

NOVEMBER 21, 2006

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CDY

| | | |
|---|---|--------------------------------|
| FEDERAL TRADE COMMISSION, |) | |
| |) | |
| Plaintiff, |) | Civil No. 06 C 2574 |
| |) | |
| v. |) | Chief Judge James F. Holderman |
| |) | |
| DATAKOM MARKETING INC., Ontario Corporation |) | Magistrate Judge Maria Valdez |
| No. 1431798, an Ontario, Canada, corporation |) | |
| d.b.a. Direct Data, Publication Distribution Centre |) | |
| Telecom Marketing, and Thesrus Publishing, |) | |
| |) | AMENDED COMPLAINT FOR |
| DATAKOM DIRECT INC., Ontario Corporation |) | INJUNCTIVE AND OTHER |
| No. 1417524, an Ontario, Canada, corporation, |) | EQUITABLE RELIEF |
| |) | |
| BERNARD FROMSTEIN, individually and as an owner, |) | |
| officer, or director of the corporate defendants, |) | |
| |) | |
| JUDY PROVENCHER, individually and as an owner, |) | |
| officer, or director of the corporate defendants, |) | |
| |) | |
| PAUL BARNARD, individually and as an owner, |) | |
| officer, or director of the corporate defendants, |) | |
| |) | |
| JUDY NEINSTEIN, individually and as an owner, |) | |
| officer, or director of the corporate defendants, |) | |
| |) | |
| STANLEY FROMSTEIN, individually and as an owner, |) | |
| officer, or director of the corporate defendants, |) | |
| and |) | |
| |) | |
| CHARLES P. FARRUGIA, individually and as an officer |) | |
| of the corporate defendants, |) | |
| |) | |
| Defendants. |) | |
| |) | |

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), for its amended
complaint alleges as follows:

1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to secure temporary, preliminary, and permanent injunctive relief, rescission of contracts and restitution, disgorgement of ill-gotten gains, 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).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345.

3. Venue in this district is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b), (c), and (d).

THE PARTIES

4. Plaintiff Federal Trade Commission is an independent agency of the United States government created by statute. 15 U.S.C. §§ 41-58, as amended. The Commission 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 Commission is authorized to initiate federal district court proceedings by its own attorneys to enjoin violations of the FTC Act and to secure such equitable relief, including restitution for injured consumers, as may be appropriate in each case. 15 U.S.C. § 53(b).

5. Defendant Datacom Marketing Inc. (“Datacom Marketing”), is incorporated in Ontario, Canada, Ontario Corporation No. 1431798, with its registered office and principal place of business located at 1835 Yonge Street, Suite 500, Toronto, Ontario M4S 1X8 Canada. Datacom Marketing was formed on August 1, 2000, from the amalgamation of 1260665 Ontario

Inc., 1345387 Ontario Inc., 1396750 Ontario Inc., and 1396753 Ontario Inc. Defendant Datacom Marketing also operates under the Ontario registered business names Direct Data, Publication Distribution Centre, Telecom Marketing, and Thesrus Publishing. Defendant Datacom Marketing transacts or has transacted business in the Northern District of Illinois and throughout the United States.

6. Defendant Datacom Direct Inc. (“Datacom Direct”), is incorporated in Ontario, Canada, Ontario Corporation No. 1417524, with its registered office and principal place of business located at 1835 Yonge Street, Suite 500, Toronto, Ontario M4S 1X8 Canada. Defendant Datacom Direct transacts or has transacted business in the Northern District of Illinois and throughout the United States.

7. Defendant Bernard Fromstein is or was an owner, officer, or director of corporate defendants Datacom Marketing and Datacom Direct. At all times material to this complaint, acting alone or in concert with others, Defendant Bernard Fromstein has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this complaint. Defendant Bernard Fromstein transacts or has transacted business in the Northern District of Illinois and throughout the United States.

8. Defendant Judy Provencher is or was an owner, officer, or director of corporate defendants Datacom Marketing and Datacom Direct. At all times material to this complaint, acting alone or in concert with others, Defendant Provencher has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this complaint. Defendant Provencher transacts or has transacted business in the Northern District of Illinois and throughout the United States.

9. Defendant Paul Barnard is or was an owner, officer, or director of corporate defendants Datacom Marketing and Datacom Direct. At all times material to this complaint, acting alone or in concert with others, Defendant Barnard has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this complaint. Defendant Barnard transacts or has transacted business in the Northern District of Illinois and throughout the United States.

10. Defendant Judy Neinstein is or was an owner, officer, or director of corporate defendants Datacom Marketing and Datacom Direct. At all times material to this complaint, acting alone or in concert with others, Defendant Neinstein has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this complaint. Defendant Neinstein transacts or has transacted business in the Northern District of Illinois and throughout the United States.

11. Defendant Stanley Fromstein is or was an owner, officer, or director of corporate defendants Datacom Marketing and Datacom Direct. At all times material to this complaint, acting alone or in concert with others, Defendant Stanley Fromstein has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this complaint. Defendant Stanley Fromstein transacts or has transacted business in the Northern District of Illinois and throughout the United States.

12. Defendant Charles P. Farrugia is or was an officer of corporate defendants Datacom Marketing and Datacom Direct. Since at least 2004, acting alone or in concert with others, Defendant Charles P. Farrugia has formulated, directed, controlled, or participated in the acts and practices of the corporate defendants, including the acts and practices set forth in this

complaint. Defendant Charles P. Farrugia transacts or has transacted business in the Northern District of Illinois and throughout the United States.

13. The defendants have operated as a common enterprise while engaging in the deceptive acts and practices and other violations of law alleged below. They have shared officers, employees, and office locations, have commingled funds, are commonly controlled, and have engaged in a common scheme.

COMMERCE

14. At all times relevant 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 PRACTICES

15. Since at least 2000, and continuing thereafter, defendants have engaged in a plan, program, or campaign to sell business directories and/or listings in those directories via interstate telephone calls to various businesses and other organizations (“consumers”) throughout the United States.

16. Defendants market their business directories and listings by making unsolicited outbound telephone calls to United States consumers. Defendants use a variety of tactics to sell or to induce consumers to pay for their business directories and/or listings in those directories. Typically, defendants’ telemarketers state that they are calling to verify a consumer’s name, address, and telephone number for a listing in one of defendants’ business directories. Defendants’ telemarketers represent, expressly or by implication, that consumers were listed

previously in defendants' business directories or that someone in a consumer's organization previously authorized purchasing a directory or listing.

17. In numerous instances, consumers who receive defendants' telemarketing calls verify the requested information, mistakenly believing that the consumer has previously been listed in one of defendants' business directories or that someone in the consumer's organization previously authorized purchasing a directory or listing. In numerous instances, defendants do not disclose a cost for their directories or listings.

18. In numerous instances, once the consumer has confirmed the requested information, verifiers employed by defendants subsequently call the consumer and again ask the consumer to verify the consumer's name, address, and telephone number. Answers to these questions are recorded by defendants, who later point to these recordings as evidence that consumers authorized the purchase of one of defendants' business directories or a listing in a directory.

19. At the conclusion of the telephone calls recorded by defendants, defendants' verifiers sometimes quickly mention that one of defendants' business directories will be shipped to the consumer followed by the delivery of an invoice a short time later. Verifiers sometimes state that the invoice will be for \$399, or \$379 plus \$20 shipping and handling. The verifiers typically mention shipping a directory and delivering an invoice so quickly that consumers do not notice the statement and either do not respond or respond affirmatively. Defendants later use the consumer's failure to respond or the consumer's affirmative response as evidence that the consumer authorized the purchase of one of defendants' business directories or a listing in a directory.

20. Defendants follow up their telephone calls by delivering a business directory and often a CD Rom. Defendants' business directories have titles such as *Southeast Business Directory* and *Western Business Directory*. Defendants' business directories are one to several inches thick and list the names, addresses, and telephone numbers of businesses and organizations alphabetically in various categories.

21. The delivery of the directory is followed by delivery of an invoice approximately a week later. The invoice indicates that the purchase of the directory was authorized by someone in the consumer's organization, typically the person who received the initial telephone call. The invoice identifies the name of one of defendants' business directories and typically bills the consumer \$379, plus \$20 Shipping & Handling, for a "**TOTAL AMOUNT DUE**" of \$399.00.

22. Upon receiving one of defendants' invoices, consumers often discover that no one within the organization previously purchased or ordered a directory or listing from defendants and that defendants have billed the consumer for a new purchase. When these consumers then contact defendants to complain that they never ordered the directory listing, defendants tell consumers that the individual who took defendants' telemarketing call ordered the listing. Defendants claim to possess a recording of that individual agreeing to shipment of the directory. Sometimes defendants play back the recording and other times defendants simply claim to possess a recording demonstrating that the consumer authorized shipment of the directory.

23. In numerous instances, consumers ignore or otherwise refuse to pay defendants' invoices typically because no one in the consumer's organization ordered a business directory or authorized the purchase of a business directory or listing. Defendants then refer these accounts

to defendants' in-house collections department. Defendants make numerous collection calls and send facsimiles seeking payment of the invoices.

24. In numerous instances, when in-house collection activities fail, defendants refer the accounts to a third party collector. The third party collector sends additional collection letters. The collection letters threaten that immediate payment is necessary to protect consumers' credit ratings and to prevent "further action to enforce payment."

25. In numerous instances, consumers pay defendants' invoices because they mistakenly believe that someone within the consumer's organization ordered the business directory, they are unaware that they have been billed for something that they never intended to purchase, or they wish to avoid collection activities by defendants.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

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

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

COUNT ONE

28. In numerous instances, in connection with the offering for sale, sale, or distribution of defendants' business directories, or listings in those business directories, defendants have represented to consumers, expressly or by implication, through, *inter alia*, telephone calls, that consumers have a preexisting business relationship with defendants.

29. In truth and in fact, consumers typically do not have a preexisting business relationship with defendants.

30. Therefore, the representation set forth in Paragraph 28 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT TWO

31. In numerous instances, in connection with the offering for sale, sale, or distribution of defendants' business directories, or listings in those business directories, defendants have represented to consumers, expressly or by implication, through, *inter alia*, telephone calls, invoices, or letters, that consumers have agreed to purchase defendants' business directories or listings in those business directories.

32. In truth and in fact, consumers have not agreed to purchase defendants' business directories or listings in those directories.

33. Therefore, the representation set forth in Paragraph 31 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act.

COUNT THREE

34. In numerous instances, in connection with the offering for sale, sale, or distribution of defendants' business directories, or listings in those business directories, defendants have represented to consumers, expressly or by implication, through, *inter alia*, telephone calls, invoices, or letters, including letters from third party debt collectors, that consumers owe money to defendants for defendants' business directories and/or listings in those business directories.

35. In truth and in fact, consumers do not owe money to defendants for defendants' business directories and/or listings in those business directories.

36. Therefore, the representation set forth in Paragraph 34 is false and misleading and constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act.

CONSUMER INJURY

37. Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of defendants' unlawful acts and practices. Absent injunctive relief from this Court, defendants are likely to continue to injure consumers and to harm the public interest.

THE COURT'S POWER TO GRANT RELIEF

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

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

PRAYER FOR RELIEF

Wherefore, plaintiff, the Federal Trade Commission, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court's equitable powers, requests that this Court:

1. Award plaintiff such temporary and 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, and an order freezing assets;

2. Permanently enjoin defendants from violating the FTC Act, as alleged herein;
3. Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from defendants' violations of the FTC Act, including, but not limited to, rescission of contracts, restitution, and the disgorgement of ill-gotten gains; and
4. Award plaintiff the costs of bringing this action, as well as such other and additional equitable relief as the Court may determine to be just and proper.

Respectfully submitted,

WILLIAM BLUMENTHAL
General Counsel

Dated: November 14, 2006

s/ John C. Hallerud

JOHN C. HALLERUD
Federal Trade Commission
55 East Monroe Street, Suite 1860
Chicago, Illinois 60603
(312) 960-5634 [telephone]
(312) 960-5600 [facsimile]

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION