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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CORPORATIONS FOR CHARACTER, L.C., Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	**MEMORANDUM IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S MOTION TO DISMISS** No. 2:11-cv-0419-BCW

INTRODUCTION

Plaintiff Corporations for Character, L.C. ("C4C"), is one of the defendants in a civil law enforcement action that the United States filed in the Northern District of Florida prior to the filing of C4C's complaint in this District. *United States v. Feature Films for Families, Inc., et al.*, No. 4:11-cv-00197-RH (N.D. Fla.) (complaint filed May 5, 2011) (referred to as the "Enforcement Action"). In the Enforcement Action, the United States alleges that C4C and its co-defendants violated the Federal Trade Commission Act ("FTC Act") and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act") by conducting deceptive

telemarketing campaigns, in which they made false and misleading representations in order to extract funds from unwitting consumers and donors.

The present case is an attempt to thwart the United States' Enforcement Action, so that C4C may avoid (or at least delay) facing the consequences of its own misconduct. C4C is "forum shopping" to try to get this Court to enter a declaratory judgment that would "set aside and hold as unlawful under the APA [Administrative Procedure Act] all enforcement action undertaken by" the Federal Trade Commission ("FTC"). C4C Complaint at 22. Courts have repeatedly condemned such gambits, in which a defendant recasts itself as an aggrieved plaintiff and asserts as affirmative claims the defenses it could raise in an enforcement case. C4C should not be allowed to use this Court to undermine the authority of another federal district court, or to play two different district courts against one another. As explained below, this Court is without jurisdiction to aid plaintiff in this undertaking.

BACKGROUND

C4C is one of a network of Utah companies that Forest S. Baker, III, owns and actively manages. Three of these for-profit companies – C4C, Family Films of Utah, Inc. ("FFU"), and Feature Films for Families, Inc. ("FFF") – all are located at the same address, where they share personnel, equipment, telephone lines and numbers, Internet domains, and other resources. Baker uses these corporate entities to produce and market DVD films and to conduct telemarketing campaigns. *See* Enforcement Action Complaint (Attachment A to this Motion) ¶¶ 4-17.

In one of these telemarketing campaigns, C4C made millions of calls to consumers across the country as part of a carefully coordinated two-step process. *First*, C4C's callers told

consumers they were calling on behalf of a nonprofit under the name of "Kids First" to offer two complimentary DVD movies with the stated purpose of gathering feedback on whether to include them on a list of recommended "family friendly" films. *Second*, C4C placed follow-up calls to consumers who accepted this offer, asking their views on the two DVDs – and urging them to pay $12.95 each, plus shipping and handling, for two or more additional DVD movies produced by C4C's sister company, FFF. C4C falsely promised: "All the proceeds of this fundraiser will help us finish up creating this recommended viewing list to help parents and grandparents, like us, with a list we can trust." In fact, the Baker companies pocketed more than 90 percent of the revenues generated through this campaign. *Id*. ¶¶ 18-26; *see also* C4C Complaint ¶¶ 15, 17.

In other broad-scale telemarketing campaigns, C4C made millions of calls to solicit contributions for groups characterized as police or firefighter fraternal charities. In its telemarketing calls ostensibly for police groups, C4C told prospective donors that their contributions would pay for law enforcement training, bulletproof vests, assistance to families of officers killed in the line of duty, and similar purposes. In campaigns for purported firefighter organizations, C4C represented that donations would be used to assist needy firefighters and victims of fires and disasters. When consumers asked about what proportion of their donations would be used for marketing, rather for the stated charitable purposes, C4C misrepresented that only minimal amounts went for telemarketing. In fact, most of the money raised through these campaigns was paid to C4C and other for-profit entities, while only 15 to 33 percent went to the named organizations – and hardly any of *that* money was used for the purposes that C4C had touted to donors. *See* Enforcement Complaint ¶¶ 38-47; *see also id*. ¶¶ 27-37 (describing another unlawful telemarketing campaign).

Beginning in at least 2009, the Commission staff engaged in discussions and exchanged correspondence with counsel for Baker and his companies about this behavior. *See* C4C Complaint ¶¶ 38-44. In 2010, the FTC staff provided counsel with a draft of the Enforcement Complaint. *Id.* ¶ 45. C4C counsel attempted to dissuade the FTC from taking enforcement action, and asserted that C4C's telemarketing activities in association with non-profit charitable organizations are protected speech under the First Amendment and do not violate the Telemarketing Sales Rule, 16 C.F.R. Part 310. *See* C4C Complaint ¶ 43.

On May 5, 2011, the U.S. Department of Justice, acting upon notification and authorization by the Commission pursuant to § 16(a) of the FTC Act, 15 U.S.C. § 56(a), filed the Enforcement Complaint against Baker, C4C, FFF, and FFU. That complaint alleges that the defendants' misrepresentations and omissions of material fact during the course of their telemarketing campaigns violated § 5(a) of the FTC Act, 15 U.S.C. § 45(a), and that their conduct of these campaigns violated numerous provisions of the Telemarketing Sales Rule. *See* Enforcement Complaint ¶¶ 52-78.

The day after the government filed the Enforcement Complaint in the Northern District of Florida, C4C filed the instant lawsuit in this Court. C4C alleges that the FTC is violating C4C's rights to freedom of speech and due process of law, and asks the Court to issue a declaratory ruling to "protect" the "Kids First" telemarketing campaign and similar conduct "from . . . law enforcement threats and actions" by the FTC. C4C Complaint at 22 (Prayer for Relief ¶ (1)(a)). C4C also contends that the Enforcement Action is arbitrary, capricious, and an abuse of discretion, and that it violates FTC rules and rulemaking procedures. *Id.* ¶¶ 70-75. C4C asks the Court to issue an order to "set aside and hold as unlawful under the APA all enforcement action

undertaken . . . against C4C." *Id.* (Prayer for Relief ¶ (1)(b)).

ARGUMENT

THE COURT IS WITHOUT JURISDICTION OVER PLAINTIFF'S COMPLAINT

Plaintiff bears the burden of establishing that the Court has jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 182 (1936). When analyzing a Rule 12(b)(1) motion, the Court may go beyond the allegations in the complaint to examine facts relevant to jurisdiction. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). It is not necessary to do so, however, when – as here – the allegations of fact in the complaint, even when accepted as true, make clear that the Court lacks jurisdiction. *See E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001). While the Court accepts plaintiff's allegations of *fact* for purposes of a facial motion to dismiss, it is "not bound by conclusory allegations, unwarranted inferences, or legal conclusions." *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994).

Although plaintiff seeks declaratory relief, such relief is only permitted if jurisdiction otherwise exists. 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction . . . any court . . . may declare the rights. . . ."); *Public Service Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 242 (1952) (Declaratory Judgment Act "applies . . . only to 'cases and controversies in the constitutional sense.'") (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950) (in the Declaratory Judgment Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. . . . [T]he requirements of jurisdiction – the limited subject matters which alone Congress had authorized the District Courts to adjudicate – were not

impliedly repealed or modified.").[1]

I. An Agency Decision to Investigate Wrongdoing or to Bring Enforcement Litigation Is Not "Final Agency Action" Subject To Judicial Review

The APA authorizes judicial review only for agency actions that are "final," and "for which there is no other adequate remedy in a court." *See* 5 U.S.C. § 704. Nothing in the APA "affects other limitations on judicial review or the power or duty of the court to dismiss any action . . . on any other appropriate legal or equitable ground." *Id.* § 702.

In order to constitute final agency action subject to judicial review, the agency conduct at issue must determine "rights or obligations," and binding "legal consequences" must flow from it. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Mobil Exploration & Producing U.S., Inc. v. Dep't of Interior*, 180 F.3d 1192, 1197-99 (10th Cir. 1999); *Howell v. U.S. Army Corps of Engineers*, 794 F. Supp. 1072, 1075 (D.N.M. 1992). When, as in this case, these criteria cannot be satisfied, the Court lacks subject-matter jurisdiction. *Pennaco Energy, Inc. v U.S. Dept. of the Interior*, 377 F.3d 1147, 1155 (10th Cir. 2004).

The Enforcement Action is not "final." It is merely the beginning, not the "consummation," of the "decisionmaking process" before the District Court in Florida, and is not an act "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. at 178 (quotation marks omitted). The defendants in that

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[1] This memorandum does not address the merits of plaintiff's complaint or its failure to state a claim; however, it should be noted that C4C's high-flown rhetoric extolling the benefits of charitable solicitations and fundraising ignores the fact that false or deceptive misrepresentations enjoy no special First Amendment protection, and are not immune from liability under the FTC Act. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (government may serve its "legitimate interests in preventing fraud" by, among other things, direct prohibition on solicitation or fraudulent misrepresentations, such as by restricting solicitation by organizations "that in fact are using the charitable label as a cloak for profitmaking.").

case, including C4C, have not yet responded to the government's complaint; and that adjudication is far from being completed. In this circumstance, there is no final agency action. *Id.*; *Mobil Exploration & Producing U.S., Inc.*, 180 F.3d at 1198.

The Supreme Court has held that the FTC's issuance of an administrative complaint is not final agency action subject to judicial review. *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). The Court reached this result even though the complaint was "definitive" on the question of whether the Commission had "reason to believe" that Standard Oil was violating the Federal Trade Commission Act. *Id.* at 241. The complaint was only a determination that adjudicatory proceedings would commence. Although the Court recognized that the burden of responding to this complaint would be "substantial," it did not constitute irreparable injury. *Id.* at 244. Permitting judicial review of the FTC's complaint would lead to "piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. . . . Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before the adjudication concludes." *Id.* at 242-43 (citations omitted).

Similarly, in *Direct Marketing Concepts, Inc. v. FTC*, 581 F. Supp. 2d 115 (D. Mass. 2008), the court rejected an attempt to obtain relief very similar to the relief sought here. The FTC had filed an enforcement action against Direct Marketing, but Direct Marketing sued the FTC, alleging that the analysis the FTC uses to determine whether advertising violates the statute runs afoul of the First Amendment. *Id.* at 116-17. The court held that the case should be dismissed: "If this action is related to the enforcement action, then it must be dismissed as an impermissible attempt to enjoin an ongoing enforcement action. If the two actions are not

related, then this action must be dismissed for failure to present a ripe claim for judicial adjudication." *Id.* at 117.[2]

In addition, the FTC's activities prior to the filing of the Enforcement Action are not final agency action, as many courts have held. *See, e.g., Veldhoen v. United States Coast Guard*, 35 F.3d 222, 225 (5th Cir.1994) ("An agency's initiation of an investigation does not constitute final agency action"); *CEC Energy Co., Inc. v. Public Serv. Comm'n*, 891 F.2d 1107, 1110 (3d Cir.1989) (agency's determination to commence investigation into a public utility contract was not definitive); *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."); *Schering Corp. v. Heckler*, 779 F.2d 683, 686 n.18 (D.C. Cir. 1985) (statements by FDA officials regarding whether a product was a "new animal drug" and the government's position in previously filed enforcement actions did not constitute final agency action); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1378 (9th Cir. 1983) (FDA regulatory letters stating that drug products were in violation of the law and threatening enforcement action did not constitute final agency action); *Jerome Milton, Inc. v. FTC*, 734 F. Supp. 1416, 1421 (N.D. Ill. 1990) (FTC letter not final agency action, and the "unlikelihood of any change in position by the agency . . . is not ground for reviewing otherwise non-final agency action."); *Estee Lauder, Inc. v. FDA*, 727 F. Supp. 1, 4-5 (D.D.C. 1989) (FDA

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[2] For the same reasons articulated in the *Direct Marketing* case, plaintiff does not present a ripe case or controversy, and its complaint can be dismissed on this basis also. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-33 (1998); *Texas v. United States*, 523 U.S. 296, 300 (1998); *Utah v. Dep't of Interior*, 535 F.3d 1184, 1194 (10th Cir. 2008) ("Thus, while we agree with SUWA that its claims largely present legal issues, this does not mean that these claims are ripe for review."); *Keyes v. School District No. 1*, 119 F.3d 1437, 1444 (10th Cir. 1997).

letters stating that products were drugs and threatening regulatory measures not final agency action); *IMS Ltd. v. Califano*, 453 F. Supp. 157, 158-60 (C.D. Cal. 1977) (FDA letter stating that IMS was in violation of the Food, Drug, and Cosmetic Act and threatening regulatory sanctions not final agency action).[3]

II. C4C Has Ample Opportunity To Present Its Defenses in the Enforcement Action, Rather Than Attempting to Thwart that Action With This Collateral Lawsuit

Nor can C4C satisfy the APA's other prerequisite to judicial review – that the party has "no other adequate remedy in a court." 5 U.S.C. § 704. C4C clearly has an adequate remedy for challenging the validity of the FTC actions with which it takes issue: it will have ample opportunity to present its arguments to the U.S. District Court for the Northern District of Florida as defenses in the Enforcement Action. It has long been established that, when the government brings suit to enforce the FTC Act, the defendants "can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to seek relief" by filing their own preemptive complaint against the FTC. *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927). "Consequently, the trial court should have refused to entertain" the complaint against the FTC, and it "should have been dismissed . . ." *Id.*

In *Belle Fourche Pipeline Co. v. United States*, 751 F.2d 332 (10th Cir. 1984), the Tenth

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[3] This lack of final agency action distinguishes the present case from the situation this Court recently addressed in *Basic Research LLC v. FTC*, No. 2:09-cv-779 (May 23, 2011). In that case, the plaintiffs sought a judicial interpretation of a prior consent decree that the FTC had entered in settlement of an administrative proceeding. This Court deemed the administrative order to be a "final action" for purposes of APA review. Slip Op. at 19-20. Here there is no such administrative order. As noted below, there are additional distinctions between this case and *Basic Research*, which make the *Basic Research* ruling inapposite here. The United States seeks to make clear, however, that it respectfully believes that the *Basic Research* ruling was in error, but has not had occasion to seek review of that ruling because it was a nonfinal order.

Circuit held that "if plaintiffs' defense to [an enforcement action] has merit, they will not be exposed to civil fines." *Id.* at 335. Therefore, plaintiffs' attempt to prevent the enforcement action was dismissed because plaintiffs "possessed an adequate legal remedy and were not exposed to the type of immediate, irreparable injury necessary to justify jurisdiction." *Id.* (citing *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 649 (5th Cir. 1977)). Similarly, in *Floersheim v. Engman*, 494 F.2d 949, 952-54 (D.C. Cir.1973), the court held that, in the absence of an enforcement action, there was no jurisdiction over a plaintiff's suit challenging the FTC's interpretation of the plaintiff's obligations. *See also Reisman v. Caplin*, 375 U.S. 440, 449 (1964) (parties could not challenge subpoenas because they could present their challenge to the validity of the agency's investigation in a subsequent proceeding); *Flowers Indus. v. FTC*, 849 F.2d 551, 553 (11th Cir. 1988) (no jurisdiction for judicial review of FTC determination regarding requirement that plaintiff divest certain acquired bakeries, except in an enforcement action to be brought against plaintiff by the FTC); *General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) ("Therefore the target of a[n] . . . investigation may not maintain a suit . . . to enjoin the investigation but must wait till the government sues to enforce a subpoena. . . ."); *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115 (2d Cir.1975) (barring suit seeking judicial review of the FTC's interpretation of a consent order because the parties could litigate the same issue in an enforcement proceeding brought by the FTC).

Even though C4C's counsel knew that the enforcement action had been filed in the Northern District of Florida, C4C filed here in the District of Utah – a classic example of "procedural fencing" or forum shopping. C4C chose to file this case as a stand-alone, collateral lawsuit in a different federal court, rather than asserting the very same arguments as affirmative

defenses to the pre-existing case. "Nothing . . . requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *McCleskey v. Zant*, 499 U.S. 467, 509 (1991) (quoting *Sanders v. United States*, 373 U.S. 1, 18 (1963)).[4]

III. This Court Has No Jurisdiction to Prevent an Enforcement Action

The complaint can also be dismissed because it attempts to prevent an enforcement action. Whether an enforcement action is simply contemplated or has already been filed, it is well-established that those subject to enforcement action may not file a separate challenge, but must raise any defenses they have in the enforcement case itself, and that district courts do not have jurisdiction to entertain such challenges. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950) (opportunity for court hearing in enforcement action "satisfies the requirements of due process."). As in *Ewing*, C4C seeks to challenge the determination that "a judicial proceeding should be instituted." *Id.* at 598. "Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts." *Id.* at 599.

C4C explicitly seeks a declaratory ruling that its telemarketing activities "be protected from . . . law enforcement threats and actions" by the FTC, C4C Complaint at 22 (Prayer for Relief ¶ (1)(a)), and to "set aside and hold as unlawful . . . all enforcement action undertaken by [the FTC] against C4C." *Id.* ¶ (1)(b). C4C's complaint makes it abundantly clear that its entire focus is to challenge the FTC's "enforcement action," ¶¶ 52.c, 58, 62, 66, 73; its "enforcement

[4] These considerations also distinguish the present case from *Basic Research*. There, both the enforcement action and the APA challenge were filed in the same district, and the plaintiffs in the APA action filed their case before the enforcement action was brought.

activity," ¶¶ 69, 79, 82; its conduct of "litigation" and "prelitigation," ¶¶ 73, 77, 78, 80, 81; and its "filing a lawsuit against C4C." ¶ 53. Indeed, C4C candidly admits that its goal is to "avoid prosecution." *Id.* ¶ 52.e.ii

Courts have recognized such tactics for what they are and have firmly rejected them. As noted above, in *Direct Marketing Concepts, Inc.*, the court rejected an attempt to preclude a judicial FTC enforcement action: "If this action is related to the enforcement action, then it must be dismissed as an impermissible attempt to enjoin an ongoing enforcement action." 581 F. Supp. 2d at 117.

In another FTC case, *Alpine Industries v. FTC*, 40 F. Supp. 2d 938 (E.D. Tenn. 1998), *aff'd,* 238 F.3d 419 (6th Cir. 2000) (Table), the FTC had issued an order which prohibited Alpine from making claims about its air purification machines unless it possessed competent and reliable scientific evidence to support its claims. *Id.* at 939. Alpine provided some studies to the FTC, but the FTC staff stated that the material did not meet the competent and reliable evidence standard and that it was recommending that the Justice Department initiate an enforcement action against Alpine. *Id.* at 939-40. Alpine filed suit against the FTC, seeking a declaration that it had provided adequate scientific substantiation to the FTC or a declaration that the FTC be required to identify the deficiencies in Alpine's studies. *Id.* at 940. The court held that what Alpine actually sought to do was enjoin an enforcement action, even though it only sought "declaratory" relief: "It is important to recognize that Alpine complains about the FTC's rejection of their scientific studies." *Id.* at 943. The court rejected Alpine's contention that the case was simply a "request for interpretation of the Consent Decree:"

> [W]hile Alpine contends this case is not an attempt to impinge upon the FTC's discretion to bring an enforcement action, this case cannot be about anything else.

> Part of the relief Alpine requests is for the Court to declare Alpine has provided adequate scientific substantiation in accordance with the Consent Decree. However, if the Court were to rule in such a manner, the FTC would be precluded from commencing an enforcement action based on an alleged violation of that agreement.

Id. at 943. The court dismissed Alpine's complaint for lack of jurisdiction because it improperly sought to preclude the FTC from exercising its discretion to commence an enforcement action. *Id.* at 942-43. For this same reason, there is no jurisdiction in the instant case.[5]

Many courts have reached the same conclusion. *See, e.g., FTC v. Claire Furnace Co.*, 274 U.S. at 174; *X-tra Art v. CPSC*, 969 F.2d 793, 796 (9th Cir. 1992) ("where the Commission opts to proceed in court . . . , the issue should be litigated by the manufacturer in that forum."); *Belle Fourche Pipeline Co.*, 751 F.2d at 335; *United States v. Alcon Laboratories*, 636 F.2d 876, 882 (1st Cir. 1981) ("The Supreme Court's decision in *Ewing* precludes judicial interference with the FDA's decision to institute enforcement actions, whatever the precise context."); *Southeastern Minerals, Inc. v. Harris*, 622 F.2d 758, 764 (5th Cir. 1980) ("in seeking to enjoin federal officials from interfering with the manufacturing and marketing of their product, the appellees necessarily sought pre-enforcement review of the FDA's determination that probable cause existed to seize and initiate enforcement proceedings . . . , a review clearly proscribed by *Ewing*."); *Pharmadyne Labs, Inc. v. Kennedy*, 596 F.2d 568, 570-71 (3d Cir. 1979) (no jurisdiction to enjoin enforcement actions, and enforcement actions were proper forum to litigate issues related to the propriety of enforcement); *Parke, Davis & Co. v. Califano*, 564 F.2d 1200,

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[5] In *Basic Research*, this Court expressed no disagreement with the *Alpine* ruling, instead distinguishing it on the ground that *Alpine* involved the application of a prior consent decree to particular facts, and not simply the interpretation of a prior consent decree. Slip. Op. at 26. As explained above, however, the present case involves no prior consent decree, and is thus even more plainly subject to dismissal.

1206 (6th Cir. 1977) ("it was an abuse of discretion to enjoin the FDA in the circumstances of this case where pending enforcement actions provided an opportunity for a full hearing before a court."); *Genendo Pharmaceutical N.V. v. Thompson*, 308 F. Supp.2d 881, 883 (N.D. Ill. 2003) (it "is well-settled that the district courts lack jurisdiction to enjoin enforcement proceedings. . . .").

In addition, courts have recognized that declaratory judgment actions cannot be used in a manner similar to what plaintiff seeks here. *See, e.g., Samuels v. Mackell*, 401 U.S. 66, 73 (1971) ("Ordinarily . . . the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction."); *Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund*, 747 F.2d 169, 170 (3d Cir. 1984) ("Although the language of the . . . motion did not use the word 'injunction,' this court must look to the substance of the request, rather than rely only on its language. . . . "); *White v. Judicial Inquiry and Review Bd.*, 744 F. Supp. 658, 671 (E.D. Pa. 1990) ("the mere request for a declaratory judgment does not define how this Court will view [the] Amended Complaint . . . . In this case, the substance of the Amended Complaint reveals that [plaintiff] seeks to use a ruling from this Court as an injunction. . . . Accordingly, the plaintiffs seeks to use a declaration in an offensive manner.").

Moreover, courts have "substantial discretion" in deciding whether to exercise jurisdiction over a declaratory judgment action, and may decline to do so based on "equitable, prudential, and policy" factors even when – unlike here – the Article III case or controversy requirement is satisfied. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007). The

Tenth Circuit "impos[es] on the trial court the obligation to weigh . . . various factors when deciding whether to hear a declaratory judgment action:"

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994) (quoting *Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1063 (6th Cir.1987), and *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1275 n.4 (10th Cir. 1989)). *See also Swish Marketing, Inc. v. FTC*, 669 F. Supp.2d 72, 76-77 (D.D.C. 2009). Plaintiff satisfies none of these factors. For example, its complaint does not address the FTC's allegations in the Enforcement Action regarding C4C's telemarketing for contributions in the name of police and firefighter organizations. Also, C4C's owner and related corporations are defendants in the Enforcement Action, but are not parties here. Thus, a resolution of the instant case will not "settle the controversy." In addition, C4C's "alternative remedy" of presenting its arguments as defenses in the Enforcement Action will be a far more effective manner to resolve the issues.

CONCLUSION

For the foregoing reasons, this case should be dismissed.

Respectfully submitted,

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ATTACHMENT A

TO

MEMORANDUM IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

IN

CORPORATION FOR CHARACTER, L.C. v. FEDERAL TRADE COMMISSION

Civil Action No. 2:11-CV-0419-BCW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FEATURE FILMS FOR FAMILIES, INC., CORPORATIONS FOR CHARACTER, L.C., FAMILY FILMS OF UTAH, INC., and FORREST SANDUSKY BAKER III, individually and as owner and principal officer of FEATURE FILMS FOR FAMILIES, INC., CORPORATIONS FOR CHARACTER, L.C., and FAMILY FILMS OF UTAH, INC., Defendants.	**Case No. 11-197** **COMPLAINT FOR CIVIL PENALTIES, PERMANENT INJUNCTION, AND OTHER EQUITABLE RELIEF; JURY TRIAL DEMANDED**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 56(a)(1), for its Complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a), and 19(a) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b(a), and Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act"), 15 U.S.C. § 6105, to obtain monetary civil penalties, a permanent injunction, and other equitable

relief from Defendants for their violations of Section 5(a) of the FTC 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.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action 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(b). This action arises under 15 U.S.C. § 45(a).

3. Venue is proper in this District under 28 U.S.C. §§ 1391(b)-(c) and 1395(a), and 15 U.S.C. § 53(b).

DEFENDANTS

4. Defendant Feature Films for Families, Inc., ("FFF") is a Utah for-profit corporation with its principal place of business located at 5286 South Commerce Drive, Suite A116, Murray, Utah.

5. Defendant Corporations for Character, L.C., ("C4C") is a Utah for-profit corporation with its principal place of business located at 5286 South Commerce Drive, Suite A116, Murray, Utah.

6. Defendant Family Films of Utah, Inc., ("Family Films") is a Utah for-profit corporation with its principal place of business located at 5286 South Commerce Drive, Suite A116, Murray, Utah. Family Films provides services to Defendants FFF and C4C, including management services and directions on regulatory compliance with respect to telemarketing conducted by Defendants FFF and C4C.

7. Defendant Forrest Sandusky Baker III ("Baker") is the president and chief executive officer of FFF, the chief executive officer of C4C, and the chief executive officer of Family Films. Baker also owns FFF, C4C, and Family Films, directly or as Trustee of the Forrest S.

Baker III Trust and co-trustee of the Sharon O. Baker Trust. At all times material to this Complaint, Baker has had the authority and responsibility to prevent or correct unlawful telemarketing practices of FFF, C4C, and Family Films, and has formulated, directed, controlled, or participated in the acts and practices of FFF, C4C, and Family Films, including the acts and practices set forth in this Complaint.

8. At all times relevant to this Complaint, Defendants have maintained a substantial course of conduct in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

9. Defendants transact and have transacted business in this District by selling DVDs to consumers in this District; by making telephone calls to consumers in this District to induce the sale of DVDs and theater tickets; and by soliciting potential donors in this District for charitable contributions. Defendant C4C is registered as a professional solicitor pursuant to the Florida Solicitation of Contributions Act, Fla. Stat. Ch. 496, and has contracted with purported charities in this District to solicit for contributions. In the course of telemarketing for contributions and to induce sales, Defendants have made or caused telephone calls to be made to consumers and potential donors in this District, including calls that violate the FTC Act and the TSR as described below in Counts I through VII.

DEFENDANTS' BUSINESS ACTIVITIES

10. Since at least 2007, Defendants have engaged in or caused others to engage in telemarketing through plans, programs, or campaigns conducted to induce the purchase of goods or services, and to induce charitable contributions, by use of one or more telephones and which involve more than one interstate telephone call.

11. FFF acquires, produces, and distributes family-friendly films on DVD. FFF also initiates telephone calls to consumers in the United States to induce the sale of theater tickets or the purchase of FFF DVDs. Defendant FFF is both a "seller" and "telemarketer" engaged in "telemarketing," as defined by the TSR, 16 C.F.R. § 310.2.

12. C4C initiates telephone calls to consumers in the United States to induce the purchase of FFF's goods or services, and to solicit contributions for purported charities. Defendant C4C is a "telemarketer" engaged in "telemarketing," as defined by the TSR, 16 C.F.R. § 310.2.

13. Family Films employs the management personnel for FFF and C4C, including the sales managers, financial personnel, and telemarketing compliance counsel. Family Films employees supervise and direct the sales and telephone solicitation activities of FFF and C4C. Defendant Family Films is both a "seller" and "telemarketer" engaged in "telemarketing," as defined by the TSR, 16 C.F.R. § 310.2.

14. Defendant Baker, as owner and chief executive of FFF, C4C, and Family Films, has been involved in conceiving telemarketing campaigns, drafting the telemarketing scripts used by FFF and C4C employees, and deciding whether the telemarketing campaigns conducted by FFF and C4C should include calls to telephone numbers on the National Do Not Call Registry maintained by the Commission under 16 C.F.R. § 310.4(b)(1)(iii)(B) (the "National Do Not Call Registry" or "Registry").

15. Defendants FFF, C4C, and Family Films have operated as a common business enterprise (hereinafter, "the Family Films Enterprise") while engaging in the deceptive acts and practices and other violations of law alleged below. Defendants in the Family Films Enterprise have shared personnel, managers, telephone numbers, telecommunications services, Internet domains, and other resources in conducting the telemarketing campaigns described below, and have

shared a common business location in Murray, Utah. Because these Defendants have operated as a common enterprise, each of them is jointly and severally liable for the deceptive acts and practices and violations of law alleged below.

16. Defendant Baker is jointly and severally liable for the conduct of Defendants FFF, C4C, and Family Films because he has had the authority to control and direct the activities of these Defendants, has had knowledge of the misrepresentations and other misconduct of these Defendants, and has participated in approving or ratifying the practices that resulted in the abusive pattern of telephone calls made by the Defendants in the Family Films Enterprise.

Telemarketing to Promote FFF DVDs and Baker's Movie

17. Defendants FFF and C4C, at the direction of Family Films, have conducted telemarketing campaigns to promote the sale of DVDs distributed by FFF or movies produced by Baker. In conducting this telemarketing, Defendants have repeatedly made telemarketing calls to telephone numbers listed on the National Do Not Call Registry, and have conducted campaigns without taking steps to prevent calls from being made to telephone numbers on the National Do Not Call Registry.

1. Telephone Calls by C4C Selling FFF DVDs

18. In 2008 and 2009, C4C conducted a nationwide calling campaign under the name "Kids First," which is part of a trademark used by the Coalition for Quality in Children's Media ("CQCM"), to signify its approval of children's programming. The telephone calls were made pursuant to agreements that provided that C4C would make survey and solicitation calls for CQCM and allow CQCM to retain at least 7 percent of the revenues generated by C4C's sales of DVDs to consumers during these telephone calls. The agreements allowed FFF to receive up to 93 percent of the revenues generated by C4C's telephone calls, in addition to shipping and

handling costs, and gave C4C the right to use information obtained during the campaign for C4C's own purposes, including marketing and solicitation.

19. The telephone calls made by C4C under the name Kids First were made in connection with "telemarketing" as defined in 15 U.S.C. § 6106(4) because they were part of a program conducted to induce the purchase of FFF's DVDs and involved more than one interstate telephone call.

20. During 2008 and 2009, C4C representatives, using recordings or reading from scripts, made telephone calls to carry-out this campaign and identified themselves as "with Kids 1st." The recordings and scripts did not identify C4C or FFF as sellers or entities on whose behalf the calls were being made.

21. During 2008 and 2009, C4C representatives made telephone calls in which they stated that they were just calling to offer to send the recipient of the call two complimentary DVD movies, and to request that the recipients give feedback on whether the movies should be included in a list of recommended movies. The C4C representatives did not disclose during these initial calls that those who accepted their offer would receive a call soliciting them to purchase additional movies.

22. During 2008 and 2009, C4C representatives made follow-up telephone calls to persons who had agreed to accept the complimentary DVDs. During this second call, C4C representatives asked the recipient of the call whether his or her family enjoyed the movies and offered the recipient the opportunity to purchase two additional movies for $12.95 each, plus shipping and handling charges. If the recipient declined to purchase two movies, the caller urged him or her to purchase one movie. In addition, C4C representatives told recipients of these calls

that the producers of the films wanted to give them a $5 credit that they could use toward the future purchase of FFF products.

23. During 2008 and 2009, when the C4C representatives offered to sell DVDs during the follow-up call, they told the recipients of the call, "[a]ll the proceeds of this fundraiser will help us finish up creating this recommended viewing list to help parents and grandparents, like us, with a list we can trust." The C4C representatives did not disclose that proceeds collected from the sale of DVDs would be paid to Defendants C4C or to FFF.

24. FFF or C4C received at least 93 percent of the total proceeds collected from recipients of the calls that C4C made using the name Kids First during 2008 and 2009.

25. In making telephone calls under the name Kids First in 2008 and 2009, C4C did not prevent calls from being placed to telephone numbers listed on the National Do Not Call Registry and did not limit calls to persons who had previously purchased or inquired about FFF products. C4C representatives told recipients of the calls that they were calling "every number in your area."

26. In making calls under the name Kids First, C4C initiated telephone calls to more than five million telephone numbers of persons who had placed their numbers on the National Do Not Call Registry before the telephone call.

2. FFF Telephone Calls Promoting *The Velveteen Rabbit*

27. In early 2009, a film produced by Baker, *The Velveteen Rabbit*, was screened in theaters nationwide prior to its release on DVD.

28. Prior to and during the period that *The Velveteen Rabbit* was screened in theaters, FFF representatives made approximately eight million unsolicited telephone calls to households in areas where the movie was being screened. The FFF representatives encouraged the recipients

of the calls to purchase tickets to see the film, and stated that producers of the movie would give the consumers an incentive to purchase a ticket. In some telephone calls, the FFF representatives stated that the producers would give the recipient of the call a credit toward the purchase of FFF DVDs equal to the cost of the movie ticket. In some calls, the FFF representatives told consumers that the producers of the movie guaranteed that the recipients of the call and their families would enjoy the movie and, if not, the recipients of the call could choose a free DVD movie from the producers' library.

29. The telephone calls made by FFF to encourage ticket sales for *The Velveteen Rabbit* were made in connection with "telemarketing" as defined in 15 U.S.C. § 6106(4), because they were part of a program conducted to induce the purchase of theater tickets and FFF's DVDs, and involved more than one interstate telephone call.

30. In making telephone calls to encourage ticket sales for *The Velveteen Rabbit,* FFF did not prevent calls from being placed to telephone numbers listed on the National Do Not Call Registry and did not limit calls to persons who had previously purchased or inquired about FFF products. FFF told recipients of the calls that they were calling "every combination of numbers in the areas where" the movie was opening.

31. In making telephone calls to encourage ticket sales for *The Velveteen Rabbit,* FFF initiated telephone calls to more than two and a half million telephone numbers of persons who had placed their numbers on the National Do Not Call Registry before the telephone call.

32. In making telephone calls to encourage ticket sales for *The Velveteen Rabbit,* FFF representatives began the calls by announcing that they were calling "on behalf of the producers of a great new movie coming to theaters and this is not a sales call." FFF representatives responded to consumers who asked who is calling by saying that they were "calling on behalf of

the producers of a new movie called the Velveteen Rabbit." The recordings and scripts used by FFF to conduct these calls did not identify FFF, Family Films, or Baker as the seller behind the calls.

33. In making telephone calls to encourage ticket sales for *The Velveteen Rabbit,* FFF arranged for the phrase "VELVETEEN" or "VELVETEENMOV" to be transmitted to caller identification services as the name of the party making the call.

3. FFF Telephone Calls to Sell DVDs

34. FFF regularly places telephone calls to induce the sale of FFF DVDs to persons who, according to FFF, have previously purchased products from FFF or have made inquiries about FFF products as part of a telemarketing program.

35. FFF has made telephone calls to induce the sale of FFF DVDs to persons whose telephone number is listed on the National Do Not Call Registry even though the person has not made a purchase from FFF in the eighteen (18) months preceding the telephone call, and the person has not made any inquiry regarding FFF's products in the three months preceding the telephone call.

36. Since June 1, 2007, FFF has made approximately nine million telephone calls to telephone numbers that were listed on the National Do Not Call Registry at the time of the telephone call, in circumstances where FFF's records do not show that the recipients of the calls had purchased FFF's products or services during the eighteen (18) months immediately preceding the telephone call, or had made an inquiry about FFF's products or services during the three (3) months immediately preceding the telephone call.

37. In the course of initiating these telephone calls to induce the purchase of FFF DVDs, Defendants arranged for names other than C4C, FFF, or Baker – such as "CUSTOMER SVC

FE" and "FAMILY VALUE CB" – to be transmitted to caller identification services as the name of the entity calling the consumer.

Telemarketing for Contributions

38. C4C, as a professional solicitor, initiates telephone calls to request contributions on behalf of organizations with names related to fraternal police organizations and firefighting, in campaigns that involve more than one interstate telephone call.

39. By contract, the organizations pay most of the donations received to C4C as fees and retain 15 to 33% of the money donated.

40. C4C has conducted solicitations for organizations that use all or most of what remains of the contributions after deducting C4C's fees to pay salaries or operational expenses of the organizations, or pay debt incurred because of such salaries or expenses, rather than using the contributions for charitable activities.

41. In soliciting contributions for organizations with names related to fraternal police organizations and firefighting, C4C has represented in telephone calls to potential donors that:

a. the organization for which C4C is soliciting provides law enforcement training, safety-related officer training, bullet proof vests, death benefits, or financial assistance to families of officers killed in the line of duty, firefighters, or victims of fires or disaster;

b. "any support you [the potential donor] can give goes to" or "goes directly into" safety-related officer training, providing supplies like bullet proof vests, aid to families, fire and disaster victims, or other charitable programs described by C4C representatives during the solicitation;

c. a specific percentage of every contribution goes to fund law enforcement training, death benefits, and assistance to families of officers killed in the line of duty; and

d. the full amount recorded by C4C as a pledge during a prior telemarketing call "was actually budgeted" for assistance to police officers or their families, volunteer fire departments, the victims of fire and other disasters, or other charitable programs described by C4C representatives during the solicitation.

42. In soliciting contributions for organizations with names related to fraternal police organizations and firefighting, if a potential donor expressly or implicitly asks how much of a contribution goes to C4C, C4C representatives respond by stating that:

a. the representative does not know the exact amount of administrative costs, but knows "it's a very minimal amount";

b. the amount of contributions going to the organization's charitable efforts has doubled because the organization recently hired a new fundraising company that decreased administrative costs; and

c. the amount of donated funds that went to the organization was less in the past but recently doubled or almost doubled.

43. C4C's representations in the telephone calls described in Paragraph 41 and 42 imply that the entities for which C4C is soliciting devote more than an incidental portion of the contributions received from donors to the charitable activities described during the telephone solicitation.

44. C4C has made the representations described above in Paragraphs 41 through 43 in soliciting for organizations that, in fact, provide no funding for the activities described during the

telephone solicitation, or devote only an incidental portion of the contributions received from donors to such activities.

45. C4C has made the representations described in Paragraph 42 in telemarketing campaigns for organizations that spend significant amounts of the contributions received on telemarketers, overhead, staff and associated costs; have not hired a new fundraising company that has decreased administrative costs; and have not doubled or nearly doubled the percentage of contributions that go to the organization or its charitable efforts.

46. In soliciting contributions for organizations with names related to fraternal police organizations and firefighting, C4C representatives encourage potential donors to immediately authorize payment, rather than wait for the arrival of written materials, by stating that if the donor authorizes payment over the telephone by credit or debit card, more of the donor's support will go to local officers, to the victims of fires, or other charitable programs, "as opposed to the administrative costs."

47. In fact, under C4C's contracts to conduct charitable solicitations, a donor's agreement to immediately authorize payment over the telephone does not increase the fraction of the donation that goes to the organization or its charitable programs.

Do-Not-Call Requests Directed to the Family Films Enterprise

48. Consumers and potential donors who have received telemarketing calls from C4C and FFF have responded by telling C4C and FFF representatives that they do not wish to receive such calls again.

49. In numerous instances, Defendants in the Family Films Enterprise have initiated, or caused to be initiated on their behalf, telephone calls to the telephone numbers of persons who

have previously responded to telephone calls from FFF or C4C on behalf of the same seller or charitable organization by stating that they do not wish to receive such calls.

Family Films Enterprise's Use of Predictive Dialer Technology

50. In the course of the telemarketing described above, the Family Films Enterprise uses predictive dialers to automatically initiate telemarketing calls to consumers and potential donors before a representative is available to speak to a consumer or potential donor who answers the automated call.

51. In the course of the telemarketing described above, in numerous instances, the Family Films Enterprise has not had a sufficient number of representatives to speak to all the persons who answer telephone calls made by its predictive dialers. As a result, the Family Films Enterprise has abandoned the telephone calls that it initiated by failing to connect a call answered by a person to a representative within two seconds of the person's completed greeting.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

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

53. Misrepresentations or omissions of material fact likely to mislead consumers acting reasonably under the circumstances constitute deceptive acts or practices prohibited by Section 5 of the FTC Act.

COUNT I
Deceptive Representations

54. In numerous instances in the course of making calls to consumers and potential donors, Defendants in the Family Films Enterprise represented that:

a. a representative calling under the name of Kids First is just calling to request the call recipient's review of movies for a recommended movie list;

b. all the proceeds from the sale of DVDs by the representatives calling under the name of Kids First will be used to help finish up creating a recommended viewing list;

c. the organization on behalf of which the representative is calling to solicit contributions uses and will use more than an incidental portion of the contributions to provide law enforcement training, safety-related officer training, bullet proof vests, death benefits or financial assistance to families of officers killed in the line of duty, firefighters, or victims of fire or disaster;

d. any contributions received from donors go to, or go directly to, particular charitable programs described during the telephone call;

e. a specific percentage of every contribution goes to fund law enforcement training, death benefits, and assistance to families of officers killed in the line of duty;

f. the full amount of a prior pledge has been "actually budgeted" for charitable programs described by C4C representatives;

g. the amount of the contributions that C4C or the organization for which it is soliciting uses for administrative costs is a "very minimal amount;"

h. C4C or the organization for which it is soliciting has recently hired a new fundraising company that decreased administrative costs;

i. C4C or the organization for which it is soliciting has recently doubled or almost doubled the percentage of contributions that goes to the charitable organization for which contributions are being solicited; and

j. if the donor authorizes payment over the telephone by credit or debit card, more of the donor's support will go to local officers, the victims of fires or other charitable programs, "as opposed to the administrative costs."

55. In truth and in fact,

a. the representatives who made calls under the name Kids First were not just calling to request reviews of movies, but to sell DVDs to persons who agreed to review movies, and offer credits to encourage future purchases of FFF's DVDs;

b. not all proceeds from the sale of DVDs by the representative calling under the name of Kids First were used to create a recommended viewing list as at least 93 percent of the proceeds were paid to FFF and C4C to purchase and ship DVDs;

c. the organization for which the representatives solicited contributions did not engage in the charitable activities described to donors in C4C's solicitations for the organization, or the organization for which the C4C representatives solicited contributions devoted only an incidental portion of contributions to such activities;

d. the contributions from donors that Defendants solicited did not go directly to charitable programs described during the telephone call, and most of the contributions go to pay Defendants for telemarketing, salaries, and operating expenses of the organization on behalf of which Defendants are soliciting;

e. the percentage of contributions solicited by C4C that went to fund law enforcement training, death benefits and assistance to families of officers killed in the line of duty was materially less than the percentage that C4C represented when it solicited donors;

f. the organizations for which C4C solicits do not budget the full amount of a pledge to C4C for the charitable programs described by C4C representatives, and, in fact, pay C4C two-thirds or more of any donations induced by C4C's telephone solicitations;

g. a significant amount of the contributions received as a result of C4C's solicitations is used for payments to telemarketers, operating expenses, and other costs that donors reasonably regard as administrative costs;

h. neither C4C nor the organization for which it is soliciting has recently hired a new fundraising company that decreased administrative costs;

i. neither C4C nor the organization for which it is soliciting has recently doubled the percentage of contributions that goes to the charitable organization; and

j. a donor's agreement to authorize payment over the telephone does not increase the percentage of the donation that goes to the organization for which C4C is soliciting or its charitable programs.

56. Therefore, the representations described in Paragraph 54 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE TELEMARKETING SALES RULE AND THE NATIONAL DO NOT CALL REGISTRY

57. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108. The FTC adopted the original TSR in 1995, extensively amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310.

58. It is a deceptive telemarketing act or practice, and a violation of the TSR, for any seller or telemarketer to make a false or misleading statement to induce a person to pay for goods or services or to induce a charitable contribution. 16 C.F.R. § 310.3(a)(4).

59. It is a fraudulent charitable solicitation, a deceptive marketing act or practice, and a violation of the TSR for any seller or telemarketer soliciting charitable contributions to misrepresent, directly or by implication:

a. the nature, purpose or mission of any entity on behalf of which a charitable contribution is being requested;

b. the purpose for which a charitable contribution will be used; or

c. the percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program.

16 C.F.R. § 310.3(d)(1), (3), and (4).

60. It is a violation of the TSR for any person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any practice that violates Sections 310.3(a), (c) or (d), or 310.4 of the Rule. 16 C.F.R. § 310.4(b).

61. Among other things, the 2003 amendments to the TSR established a do-not-call registry of consumers who do not wish to receive certain types of telemarketing calls. Consumers can register their telephone numbers on the National Do Not Call Registry without charge either through a toll-free telephone call or over the Internet at *donotcall.gov*.

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

63. The FTC allows sellers, telemarketers, and other permitted organizations to access the Registry over the Internet at *telemarketing.donotcall.gov*, to pay the fee(s) if required, and to download the numbers not to call.

64. Under the TSR, an "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. 16 C.F.R. § 310.2(u).

65. The TSR prohibits sellers and telemarketers from initiating an outbound telephone call to numbers on the Registry in violation of the TSR. 16 C.F.R. § 310.4(b)(1)(iii)(B).

66. The TSR prohibits sellers and telemarketers from initiating an outbound telephone call to any consumer when that consumer previously has 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. 16 C.F.R. § 310.4(b)(1)(iii)(A).

67. The TSR prohibits sellers and telemarketers from abandoning any outbound telephone call. A telephone call is considered "abandoned" if a person answers it and the person who initiated the call does not connect the call to a sales representative within two (2) seconds of the person's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv).

68. The TSR prohibits sellers and telemarketers from failing to transmit or cause to be transmitted to caller identification services the telephone number and name of the telemarketer making the call, or the customer service number and name of the seller. 16 C.F.R. § 310.4(a)(7).

69. It is an abusive telemarketing act or practice and a violation of the TSR for a telemarketer making an outbound telephone call to fail to promptly, truthfully and in a clear and conspicuous

manner disclose the identity of the seller, that the purpose of the call is to sell goods or services, and the nature of the goods or services. 16 C.F.R. § 310.4(d).

70. 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), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II
Making False Statements in Connection with Telemarketing

71. In numerous instances, in the course of telemarketing for sales of FFF products or charitable contributions, Defendants in the Family Films Enterprise have made false or misleading statements to induce consumers to pay for goods, or to induce a charitable contribution, including, but not limited to, the misrepresentations described in Paragraph 54.

72. The practices of Defendants in the Family Films Enterprise alleged in Paragraph 71 are deceptive telemarketing practices that violate the TSR, 16 C.F.R. § 310.3(a)(4), 310.3(d)(1), (3), (4).

COUNT III
Violating the National Do Not Call Registry

73. In numerous instances, in connection with telemarketing, Defendants in the Family Films Enterprise engaged in or caused others to engage in initiating an outbound telephone call to a person's telephone number on the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

COUNT IV
Ignoring Entity-Specific Do Not Call Requests

74. In numerous instances, in connection with telemarketing, Defendants in the Family Films Enterprise engaged in or caused others to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of the seller whose goods or services are being offered, or on behalf of the charitable organization for which a charitable contribution is being solicited, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A).

COUNT V
Failing to Transmit Information to Caller Identification Services

75. In numerous instances, in connection with telemarketing, Defendants in the Family Films Enterprise have failed to transmit or cause to be transmitted to caller identification services the telephone number and name of the telemarketer making the call, or the customer service number and name of the seller, in violation of the TSR, 16 C.F.R. § 310.4(a)(7).

COUNT VI
Failing to Make Required Oral Disclosures

76. In numerous instances, in the course of telemarketing products and services, Defendants in the Family Films Enterprise have made or caused telemarketers to make outbound telephone calls in which the telemarketer failed to disclose promptly and in a clear and conspicuous manner to the person receiving the call:

a. the identity of the seller;

b. that the purpose of the call is to sell goods or services; or

c. the nature of the goods or services.

77. The practices of the Defendants in the Family Films Enterprise alleged in Paragraph 76 are an abusive telemarketing practices that violate Subsections 310.4(d)(1), (2), and (3) of the TSR, 16 C.F.R. § 310.4(d)(1), (2), (3).

COUNT VII
Abandoning Calls

78. In numerous instances, in connection with telemarketing, Defendants in the Family Films Enterprise have abandoned, or caused others to abandon, an outbound telephone call by failing to connect the call to a sales representative within two (2) seconds of the completed greeting of the person answering the call, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iv).

INJURY TO THE PUBLIC INTEREST

79. Consumers and potential donors in the United States have suffered and will suffer injury as a result of Defendants' violations of Section 5(a) of the FTC Act and the TSR. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers and potential donors, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

80. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other equitable and ancillary relief as it may deem appropriate to prevent and remedy any violation of any provision of law enforced by the FTC, including an order that a wrongdoer disgorge its ill-gotten gains.

81. Defendants have violated the TSR as described above with knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is

prohibited by the Rule, as set forth in Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

82. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of up to $11,000 for each violation of the TSR on or before February 9, 2009, *see* 16 C.F.R. § 1.98(d) (2009), and up to $16,000 for each violation of the TSR after February 9, 2009. 74 Fed. Reg. 857 (Jan. 9, 2009).

83. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by Defendants' violations of the TSR and the FTC Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), and 53(b), and pursuant to its own equitable powers:

A. Award Plaintiff such 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 permanent injunctions;

B. Enter judgment in favor of Plaintiff and against Defendants for each violation alleged in the Complaint;

C. Enter a permanent injunction to prevent future violations of the FTC Act and the TSR by Defendants;

D. Award such relief as the Court finds necessary to redress injury resulting from Defendants' violations of the FTC Act and the TSR, including but not limited to, the disgorgement of ill-gotten monies, rescission or reformation of contracts, restitution, and the refund of monies paid;

E. Award Plaintiff monetary civil penalties against each Defendant for each violation of the TSR alleged in Counts II through VII of this Complaint.

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

Dated: May 5, 2011

Respectfully submitted,

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