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U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

15
 16 FEDERAL TRADE COMMISSION,)
)
 17 Plaintiff,)
)
 18 v.)
)
 19 Del Sol LLC, also d/b/a Del)
 Sol Educational,)
 20)
 21 and)
)
 22 Fernando Gonzalez Lopez,)
)
 23 Defendants.)
)
 24

Case No. CV 05-3013 GAF (RCx)

 FIRST AMENDED COMPLAINT FOR
 INJUNCTIVE AND OTHER EQUITABLE
 RELIEF

25 Plaintiff, the Federal Trade Commission ("FTC" or
26 "Commission"), by its undersigned attorneys, alleges:

27 1. Plaintiff FTC brings this action under Sections 13(b)
28 and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C.

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1 §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and
2 Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 *et*
3 *seq.*, to secure temporary, preliminary and permanent injunctive
4 relief, rescission of contracts and restitution, disgorgement of
5 ill-gotten gains, and other equitable relief against Defendants
6 for engaging in deceptive acts or practices in violation of
7 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's
8 Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.

9 **JURISDICTION AND VENUE**

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

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

15 **PLAINTIFF**

16 4. Plaintiff, Federal Trade Commission, is an independent
17 agency of the United States government created by statute. 15
18 U.S.C. §§ 41 *et seq.* The Commission enforces Section 5(a) of the
19 FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive
20 acts or practices in or affecting commerce. The Commission also
21 enforces the TSR, 16 C.F.R. Part 310, which prohibits deceptive or
22 abusive telemarketing acts or practices. The Commission may
23 initiate federal district court proceedings, through its
24 attorneys, to enjoin violations of the FTC Act and the TSR, and to
25 secure such other equitable relief, including rescission of
26 contracts and restitution, and disgorgement of ill-gotten gains,
27 as may be appropriate in each case. 15 U.S.C. §§ 53(b), 57b, and
28 6105(b).

1 purchase merchandise including, but not necessarily limited to,
2 specified brand-name designer colognes, perfume, watches, and
3 musical compact discs ("CDs") at prices ranging from about \$213 to
4 \$250. Defendants also have told consumers that this merchandise
5 will include brands such as Calvin Klein, Tommy Hilfiger, Caroline
6 Herrera, Polo and Hugo Boss. Defendants have told consumers they
7 could select the recording artists that will be featured on the
8 musical CDs. Many consumers have responded to these solicitations
9 by agreeing to purchase Defendants' merchandise.

10 11. Defendants' telemarketers have informed consumers that
11 they do not accept personal checks or credit cards. They have
12 explained that the shipment will arrive Cash on Delivery
13 ("C.O.D."), and have advised consumers to obtain a money order to
14 give to the delivery person. Defendants have shipped the
15 merchandise via United Parcel Service ("UPS"), whose C.O.D.
16 policies prohibit the opening and inspection of packages before
17 payment.

18 12. Consumers who have provided a money order and have
19 accepted and opened the Defendants' package soon find that they
20 have not received what they were promised. Rather than the
21 promised laptop computer, digital video camera, or other prize of
22 commensurate value, Defendants have shipped consumers an
23 inexpensive electronic device that enables them to access the
24 Internet via their television sets or other inexpensive gadgets.

25 13. Rather than the promised specified brand-name
26 merchandise and musical CDs featuring the consumers' selected
27 artists, Defendants have shipped consumers bottles of inexpensive
28 perfume or cologne, imitation ("knock-off") versions of brand-name

1 watches (such as "Calvin Hill"), and CDs from recording artists
2 they did not request.

3 14. Numerous consumers who have attempted to telephone
4 Defendants to complain about the products and seek refunds have
5 been unable to reach an operator, have been put on hold for long
6 periods, or have been disconnected. In several instances where
7 consumers were able to reach Defendants, Defendants' telemarketers
8 have told consumers that they have received the correct order, and
9 that Defendants do not provide refunds.

10 15. Since at least October 17, 2003, Defendants have called,
11 or have caused telemarketers to call, consumers' telephone numbers
12 that are on the National Do Not Call Registry, a list of consumers
13 who do not wish to receive certain types of telemarketing calls,
14 maintained by the Commission pursuant to 16 C.F.R. Part 310.

15 16. Defendants have not established or implemented written
16 procedures or trained personnel on compliance with the Do Not Call
17 Registry requirements of the TSR.

18 17. Defendants, in numerous instances, called numbers
19 protected by the Registry even though Defendants purportedly
20 purchased lists of phone numbers ("lead lists") from list brokers
21 and purportedly relied on representations from these list brokers
22 that the lead lists had been properly scrubbed against the
23 Registry and that all registered numbers had been removed.
24 Therefore, Defendants have not used a process to prevent
25 telemarketing to any telephone number on the National Do Not Call
26 Registry employing a version of the Do-Not-Call Registry obtained
27 from the Commission no more than thirty-one (31) days prior to the
28

1 date any call is made or maintained records documenting this
2 process.

3 18. Since at least October 17, 2003, Defendants have called,
4 or have caused telemarketers to call, telephone numbers in various
5 area codes without first paying the annual fee for access to the
6 telephone numbers within such area codes that are included in the
7 National Do Not Call Registry.

8 **THE FEDERAL TRADE COMMISSION ACT**

9 19. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),
10 prohibits unfair or deceptive acts or practices in or affecting
11 commerce. Misrepresentations or omissions of material fact
12 constitute deceptive acts or practices prohibited by Section 5(a)
13 of the FTC Act.

14 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

15 **COUNT I**

16 **MISREPRESENTATION OF PRIZE OFFER**

17 20. In connection with the marketing of prize offers,
18 Defendants have represented, expressly or by implication, that
19 consumers who participate in their prize offer will receive a
20 laptop computer, digital video camera, or other electronic device
21 of commensurate value.

22 21. In truth and in fact, consumers who participated in
23 Defendants' prize offer did not receive a laptop computer, digital
24 video camera, or other electronic device of commensurate value.

25 22. Therefore, the representation set forth in paragraph 20
26 is false and misleading and constitutes a deceptive act or
27 practice, in or affecting commerce, in violation of Section 5(a)
28 of the FTC Act, 15 U.S.C. § 45(a).

1 **COUNT II**

2 **MISREPRESENTATION OF MERCHANDISE ACCOMPANYING PRIZE OFFER**

3 23. In connection with their prize offer, Defendants have
4 represented, expressly or by implication, that Defendants will
5 ship to consumers, who pay a price ranging from about \$213 to
6 \$250, specified brand-name merchandise and musical CDs featuring
7 recording artists selected by the consumers.

8 24. In truth and in fact, Defendants did not ship to
9 consumers, who paid a price ranging from about \$213 to \$250,
10 specified brand-name merchandise or musical CDs featuring
11 recording artists selected by the consumers. Instead, Defendants
12 have shipped consumers bottles of inexpensive perfume or cologne,
13 imitation ("knock-off") versions of designer watches, and CDs of
14 recording artists that the consumers did not select.

15 25. Therefore, the representation set forth in paragraph 23
16 is false and misleading and constitutes a deceptive act or
17 practice, in or affecting commerce, in violation of Section 5(a)
18 of the FTC Act, 15 U.S.C. § 45(a).

19 **THE FTC'S TELEMARKETING SALES RULE**

20 **AND THE NATIONAL DO NOT CALL REGISTRY**

21 26. Congress directed the FTC to prescribe rules prohibiting
22 abusive and deceptive telemarketing acts or practices pursuant to
23 the Telemarketing Act, 15 U.S.C. §§ 6101-6108, in 1994. On August
24 16, 1995, the FTC promulgated the Telemarketing Sales Rule (the
25 "Original TSR"), 16 C.F.R. Part 310, which became effective on
26 December 31, 1995.

27 27. On or after December 31, 1995, the TSR has prohibited
28 telemarketers and sellers from making any false or misleading

1 statements to induce any person to pay for goods or services. 16
2 C.F.R. § 310.3(a)(4).

3 28. On January 29, 2003, the FTC amended the TSR by issuing
4 a Statement of Basis and Purpose and the final amended TSR (the
5 "Amended TSR"). 68 Fed. Reg. 4580, 4669.

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

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

18 31. On or after September 2, 2003, the FTC allowed sellers,
19 telemarketers, and other permitted organizations to access the
20 Registry over the Internet at www.telemarketing.donotcall.gov to
21 pay the required fees, and download the registered numbers by area
22 code.

23 32. Since October 17, 2003, sellers and telemarketers
24 subject to the FTC's jurisdiction have been prohibited from
25 calling numbers on the Registry in violation of the Amended TSR.
26 16 C.F.R. § 310.4(b)(1)(iii)(B).

27 33. Since October 17, 2003, sellers and telemarketers have
28 been generally prohibited from calling any telephone number within

1 a given area code unless the seller first has paid the annual fee
2 for access to the telephone numbers within that area code that are
3 included in the National Do Not Call Registry. 16 C.F.R.
4 § 310.8(a) and (b).

5 34. Pursuant to Section 3(c) of the Telemarketing Act, 15
6 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C.
7 § 57a(d)(3), a violation of the TSR constitutes an unfair or
8 deceptive act or practice in or affecting commerce, in violation
9 of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

10 35. Defendants are "sellers" or "telemarketers" engaged in
11 "telemarketing" as those terms are defined in the Original TSR, 16
12 C.F.R. §§ 310.2(r), (t), and (u), and the Amended TSR, 16 C.F.R.
13 §§ 310.2(z), (bb), and (cc).

14 **VIOLATIONS OF THE TELEMARKETING SALES RULE**

15 **COUNT III**

16 **FALSE AND MISLEADING STATEMENTS TO INDUCE A PURCHASE**

17 36. In connection with their telemarketing of merchandise,
18 Defendants have induced consumers to purchase goods by making
19 false or misleading statements (a) that they won a free laptop
20 computer, digital video camera, or other electronic device of
21 commensurate value; and (b) about the identity, brand names,
22 musical content, or other material characteristics of their goods.

23 37. Defendants have thereby violated Section 310.3(a)(4) of
24 the Original and Amended TSR. 16 C.F.R. § 310.3(a)(4).

25 **COUNT IV**

26 **DEFENDANTS' OUTBOUND CALLS TO REGISTRY TELEPHONE NUMBERS**

27 38. Since at least October 17, 2003, in numerous instances,
28 in connection with telemarketing, Defendants engaged in, or caused

1 others to engage in, initiating an outbound telephone call to a
2 person's telephone number on the National Do Not Call Registry.

3 39. Defendants have thereby violated Section 310.4(b)(1)
4 (iii)(B) of the Amended TSR. 16 C.F.R. § 310.4(b)(1)(iii)(B).

5 **COUNT V**

6 **DEFENDANTS' FAILURE TO PAY REQUIRED ANNUAL REGISTRY FEE**

7 40. Since at least October 17, 2003, in numerous instances,
8 in connection with telemarketing, Defendants have initiated, or
9 caused others to initiate, an outbound telephone call to a
10 telephone number within a given area code without Defendants,
11 either directly or through another person, first paying the
12 required annual fee for access to the telephone numbers within
13 that area code that are included in the National Do Not Call
14 Registry.

15 41. Defendants have thereby violated Section 310.8 of the
16 Amended TSR. 16 C.F.R. § 310.8.

17 **CONSUMER INJURY**

18 42. Consumers throughout the United States have suffered and
19 continue to suffer substantial monetary loss as a result of
20 Defendants' unlawful acts or practices in violation of the FTC Act
21 and the TSR. In addition, Defendants have been unjustly enriched
22 as a result of their unlawful acts and practices. Absent
23 injunctive relief by this Court, Defendants are likely to continue
24 to injure consumers, reap unjust enrichment, and harm the public
25 interest.

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

27 43. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
28 empowers this Court to grant injunctive and such other relief as

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

7 44. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section
8 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this
9 Court to grant such relief as the Court finds necessary to halt
10 and redress injury to consumers or other persons resulting from
11 Defendants' violations of the TSR, including the rescission of
12 contracts and restitution, and disgorgement of ill-gotten gains.

13 **PRAYER FOR RELIEF**

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

19 1. Award Plaintiff such temporary and preliminary
20 injunctive and ancillary relief as may be necessary to avert the
21 likelihood of consumer injury during the pendency of this action
22 and to preserve the possibility of effective final relief,
23 including, but not limited to, temporary and preliminary
24 injunctions and an order freezing assets;

25 2. Permanently enjoin Defendants from violating the FTC Act
26 and the TSR as alleged herein;

27 3. Award such equitable relief as the Court finds necessary
28 to redress injury to consumers resulting from Defendants'

1 violations of Section 5(a) of the FTC Act and the TSR, including
2 but not limited to, rescission of contracts and restitution, and
3 the disgorgement of ill-gotten gains by Defendants; and

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

7

8 Dated: December 5, 2005

Respectfully submitted,

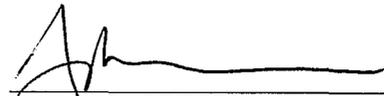
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