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JONATHAN E. NUECHTERLEIN
General Counsel

DANIELLE ESTRADA (DC Bar No. 494517)
KATHLEEN DAFFAN (DC Bar No. 991729)
Federal Trade Commission
600 Pennsylvania Avenue NW
Mailstop: CC-8528
Washington, DC 20580
Tel. (202) 326-2630 (Estrada)
Tel. (202) 326-2727 (Daffan)
Fax (202) 326-3395
destrada@ftc.gov
kdaffan@ftc.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

WORDSMART CORPORATION, a
California corporation, also doing business
as WS LEARNING CENTER, and

DAVID A. KAY, individually and as the
President and CEO of WordSmart
Corporation,

Defendants.

Case No.
'14CV2348 AJB RBB

**COMPLAINT FOR
PERMANENT INJUNCTION
AND OTHER EQUITABLE
RELIEF**

1 Plaintiff, the Federal Trade Commission (“FTC” or “the Commission”), for its
2 Complaint alleges:

3 1. The FTC brings this action under Sections 13(b) and 19 of the Federal
4 Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the
5 Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing
6 Act”), 15 U.S.C. §§ 6101-6108, as amended, to obtain temporary, preliminary, and
7 permanent injunctive relief, rescission or reformation of contracts, restitution, the
8 refund of monies paid, disgorgement of ill-gotten monies, and other relief for
9 Defendants’ violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the
10 FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, as amended.

11 **SUMMARY OF THE CASE**

12 2. Defendants have targeted parents of school-age children, and have
13 used deceptive practices to take millions of dollars from such families at least as
14 far back as January 2010. In marketing the “WordSmart” educational goods and
15 services to consumers throughout the United States, Defendants have used illegal
16 methods and made false or unsubstantiated claims in media such as a television
17 infomercial.

18 3. Defendants have often called consumers with school-age children,
19 referred to their children by name, and misrepresented that the child in question
20 had expressed interest in a WordSmart good or service. In some instances,
21 Defendants have claimed an affiliation with the child’s school or the administrators

1 of a standardized test such as the SAT. Defendants have also repeatedly called
2 consumers whose numbers are registered on the “do-not-call” registry (the
3 “National Do Not Call Registry” or “Registry”). In addition, they have refused to
4 honor consumers’ requests to stop calling and have “abandoned” numerous calls,
5 i.e., failing to connect a consumer to a sales representative within two seconds of
6 the consumer’s greeting.

7 4. During Defendants’ telemarketing and other advertising they have
8 also made false or unsubstantiated claims about WordSmart goods and services.
9 For example, Defendants have falsely claimed that consumers who use them will
10 learn 10 to 100 times faster, that WordSmart goods and services will improve letter
11 grades by at least one GPA point, and that WordSmart offers a risk-free 30-day
12 trial period.

13 5. Defendants’ deceptive sales pitches violate the FTC Act, and their
14 aggressive telemarketing campaigns violate the TSR’s restrictions against
15 harassing consumers and calling individuals who have listed their phone numbers
16 on the National Do Not Call Registry.

17 **JURISDICTION AND VENUE**

18 6. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
19 §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c), and
20 6105(b).

21

1 others, WordSmart manufactured, advertised, marketed, promoted, offered for sale,
2 sold, and distributed educational goods and services to consumers throughout the
3 United States.

4 11. Defendant David A. Kay formed WordSmart in 1993, oversaw the
5 creation of its goods and services, and has served as majority shareholder and CEO
6 of the Company through the present day. Kay oversees all operations for
7 WordSmart, including the creation, development, and approval of its advertising
8 and promotional materials and the development and evaluation of substantiation
9 for representations contained therein. At all times material to this Complaint,
10 acting alone or in concert with others, Kay formulated, directed, controlled, had the
11 authority to control, or participated in the acts and practices of WordSmart,
12 including the acts and practices set forth in this Complaint. Kay resides in this
13 district and, in connection with the matters alleged herein, transacts or has
14 transacted business in this district and throughout the United States.

15 **COMMERCE**

16 12. At all times material to this Complaint, Defendants have maintained a
17 substantial course of trade in or affecting commerce, as “commerce” is defined in
18 Section 4 of the FTC Act, 15 U.S.C. § 44.

19 **THE TELEMARKETING SALES RULE**

20 13. Congress directed the FTC to prescribe rules prohibiting abusive and
21 deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15

1 U.S.C. §§ 6101-6108. The FTC adopted the original TSR in 1995, extensively
2 amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310.

3 14. The TSR prohibits sellers and telemarketers from misrepresenting,
4 directly or by implication, in the sale of goods or services, any material aspect of
5 the performance, efficacy, nature, or central characteristics of the goods or services
6 that are the subject of a sales offer. 16 C.F.R. § 310.3(a)(2)(iii). It also prohibits
7 sellers and telemarketers from making a false or misleading statement to induce
8 any person to pay for goods or services. 16 C.F.R. § 310.3(a)(4).

9 15. The TSR, as amended in 2003, established a National Do Not Call
10 Registry maintained by the FTC, which lists consumers who do not wish to receive
11 certain types of telemarketing calls. Consumers can register their telephone
12 numbers on the Registry without charge either through a toll-free telephone call or
13 over the Internet at www.donotcall.gov.

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

18 17. The FTC allows sellers, telemarketers, and other permitted
19 organizations to access the Registry over the Internet at
20 www.telemarketing.donotcall.gov, to pay any required fee(s), and to download the
21 numbers not to call.

1 18. Under the TSR, an “outbound telephone call” means a telephone call
2 initiated by a telemarketer to induce the purchase of goods or services or to solicit
3 a charitable contribution. 16 C.F.R. § 310.2(v).

4 19. The TSR prohibits sellers and telemarketers from initiating an
5 outbound telephone call to telephone numbers on the Registry. 16 C.F.R.
6 § 310.4(b)(1)(iii)(B).

7 20. The TSR prohibits sellers and telemarketers from engaging in or
8 causing others to engage in initiating an outbound telephone call to a consumer
9 who has previously stated that he or she does not wish to receive an outbound
10 telephone call made by or on behalf of the seller whose goods or services are being
11 offered. 16 C.F.R. § 310.4(b)(1)(iii)(A).

12 21. The TSR prohibits sellers and telemarketers from abandoning, or
13 causing others to abandon, any outbound telephone call. A telephone call is
14 considered “abandoned” if a person answers it and the person who initiated the call
15 does not connect the call to a sales representative within 2 seconds of the
16 completed greeting of the person answering the call. 16 C.F.R. § 310.4(b)(1)(iv).

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

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DEFENDANTS' BUSINESS PRACTICES

23. Defendants WordSmart and David Kay (collectively, “Defendants”) have manufactured, advertised, marketed, promoted, offered for sale, sold, and distributed educational goods and services to consumers throughout the United States at least as far back as January 2010. These goods and services have included an SAT/ACT preparation product as well as “Excellence Packs,” which Defendants advertised using a 30-minute infomercial featuring Alex Trebek.

24. The retail price for Defendants’ goods and services has ranged from approximately \$15 to \$300. From January 2010 to present, total sales revenue for Defendants’ goods and services has exceeded \$18 million.

25. Defendants have primarily targeted their advertising to parents who would like to improve the academic performance of their school-age children or help them prepare for a standardized test such as the SAT or ACT.

26. Defendants have advertised their goods and services through a wide variety of media, including outbound telemarketing calls, television infomercials, direct mail campaigns, and the Internet.

Defendants’ Deceptive and Abusive Telemarketing Campaign

27. From at least January 2010 through the present day, Defendants have engaged in a plan, program, or campaign to manufacture, advertise, market, promote, offer for sale, sell, or distribute educational goods and services through interstate telephone calls to consumers throughout the United States.

1 28. Defendants have often contacted consumers initially through
2 unsolicited telemarketing calls made by WordSmart employees or intermediaries
3 working on behalf of Defendants. During these sales calls, the telemarketers have
4 usually used the name of a school-age child living in the home. They have
5 frequently stated that the child expressed an interest in WordSmart goods or
6 services. In addition, they have often given parents the impression that they were
7 affiliated with the child's school or with the administrators of a standardized test
8 such as the ACT or the SAT. In fact, none of these things were true.

9 29. During telemarketing calls, Defendants have guaranteed consumers'
10 results from using the WordSmart program for only 20 minutes a day, twice a
11 week, for a total of 20 hours. Specifically, Defendants have guaranteed that these
12 20 hours will improve the following: letter grades by at least 1 GPA point; SAT
13 scores by at least 200 points; ACT scores by at least 4 points; GRE and GMAT
14 scores by at least 100 points; and IQ scores. These claims are false or were not
15 substantiated at the time the representations were made.

16 30. During telemarketing calls, Defendants have often told consumers that
17 WordSmart uses five modes of learning, which can teach people to learn a word
18 after viewing it only 1-5 times, instead of having to view that same word up to 50
19 times without WordSmart. This claim is false or was not substantiated at the time
20 the representation was made.

21

1 31. During telemarketing calls, Defendants have told consumers that
2 WordSmart offers a risk-free 30-day trial period during which they could return the
3 goods or services for any reason and receive a full refund. Yet, as described below,
4 Defendants have often failed to honor their promise to provide a full refund for any
5 reason.

6 32. Defendants have been “seller[s]” and/or “telemarketer[s]” engaged in
7 “telemarketing,” and Defendants have initiated, or have caused telemarketers to
8 initiate, “outbound telephone call[s]” to consumers to induce the purchase of goods
9 or services, as those terms are defined in the TSR, 16 C.F.R. § 310.2(v), (aa), (cc),
10 and (dd).

11 33. Defendants have engaged in telemarketing by a plan, program, or
12 campaign conducted to induce the purchase of goods or services by use of one or
13 more telephones and which involves more than one interstate telephone call.

14 34. To induce the purchase of WordSmart goods or services, Defendants
15 have initiated, or caused others to initiate, outbound telephone calls to telephone
16 numbers on the National Do Not Call Registry.

17 35. To induce the purchase of WordSmart goods or services, Defendants
18 have initiated, or caused others to initiate, outbound telephone calls to consumers
19 who previously stated that they did not wish to receive further calls by or on behalf
20 of the Defendants.

21

1 36. Defendants have abandoned outbound telephone calls by failing to
2 connect the call to a sales representative within two seconds after the consumer's
3 completed greeting.

4 **Defendants' Failure to Substantiate Their Advertisements**

5 37. To induce consumers to purchase WordSmart goods and services,
6 Defendants disseminated or caused to be disseminated advertisements, including,
7 but not limited to, the attached Exhibits A through C.

8 38. The advertisements contain, among other things, the following
9 statements:

10 A. Television: 30-Minute Advertisement (Exhibit A – DVD and
11 Transcript of DVD)

- 12 • “Learn 10 to 100 times faster with Wordsmart.” *See* Ex. A at 9,
13 18, 26.
- 14 • “WordSmart’s five modes of learning teach people to learn a
15 word after viewing it just one to five times, instead of having to
16 view that same word 20 to 50 times.” *See* Ex. A at 9, 18.
- 17 • WordSmart’s “award-winning speed-reading program is
18 designed to improve reading speed up to ten times, while
19 improving comprehension.” *See* Ex. A at 11, 20, 27.
- 20 • “Wordsmart guarantees your child can increase letter grades
21 and standardized test scores and improve their chances of

1 acquiring the college degree of their choice.” *See* Ex. A at 9-10,
2 18.

- 3 • “[G]uaranteed to improve letter grades, SAT, ACT, GRE,
4 GMAT and IQ scores” *See* Ex. A at 6.
- 5 • “[G]uaranteed way to increase SAT scores an unprecedented
6 200 points.” *See* Ex. A at 25-26.
- 7 • “And adults can enjoy ... greater income potential.” *See* Ex. A
8 at 10, 18-19.
- 9 • “Call now to try the complete WordSmart system through this
10 exclusive television offer risk-free for 30 days for just
11 \$14.95.... That’s right, just \$14.95 to try the complete
12 WordSmart system risk-free. After using Wordsmart for 30
13 days, if you or your child doesn’t begin reading, writing and
14 speaking better, simply send it back and we’ll refund your
15 \$14.95.” *See* Ex. A at 10, 19, 26-27.
- 16 • “Wordsmart can help any student read, write and speak better in
17 just 30 days. Guaranteed.” *See* Ex. A at 10, 19, 26.

18 B. Website: www.wordsmart.com (Exhibit B)

- 19 • “Score higher in every class and on every test.” *See* Ex. B at 30-
20 36, 38.
- 21 • “Get into the college of your choice.” *See* Ex. B at 37.

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- “At WordSmart, we have developed a comprehensive Vocabulary and Reading program that insures [sic] your Vocabulary will increase to the level of top University entrants.” *See* Ex. B at 39.
- “After just 20 hours with the WordSmart program, you will have internalized so much knowledge of the English language that you will be able to identify the meaning of ANY word you come across on your college prep tests and beyond!” *See* Ex. B at 38.
- WordSmart will improve: letter grades by at least 1 GPA point; SAT scores by at least 200 points; ACT scores by at least 4 points; GRE and GMAT scores by at least 100 points; and IQ scores. Consumers can achieve these benefits with only 20 minutes of study per day, twice a week, for a total of 20 hours. *See* Ex. B at 33-34 (letter grade claim); 30-36 (SAT claim); 32 (ACT claim); 33 (GRE, GMAT claims); 35 (IQ score claim).
- “100% Money Back 30-Day Guarantee: ...[G]o ahead and try WordSmart for 30 days. If for any reason you are unsatisfied with the product, simply return it for a full refund of the purchase price. It’s that easy.” *See* Ex. B at 30.

1 C. Sample Direct Mail flyer addressed to “Jennifer Johnson” (Exhibit C)

- 2 • “Jennifer, find out how you can improve Chloe’s SAT score
3 200 points or more – Guaranteed.” *See* Ex. C at 40.

4 **Defendants’ Written Claims**

5 39. A few days after charging the consumer’s credit card, Defendants
6 have typically sent the consumer a package of software, along with materials
7 relating to their goods and services.

8 40. In the written packages, Defendants have made many of the same
9 claims and guarantees about their goods and services that they have made to
10 consumers through telemarketing and other advertising.

11 A. SAT/ACT preparation product:

- 12 • “It’s fast – 10 to 100 times faster than unstructured study.”
13 • “WordSmart will increase SAT, ACT, GRE, & IQ test scores.”
14 • “Studies have shown that, on average, 20 hours of study with
15 WordSmart will improve students’ SAT combined scores by at
16 least 200 points or their ACT by 4 or more points.”

17 B. “Progressive Reader” product:

- 18 • “Reading speed and comprehension will increase after only
19 several hours of use.”

20 C. “Satisfaction Guarantee” page included with WordSmart products:

- 21 • “If for any reason you are not satisfied with our products or

1 services in the first 30 days, we will exchange your software or
2 give you a full refund for the product amount. It's your choice!"

3 D. Letter signed by David A. Kay as President of WordSmart included
4 with products:

- 5 • "The WordSmart system has consistently been recognized as
6 the most effective way to improve test taking ability, grades,
7 and income potential."

8 41. Consumers who visited the landing page of the WordSmart website,
9 saw the infomercial with Alex Trebek, or received a call from a WordSmart
10 telemarketer were presented with many of the above claims. Thousands of
11 consumers reasonably relied on these claims and spent millions of dollars each
12 year on Defendants' goods or services in an attempt to improve their children's
13 future prospects. Yet, Defendants did not have evidence to substantiate any of
14 these claims at the time they were made. Further, based on the experience of some
15 consumers who purchased WordSmart goods or services, Defendants' claims about
16 their refund policies were false.

17 **Consumers Had to Fight Defendants to Obtain Refunds**

18 42. Defendants' stated refund policy is "100% Money Back 30-Day
19 Guarantee: ...[G]o ahead and try WordSmart for 30 days. If for any reason you are
20 unsatisfied with the product, simply return it for a full refund of the purchase price.
21

1 It's that easy." This guarantee has appeared repeatedly on the WordSmart website,
2 as well as in the infomercial and in Defendants' telemarketing calls to consumers.

3 43. Yet consumers were not guaranteed a full refund for any reason.
4 When consumers have requested a refund within 30 days, Defendants have often
5 told them that they must complete additional tasks. For example, Defendants have
6 required that consumers use specific portions of the software and complete a
7 specified number of training modules, or answer a series of questions about the
8 product. In some cases, Defendants have refused to provide a refund within the 30-
9 day trial period even when the consumer complied with these additional,
10 previously undisclosed, hurdles.

11 44. Consumers who made multiple refund requests and complied with
12 Defendants' additional conditions often did not receive refunds unless they also
13 complained to law enforcement, their credit card companies, or the Better Business
14 Bureau.

15 **VIOLATIONS OF THE FTC ACT**

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

18 46. Misrepresentations or deceptive omissions of material fact constitute
19 deceptive acts or practices prohibited by Section 5(a) of the FTC Act. 15 U.S.C. §
20 45(a).

21

COUNT ONE

Misrepresentations in Violation of Section 5(a) (15 U.S.C. § 45(a))

47. In numerous instances, in connection with the manufacturing, advertising, marketing, promotion, offering for sale, sale, or distribution of WordSmart goods and services, Defendants have represented, directly or indirectly, expressly or by implication, that:

- A. Consumers' children expressed an interest in WordSmart goods or services;
- B. WordSmart is affiliated with the administrators of a standardized test or a consumer's local school;
- C. Consumers who use WordSmart will learn 10 to 100 times faster;
- D. Students who use WordSmart will score higher in every class and on every test;
- E. WordSmart's 5 modes of learning teach consumers how to learn a word after just 1-5 times, instead of having to view that same word up to 50 times;
- F. WordSmart's award-winning speed reading program will improve reading speed up to 10 times, while improving comprehension;

1 G. After just 20 hours with the WordSmart program, students will
2 have internalized so much knowledge of the English language
3 that they will be able to identify the meaning of any word they
4 come across on college preparation tests and beyond;

5 H. WordSmart will improve: letter grades by at least 1 GPA point;
6 SAT scores by at least 200 points; ACT scores by at least 4
7 points; GRE and GMAT scores by at least 100 points; and IQ
8 scores. Consumers can achieve these benefits with only 20
9 minutes of study per day, twice a week, for a total of 20 hours;
10 and

11 I. WordSmart provides a 100% Money Back 30-Day Guarantee,
12 which states that for 30 days following the purchase, consumers
13 can return the goods or services for any reason and get a full
14 refund of the purchase price.

15 48. In truth and in fact, the representations set forth in Paragraph 47 are
16 false or were not substantiated at the time the representations were made.

17 49. Therefore, the making of the representations set forth in Paragraph 47
18 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act,
19 15 U.S.C. § 45(a).

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1 G. After just 20 hours with the WordSmart program, students will
2 have internalized so much knowledge of the English language
3 that they will be able to identify the meaning of any word they
4 come across on college preparation tests and beyond;

5 H. WordSmart will improve: letter grades by at least 1 GPA point;
6 SAT scores by at least 200 points; ACT scores by at least 4
7 points; GRE and GMAT scores by at least 100 points; and IQ
8 scores. Consumers can achieve these benefits with only 20
9 minutes of study per day, twice a week, for a total of 20 hours;
10 and

11 I. WordSmart provides a 100% Money Back 30-Day Guarantee,
12 which states that for 30 days following the purchase, consumers
13 can return the goods or services for any reason and get a full
14 refund of the purchase price.

15 51. Defendants' acts and practices, as described in Paragraph 50 above,
16 are deceptive telemarketing acts or practices that violate the TSR, 16 C.F.R. §
17 310.3(a)(2)(iii) and/or 16 C.F.R. § 310.3(a)(4).

18 **COUNT THREE**

19 **Violating the National Do Not Call Registry**

20 52. In numerous instances, in connection with telemarketing, Defendants
21 have initiated, or caused others to initiate, an outbound telephone call to a

1 consumer's telephone number on the National Do Not Call Registry in violation of
2 the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

3 **COUNT FOUR**

4 **Ignoring Entity-Specific Do Not Call Requests**

5 53. In numerous instances, in connection with telemarketing, Defendants
6 have initiated, or caused others to initiate, an outbound telephone call to a
7 consumer who has previously stated that he or she does not wish to receive an
8 outbound telephone call made by or on behalf of the seller whose goods or services
9 are being offered, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A).

10 **COUNT FIVE**

11 **Abandoning Calls**

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

17 **CONSUMER INJURY**

18 55. Consumers in the United States have suffered and will continue to
19 suffer substantial injury as a result of Defendants' violations of the FTC Act and
20 the TSR. In addition, Defendants have been unjustly enriched as a result of their
21 unlawful acts or practices. Absent injunctive relief by this Court, Defendants are

1 likely to continue to injure consumers, reap unjust enrichment, and harm the public
2 interest.

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

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

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

16 **PRAYER FOR RELIEF**

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

- 20 A. Enter judgment in favor of Plaintiff for each violation alleged in this
21 Complaint;

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- 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.

Dated: October 3, 2014

Respectfully submitted,
Jonathan E. Nuechterlein
General Counsel


Danielle Estrada
Tel: (202) 326-2630
E-mail: destrada@ftc.gov

Kathleen Daffan
Tel: (202) 326-2727
E-mail: kdaffan@ftc.gov

Federal Trade Commission
600 Pennsylvania Ave., NW
Mail Stop CC-8528
Washington, DC 20580
Fax: (202) 326-3395

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION