

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

FMFG, Inc., a Nevada corporation, also d/b/a  
American Adjustable Beds, Tranquility  
Adjustable Beds, and California Sleep  
Research; and

KURT G. CUDDY, individually and as an  
officer or director of FMFG, Inc.,

Defendants.

Civil No. 05-711-LRH-VPC

**JUDGMENT AND ORDER OF  
PERMANENT INJUNCTION AND  
CIVIL PENALTIES**

On December 29, 2005, a Complaint for Civil Penalties, Consumer Redress, Permanent Injunction and Other Equitable Relief against the defendants, was filed in this Court by the plaintiff, the United States of America. The complaint alleged, *inter alia*, that defendants violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule (the "TSR" or "Rule"), 16 C.F.R. Part 310, as amended by 68 Fed. Reg. 4580, 4669 (January 29, 2003), promulgated by the Federal Trade Commission ("FTC" or "Commission"). The complaint alleges that defendants' violations include over 900,000 calls to telephone numbers listed in the National Do Not Call Registry ("DNC Registry").

Defendants were personally served with a summons and complaint on January 13, 2006. On February 22, 2006, defendants moved to dismiss the complaint. The Court denied

defendants' motion to dismiss on September 13, 2006. Pursuant to Rule 12(a)(4)(A), Fed. R. Civ. P., the time within which defendants could plead or otherwise defend expired, defendants did not plead or otherwise defend, and the time for pleading or defending was not extended. A clerk's default was entered against defendants on October 23, 2006.

Plaintiff has moved the Court to issue a permanent injunction against defendants, and to impose a civil penalty against defendants.

THEREFORE, the Court being fully advised in the premises, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

**FINDINGS**

1. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b.
2. Venue is proper as to all parties in this District.
3. The activities of defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The complaint states a claim upon which relief may be granted against Defendants, under Sections 5(a), 5(m)(1)(A), 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b.
5. Entry of this Order is in the public interest.

**DEFINITIONS**

For the purpose of this Order, the following definitions shall apply:

1. “Asset” means any legal or equitable interest in, or right or claim to, any real and personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

2. “Customer” means any person who is or may be required to pay for goods or services offered through telemarketing.

3. “Defendants” means the Corporate Defendant and Individual Defendant. The “Corporate Defendant” is FMFG, Inc., a Nevada corporation. The “Individual Defendant” is Kurt Cuddy, individually and as an officer of FMFG.

4. “Established business relationship” means a relationship between the seller and a person based on: (a) the person’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the person and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (b) the person’s inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

5. “National Do Not Call Registry” means the National Do Not Call Registry, which is the “do-not-call” registry maintained by the Commission pursuant to 16 C.F.R.

§ 310.4(b)(1)(iii)(B).

6. “Representatives” means defendants’ successors, assigns, officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

7. “Seller” means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration whether or not such person is under the jurisdiction of the Commission.

8. “Telemarketer” means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

9. “Telemarketing Sales Rule” or “Rule” means the FTC Rule entitled “Telemarketing Sales Rule,” 16 C.F.R. § 310, attached hereto as Appendix A or as may be hereafter amended.

10. “Telemarketing” means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term includes a plan, program, or campaign where callers purport to take an informational survey, but also offer to sell goods or services. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, any other item

included in the same catalog which prompted the customer's call or in a substantially similar catalog.

11. "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.

12. "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

### **ORDER**

#### **I. PROHIBITION AGAINST ABUSIVE TELEMARKETING PRACTICES**

IT IS ORDERED that, in connection with telemarketing, defendants and their representatives are hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Telemarketing Sales Rule, including but not limited to:

A. Initiating any outbound telephone call to a person's telephone number on the National Do Not Call Registry of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services (regardless of whether the sale of goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face meeting with the seller), unless the seller proves:

- (1) the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls

may be placed and the signature of that person; or

(2) the seller has an established business relationship with such person and that person has not previously stated that he or she does not wish to receive outbound telephone calls made by or on behalf of the seller;

B. Initiating any outbound telephone call to a person when that person has previously stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made by or on behalf of the charitable organization for which a charitable contribution is being solicited;

C. Initiating any outbound telephone call to a telephone number within a given area code without first paying the required annual fee for access to the telephone numbers within that area code that are on the National Do Not Call Registry; and

D. Abandoning any outbound telephone call to a person by failing to connect the call to a representative within two seconds of the person's completed greeting, unless the following four conditions are met:

1. Defendants employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured per day per calling campaign;

2. Defendants and their representatives, for each telemarketing call placed, allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call;

3. Whenever a representative is not available to speak with the person answering the call within two seconds after the person's completed greeting, the seller or

telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

4. Defendants retain records, in accordance with 16 C.F.R. § 310.5 (b)-(d), establishing compliance with the preceding three conditions;

*Provided, however,* that if the Commission promulgates rules that modify or supersede the Telemarketing Sales Rule, in whole or part, defendants shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such rules.

## II. CIVIL PENALTY AND RIGHT TO REOPEN

**IT IS FURTHER ORDERED** that:

A. Judgment in the amount of NINE HUNDRED THOUSAND and no/100 Dollars (\$900,000.00) is hereby entered against defendants, jointly and severally, as a civil penalty, pursuant to Section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A)

B. Within five (5) days of receipt of notice of the entry of this Order, defendants shall transfer the civil penalty payment in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to the Director, Office of Consumer Litigation, Civil Division, P.O. Box 386, Washington, D.C. 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3327.

C. Defendants shall cooperate fully with plaintiff and the Commission and their agents in all attempts to collect the amount due pursuant to this Paragraph if defendants fail to pay fully the amount due at the time specified herein. In such an event, defendants shall provide

plaintiff and the Commission with their federal and state tax returns for the preceding two years, and to complete standard-form financial disclosure forms fully and accurately within ten (10) business days of receiving a request from plaintiff or the Commission to do so. Plaintiff and the Commission may verify all information provided on the financial disclosure forms with all appropriate third parties, including but not limited to financial institutions.

E. In accordance with 31 U.S.C. § 7701, defendants are hereby required to furnish to plaintiff and the FTC their respective taxpayer identifying numbers (social security numbers or employer identification numbers) which shall be used for purposes of collecting and reporting on any delinquent amount arising out of defendants' relationship with the government.

F. Defendant Cuddy shall provide the FTC with clear, legible and full-size photocopies of all valid driver's licenses he possesses, which will be used for collection, reporting and compliance purposes.

G. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the plaintiff may initiate to enforce this Order.

### **III. RECORD KEEPING PROVISIONS**

**IT IS FURTHER ORDERED** that for a period of five (5) years from the date of entry of this Order, each defendant, and its successors and assigns, shall maintain and make available to the plaintiff or Commission, within seven (7) days of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this Order.



**IV. DISTRIBUTION OF ORDER BY DEFENDANTS AND  
ACKNOWLEDGMENTS OF RECEIPT**

**IT IS FURTHER ORDERED** that each defendant, and its successors and assigns, shall within thirty (30) days of the entry of this Order, provide a copy of this Order including **Appendix A** to all of its owners, principals, members, officers, and directors, as well as managers, agents, servants, employees, and attorneys having decision-making authority with respect to the subject matter of this Order; secure from each such person a signed statement acknowledging receipt of a copy of this Order; and shall, within ten (10) days of complying with this Paragraph, file an affidavit with the Court and serve the Commission, by mailing a copy thereof, to the Regional Director, Western Region, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103, setting forth the fact and manner of their compliance, including the name and title of each person to whom a copy of the Order has been provided.

**V. NOTIFICATION OF BUSINESS CHANGES**

**IT IS FURTHER ORDERED** that each defendant, and its successors and assigns, shall notify the Regional Director, Western Region, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103, at least thirty (30) days prior to any change in such defendant's business, including, but not limited to, merger, incorporation, dissolution, assignment, and sale, which results in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other change, which may affect such defendant's obligations under this Order.

#### **VI. NOTIFICATION OF INDIVIDUALS' AFFILIATIONS**

**IT IS FURTHER ORDERED** that Kurt Cuddy shall, for a period of ten (10) years from the date of entry of this Order, notify the Regional Director, Western Region, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103, within thirty (30) days of his affiliation with a new business or employment whose activities include telemarketing or of his affiliation with a new business or employment in which his own duties and responsibilities involve telemarketing.

#### **VII. COMMUNICATION WITH DEFENDANTS**

**IT IS FURTHER ORDERED** that for the purposes of compliance reporting, if defendants' current counsel no longer represents a defendant, plaintiff and the Commission are authorized to communicate directly with such defendant.

#### **VIII. SEVERABILITY**

**IT IS FURTHER ORDERED** that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

#### **IX. OTHER REMEDIES**

This action, and the relief awarded herein, is in addition to and not in lieu of other remedies as may be provided by law, including both civil and criminal remedies.

#### **X. RETENTION OF JURISDICTION**

**IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

**JUDGMENT IS THEREFORE ENTERED** in favor of plaintiff and against defendants, pursuant to all the terms and conditions recited above.

SO ORDERED this 22nd day of May, 2007.

A handwritten signature in blue ink, appearing to read "L. Hicks", is written above the printed name of the judge.

---

THE HONORABLE LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE