Court may
7 determine to be just and proper.

8
9 Dated October 28, 2004

Respectfully submitted,

10 WILLIAM E. KOVACIC
11 General Counsel



12 RAYMOND E. MCKOWN
13 Federal Trade Commission
14 10877 Wilshire Blvd, Suite 700
15 Los Angeles, CA 90024
16 (310) 824-4343
17 Attorneys for Plaintiff
18 Federal Trade Commission
19
20
21
22
23
24
25
26
27
28