

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by _____ D.C.
NOV 18 2009
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. - MIAMI

Case No. _____

09-23507

CIV. - GOLD

McALLEN

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Kirkland Young, LLC, a limited liability
company, and

David Botton, individually and as manager of
Kirkland Young, LLC,

Defendants.

COMPLAINT FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC"), for its Complaint alleges:

1. The FTC brings this action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. § 6101 *et seq.*, to obtain temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, 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), and in violation of the Telemarketing Sales Rule, 16 C.F.R. Part 310, in

connection with the marketing and sale of mortgage loan modification and foreclosure relief services.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and 6105(b).

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

PLAINTIFF

4. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. The FTC also enforces the Telemarketing Act, 15 U.S.C. §§ 6101-6108. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the Telemarketing Sales Rule, 16 C.F.R. Part 310, which prohibits deceptive and abusive telemarketing acts or practices.

5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the Telemarketing Sales Rule and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), 57b, 6102(c), and 6105(b).

DEFENDANTS

6. Defendant Kirkland Young, LLC (“Kirkland Young”) is a Florida limited liability company with its principal place of business in the Southern District of Florida. Kirkland Young transacts or has transacted business in this District and throughout the United States. At all times

material to this Complaint, acting alone or in concert with others, Kirkland Young has advertised, marketed, distributed, or sold loan modification and foreclosure relief services to consumers throughout the United States.

7. Defendant David Botton is the managing member of Kirkland Young. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Kirkland Young, including the acts and practices set forth in this Complaint. Defendant Botton resides in this district and in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

COMMERCE

8. 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 ACTIVITIES

9. Since at least early 2008, Defendants, acting alone or in concert with others, have engaged in a course of conduct to advertise, market, offer to sell, and sell to consumers mortgage loan modification and foreclosure relief services.

10. Defendants initiate outbound telephone calls to and receive inbound telephone calls from consumers throughout the United States to induce the purchase of loan modification and foreclosure relief services.

11. As part of their outbound telemarketing effort, Defendants have telephoned consumers. Defendants have reached the consumers directly and spoken with them or left

messages on the consumers' answering machines and voice mail requesting return calls. For example, Defendants have left the following message by telephone or messages similar to it:

We did receive your application for loan modification, and we do understand that you are having issues paying your monthly mortgage payment at this time. We would like to approve you for a loan modification on your current home mortgage. This procedure can help you avoid foreclosure. We do understand times are tough and we would like to work together to achieve a monthly payment that is affordable to you in your current hardship. Please call me. It's 8:15.

Again this is Jeffery Wilkinson in the Loan Modification Department at (866) 554-3879, again that is (866) 554-3879. Thank you.

12. In numerous instances, consumers who have received the telephone messages from Defendants have had home mortgage loans and were having difficulty making their monthly mortgage loan payments. In numerous instances, consumers had already contacted their mortgage lenders or servicers seeking modification of their loans. The telephone messages used by Defendants have led numerous consumers to believe they have been contacted by their mortgage lenders or servicers.

13. Consumers who have returned calls to the telephone numbers in the messages left by Defendants are put in contact with Defendants' telemarketers. In this way, Defendants have led consumers to believe that they have been referred to Kirkland Young by their mortgage lenders or servicers or that Kirkland Young is affiliated with their mortgage lender or servicer.

14. Whether consumers are initially contacted with a telephone message or a live call from a telemarketer, Defendants attempt to sell their loan modification and foreclosure relief

services to the consumers they contact. As part of their sales pitch, Defendants represent that they will work with the consumers to attain loan modifications with substantially lower monthly payments that each consumer can afford to pay and thereby avoid foreclosure. In numerous instances, Defendants have discussed specific interest rates and monthly payments that will be part of the loan modification or ranges of interest rates or monthly payments the modification will attain. The monthly payments and interest rates discussed by Defendants have been substantially lower than the consumers' current obligations on their home mortgage loans.

15. Defendants have represented that Kirkland Young will obtain or is highly likely to obtain loan modifications with substantially lower monthly payments that each consumer can afford to pay.

16. In numerous instances, Defendants have also represented that they will stop foreclosure or that it is their job to save the consumer's home from foreclosure.

17. In numerous instances, Defendants have also represented they have an affiliation with the consumers' lender.

18. During their sales pitch, Defendants request payment of an initial fee by debit or credit cards or telephone checks to begin the process of loan modification. Numerous consumers have paid the fee over the telephone, before receiving any proposed agreement or other documents regarding the services offered by Kirkland Young.

19. After requesting payment of a fee over the telephone, Defendants send a package of documents to consumers including a welcome letter, a "Loan Mitigation/Modification" contract, and other forms and documents to complete and return.

20. The welcome letter reinforces the representations that Kirkland Young will obtain a loan modification with affordable monthly payments and save their clients' homes from

foreclosure. For example, one such letter states: “By taking this important first step you are on track to affordable payments, and most importantly to keeping your home for years to come.”

21. Defendants also send an instruction letter to clients of Kirkland Young which states “we would like to welcome you to your first step at attaining an affordable mortgage” and “we are here every step of the way towards an affordable mortgage that will keep you and your family in your home for years to come!” The letter instructs consumers that, if their lender contacts them, they should tell their lenders that the consumers have hired Kirkland Young and that the lender should contact Kirkland Young.

22. In numerous instances, Defendants fail to obtain the promised mortgage loan modifications that will make consumers’ mortgage payments substantially more affordable.

VIOLATIONS OF THE FTC ACT

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

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

Count I

25. In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, or sale of loan modification or foreclosure relief services, Defendants have represented, directly or indirectly, expressly or by implication, that Defendants will obtain for consumers mortgage loan modifications, in all or virtually all instances, that will make their mortgage payments substantially more affordable.

26. In truth and in fact, Defendants do not obtain for consumers mortgage loan modifications, in all or virtually all instances, that will make their mortgage payments substantially more affordable.

27. Therefore, Defendants' representation as set forth in Paragraph 25 of this Complaint 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 II

28. In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, or sale of mortgage loan modification or foreclosure relief services, Defendants have represented directly or indirectly, expressly or by implication, that Defendants are consumers' mortgage lenders or servicers, or are affiliated with, working with, or authorized by consumers' mortgage lenders or servicers.

29. In truth and in fact, Defendants are not consumers' mortgage lenders or servicers, or are not affiliated with, working with, or authorized by consumers' mortgage lenders or servicers.

30. Therefore, Defendants' representation as set forth in Paragraph 28 of this Complaint 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).

THE TELEMARKETING SALES RULE

31. 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 *et seq.*, in 1994. The FTC adopted the original Telemarketing Sales Rule in 1995, extensively amended it in 2003, and amended certain sections thereafter.

32. Defendants are “sellers” or “telemarketers” engaged in “telemarketing,” as defined by the TSR, 16 C.F.R. § 310.2(z), (bb), and (cc).

33. The TSR prohibits sellers and telemarketers from misrepresenting, directly or by implication, in the sale of goods or services, any of the following material information:

- (a) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2)(iii); or
- (b) A seller’s or telemarketer’s affiliation with, or endorsement or sponsorship by, any person or government entity. 16 C.F.R. § 310.3(a)(2)(vii).

34. 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).

VIOLATIONS OF THE TELEMARKETING SALES RULE

Count III

35. In numerous instances, in the course of telemarketing loan modification or foreclosure rescue services, Defendants have misrepresented, directly or by implication, a material aspect of the performance, efficacy, nature or central characteristic of such services, including that Defendants will obtain for consumers mortgage loan modifications, in all or virtually all instances, that will make their mortgage payments substantially more affordable.

36. Defendants' acts or practices, as described in Paragraph 35 above, violate Section § 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii).

Count IV

37. In numerous instances, in connection with the telemarketing of loan modification or foreclosure rescue services, Defendants have misrepresented, directly or by implication, that Defendants are part of, affiliated with or endorsed by lenders of consumers to whom they offer their loan modification or foreclosure relief services.

38. Defendants' acts or practices, as described in Paragraph 37 above, violate Section § 310.3(a)(2)(vii) of the TSR, 16 C.F.R. § 310.3(a)(2)(vii).

CONSUMER INJURY

39. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants' violations of the FTC Act and the TSR. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

40. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

41. Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR, including the rescission or reformation of contracts, and the refund of money.

PRAYER FOR RELIEF

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


- 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 preliminary injunctions, appointment of a receiver over the corporate Defendant, immediate access to records, and an order freezing assets;
- B. Enter a permanent injunction to prevent future violations of the FTC Act and the TSR by Defendants;
- C. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and the TSR, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies; and

D. 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.

Respectfully submitted,

WILLARD K. TOM
General Counsel

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