

[Filed 11/14/08]

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel.)
THOMAS J. MILLER,)
ATTORNEY GENERAL OF IOWA,)
99AG25112)

Plaintiff,)

vs.)

MIDWEST PUBLISHING-DN, INC.,)
a Michigan corporation;)

JOHN F. McCALLUM,)
President of Midwest Publishing-DN, Inc.,)
in his individual and corporate capacities; and)

STANISLAW BURZYNSKI,)
Vice President of Sales of)
Midwest Publishing-DN, Inc.,)
in his individual and corporate capacities,)

Defendants.)

Equity No. CE 60511

PETITION IN EQUITY

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The State of Iowa ex rel. Attorney General Thomas J. Miller, through Assistant Attorney General Steve St. Clair, states as follows for its cause of action against Midwest Publishing-DN, Inc. (hereinafter "Midwest Publishing" or "Midwest"), and the above-captioned individuals, in their corporate and individual capacities:

INTRODUCTION

1. Midwest Publishing, a Michigan corporation headquartered in Phoenix, Arizona, makes fundraising calls to Iowa residents and businesses from a phone room in St. Paul,

Minnesota. The calls request donations to a charity or non-profit that has contracted with Midwest to let Midwest solicit contributions in its name. In exchange, the charity or non-profit receives about 15% of total donations, and Midwest keeps the remainder. Midwest employs many telemarketers to solicit donations from Iowans. Midwest provides the telemarketers scripts and instructions that encourage deception. Misleading aspects of the scripts and instructions are then magnified and supplemented by telemarketers whose rate of pay depends upon their success at persuading people to donate. These telemarketers – the majority of whom are on parole or probation for criminal offenses – consistently mislead Iowans about who they are, their ties to Iowa, the nature of their fundraising effort, and the deductibility of donations, among other things. Generous Iowans are being subjected to the ongoing abuse of their charitable impulses by these defendants, and the Attorney General seeks to end the abuse.

VENUE

2. Venue is proper in Polk County, Iowa, because Defendants have engaged and, upon information and belief, continue to engage in the activities that are the subject of this Petition in Polk County, Iowa. Moreover, upon information and belief Defendants do business in Polk County and one or more victims of the practices in question reside in Polk County. Iowa Code §714.16 (10).

PARTIES

3. The Iowa Attorney General is authorized to bring this action on behalf of the State of Iowa by Iowa Code §§ 714.16 (7).

4. Midwest Publishing-DN, Inc. was incorporated in Michigan in 1993 and is currently headquartered in Phoenix, Arizona. Midwest is a professional fundraiser with phone rooms in

St. Paul, Minnesota and Adrian, Michigan. Midwest enters into contracts with charities or non-profits to engage in the telephone solicitation of donations in Iowa and other states.

5. John F. McCallum of Phoenix, Arizona is the President and owner of Midwest Publishing. Mr. McCallum actively directs the fundraising and other activities of Midwest. Mr. McCallum is responsible in his individual and corporate capacities for the violations of law set forth herein.

6. Stanislaw Burzynski of Woodbury, Minnesota is Vice President of Sales of Midwest Publishing and manages the St. Paul call center. Mr. Burzynski is responsible in his individual and corporate capacities for the violations of law set forth herein.

JURISDICTION

7. The Iowa Consumer Fraud Act, Iowa Code § 714.16 (“the Consumer Fraud Act”) provides at subsection 714.16(2)(a) (in pertinent part):

The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

8. Iowa Code § 714.16 (1) provides the following definitions:

(f) “Deception” means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

(n) “Unfair practice” means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.

9. Iowa Code § 714.16 (7) provides, in pertinent part:

Except in an action for the concealment, suppression, or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction, to allege or to prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth.

10. In describing remedies under the Consumer Fraud Act, Iowa Code § 714.16 (7)

provides in pertinent part as follows:

If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice. The court may make orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices, or which are necessary to restore to any person in interest any moneys ... which have been acquired by means of a practice declared to be unlawful by this section ...

In addition to the remedies otherwise provided for in this subsection, the attorney general may request and the court may impose a civil penalty not to exceed forty thousand dollars per violation against a person found by the court to have engaged in a method, act, or practice declared unlawful under this section; provided, however, a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person. In addition, on the motion of the attorney general or its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of intentional violation of a ... permanent injunction issued under authority of this section.

FACTUAL ALLEGATIONS

11. The Iowa Narcotics Officers Association (“INOA”) was formed in 2004, and its stated mission is to provide education and training and to facilitate the establishment and growth of partnerships and communication between members.

12. Effective September 1, 2007 INOA entered into a contract with Midwest Publishing

authorizing Midwest to engage in telemarketing solicitations of Iowa residents and Iowa businesses on behalf of INOA for a three year period. Individual Iowans are asked to simply donate money to INOA. Iowa businesses are asked to sponsor a small acknowledgment in "The Iowa Narcotics Officer," a magazine Midwest has contracted to publish twice each year. Each magazine is to be twelve or fewer pages in black and white, and 400 copies are to be produced.

13. The fundraising contract between the INOA and Midwest provides that 85% of all money collected by Midwest in INOA's name is kept by Midwest, and that the other 15% is provided to INOA. The contract also provides that the lists of Iowa residents who donate to INOA are the sole property of Midwest, not INOA, and therefore under the contract Midwest may use those donor lists to solicit for other entities or may market the lists of Iowans to others.

14. Under INOA's fundraising arrangement with Midwest, Iowans mail their donations to a Des Moines address; however, that address is a commercial mail drop that forwards all the mail, unopened, to Midwest's corporate office in Phoenix, where donations are deposited.

15. Upon information and belief, Midwest incurs the expense of maintaining a commercial mail drop in Des Moines in order to create the impression in the minds of would-be donors that the connection to Iowa is greater than is in fact the case.

16. Midwest also makes telephone fundraising appeals to Iowans on behalf of Operation Lookout, National Center for Missing Youth, of Everett, Washington. According to Midwest's professional fundraiser filings with the Attorney General's Office, Operation Lookout "offers tools of home and direction when a family's child vanishes." Midwest's fundraising contract guarantees Operation Outlook 15% of gross revenues collected. Lists of Operation Lookout contributors are managed, maintained and stored by Midwest, at least during the term of the

fundraising agreement.

17. According to the website of Charity Navigator, a non-profit organization that rates charities on the basis of such factors as the amount of donated money spent on fundraising rather than on the underlying charitable mission, in 2006 Operation Outlook committed only about 29% of its revenues to charitable purposes (“program expenses”) and rated zero stars on a four-star assessment scale. The Better Business Bureau’s Wise Giving website indicates that it was unable to evaluate Operation Lookout, because “[t]his Charity did not provide requested information.”

18. Midwest also makes telephone fundraising appeals to Iowans on behalf of Firefighters Charitable Foundation (“FCF”) of Farmingdale, New York. According to Midwest’s professional fundraiser filings with the Attorney General’s Office, FCF’s primary focus is to provide “financial assistance to individuals who have been affected by a fire or disaster and to support other charities, institutions, and volunteer fire departments.” FCF receives 15%, and Midwest 85%, of all proceeds collected. Midwest owns and controls the list of Iowans who make donations.

19. According to Charity Navigator, in 2006 FCF committed only about 15% of its revenues to its charitable mission (“program expenses”) and rated zero stars on a four-star assessment scale.

20. The telephone fundraisers employed by Midwest are either paid a direct commission on the donations received (calls to businesses) or paid on a scale that involves a higher hourly rate for fundraisers who generate more donations (calls to residences). Thus, all of Midwest’s telephone fundraisers have a direct financial stake in persuading Iowans to contribute.

21. At any given time approximately 50 % to 60 % of Midwest's telephone fundraisers are on parole or probation; Midwest's hiring of offenders includes felons, drug offenders, and persons charged with theft or theft-related crimes.

22. If a person solicited by Midwest makes a donation to INOA, about six weeks later Midwest solicits that person again on behalf of one of the other organizations for which Midwest is engaged in Iowa fundraising, for example, Operation Lookout. Several weeks after that, the person is solicited again by Midwest, this time to donate to another organization for which Midwest is engaged in Iowa fundraising, for example, Firefighters Charitable Foundation.

23. Would-be donors are never informed that by contributing in response to Midwest's solicitation on behalf of INOA they are subjecting themselves to fundraising appeals for other charities or non-profits that Midwest happens to have solicitation contract with. Such information is material, as it is reasonably likely to affect a person's decision whether to donate.

24. In order to evaluate the content of phone solicitations directed to Iowans by Midwest, it is important to recognize that telephone fundraising efforts enjoy enhanced success if prospective donors believe:

- a) that the individual soliciting the donation is himself or herself part of the charitable organization;
- b) that the call is coming from within Iowa rather than from another state, and is thus a local fundraising effort;
- c) that one's donation will stay in Iowa;
- d) that the contribution is tax deductible; and
- e) that the fundraising is performed infrequently, for example, as part of an annual drive.

Midwest's Solicitation Call to MECCA

25. On October 2, 2007, the Director of the Iowa City office of MECCA Services, a provider of community-based substance abuse services, received a phone call from a representative of Midwest who was soliciting donations on behalf of INOA. Aspects of the solicitation made the Director suspicious, and so the Iowa Attorney General's Office was immediately contacted.

26. The Consumer Protection Division ("CPD") identified Midwest through professional fundraiser registration files as the telemarketer contracted to solicit donations for INOA, and on October 2, 2007 contacted Leann Coakley, Midwest's Director of Compliance. Ms. Coakley indicated that Midwest recorded all fundraising calls, kept the recordings for at least three months and sometimes as long as six months, and that a specified recording could be provided upon request. So the CPD requested the recording of the call to MECCA.

27. On October 4, 2007, Ms. Coakley indicated that the recording in question had been located and reviewed, and that it showed a perfectly good solicitation call. However, she declined to provide the recording to the CPD, and referred the matter to Midwest Vice President Stan Burzynski.

Subpoena for Recordings

28. On October 4, 2007, Mr. Burzynski indicated that he had listened to the recording in question, but he declined to provide a copy to the CPD.

29. On October 4, 2007, the CPD issued a subpoena to Midwest under the authority of Iowa Code § 714.16(3), seeking the recording of the solicitation call to MECCA and recordings of five other pledge-generating solicitation calls made by the same employee ("Bill Senior") on

the same day on behalf of INOA. The subpoena also sought the fundraising scripts and instructions Midwest provided its telemarketers.

30. By letter of October 22, 2007 Midwest produced to the CPD the recording of the October 2, 2007 call to MECCA. However, rather than provide the five subpoenaed recordings of calls by the same solicitor, Midwest produced about fourteen recordings of “representative example calls” by other solicitors.

31. By e-mail of October 24, 2007 the CPD renewed its request for the five subpoenaed recordings of INOA calls by the same Midwest solicitor, but by letter of November 6, 2007 Midwest informed the CPD that “we are unable at this time to produce the specific calls from this caller that you have requested.”

32. By letter of November 12, 2007 Midwest further explained the unavailability of the subpoenaed calls: “Due to space limitations the recordings are routinely cycled out in various random segments to open additional storage space for new recordings. It just so happens that the segment of storage that would have contained the additional recordings you have requested was part of this routine space clearing process.”

33. In a sworn statement provided by Mr. Burzynski on January 30, 2008, Mr. Burzynski indicated that, although the established procedure at the St. Paul phone room is to wait about 30 days before re-using a tape by recording over its contents, after retrieving the call to MECCA he may have misfiled the tape containing the other recordings of Bill Senior’s solicitations on behalf of INOA, resulting in the loss of the other subpoenaed recordings. Mr. Burzynski also indicated that he was aware of no other instance in three to four years of daily tape handling in which the routine was disrupted in this manner rendering recent recordings unavailable.

34. On February 21, 2008 the Consumer Protection Division subpoenaed recordings of solicitations by Midwest telemarketers on behalf of the other two organizations for which Midwest was known to solicit donations from Iowans, namely Operation Lookout and Firefighters Charitable Foundation.

Deceptions/Unfair Practices in Midwest's Solicitation Calls on Behalf of INOA

35. The fundraising call made by Midwest employee "Bill Senior"¹ to MECCA on October 2, 2007 was misleading in the following ways, among others:

- a) The fact that the call was being made by professional fundraiser Midwest Publishing-DN, Inc. was not properly disclosed ("Hi, Bill Senior MPI ...");
- b) The solicitor indicated that he was calling *from* INOA, and misrepresented the name of the organization in a manner that implied a governmental connection ("Calling you from your Iowa State Narcotics Officers ...");
- c) Senior repeatedly implied that he was part of INOA, by referring to INOA's activities in the first person ("... what we're doing is providing free narcotics officers' training ..."; "... we continue to send our officers on undercover assignments ...");
- d) When asked whether he was "with the Iowa State Narcotics Officers' Association," Senior replied "Yes sir";
- e) When asked "where are you located," Senior replied "Our headquarters is in Des Moines ... right here";
- f) Senior twice asserted "We're registered with the state's Attorney General," implying some form of approval or endorsement by the Iowa Attorney General;
- g) Senior repeatedly urged the would-be donor to "hang on to" the part of the later solicitation mailing "with our federal tax I.D. number on it," falsely implying that a donation to INOA would be tax deductible.

¹ "Bill Senior" was later determined to be a phone name, used by a Midwest employee whose foreign-sounding real name was believed to impede fundraising.

36. After the Attorney General brought the MECCA call to Midwest's attention, "Bill Senior" was suspended for a period, estimated by Mr. Burzynski at 3 to 7 days. Midwest made no effort to determine whether recordings of other solicitation calls made by "Bill Senior" on behalf of INOA exhibited comparable problems.

37. Recordings of INOA fundraising solicitations that Midwest provided to the Attorney General as "representative example calls" reflected the following misleading and/or unfair practices:

- a) The fact that the call was being made by Midwest Publishing-DN, Inc., a professional fundraiser, was typically not properly disclosed;
- b) Solicitors repeatedly implied that they were part of INOA, by referring to INOA's activities in the first person ("our officers ..."; "our members ...");
- c) One or more solicitors misrepresented their location ("Where are you guys located?" "In Des Moines.");
- d) Some solicitors urged would-be donors to keep the part of the invoice with "our tax I.D. number," implying that the donation would be tax deductible;
- e) At least one solicitor referred to "our over 900" narcotics officers, when Midwest's instructions to telemarketers refer to "over 250" INOA members;
- f) At least one solicitor said the donation check was to be mailed "into the organization," when in fact it was addressed to INOA but directed to a mail drop controlled by Midwest;
- g) At least one solicitor referred to the donee organization as "our Iowa *State* Narcotics Officers Association," implying a governmental connection that does not exist;²
- h) At least one solicitor said "what we do *every year* sir is call on our business friends ...", suggesting that the fundraising was part of an annual drive, rather than a continuous effort;
- i) At least one solicitor referred to making a donation "*one time on the year*," when in fact donors are contacted more frequently than once a year;

² Italics added, in this and in other excerpts from recordings in which italics appear.

k) At least one solicitor told the would-be donor that “all the money goes back to *Des Moines* ... `cause that’s where the *headquarters* is,” in spite of the fact that the mail drop in Des Moines simply forward the checks on to Midwest in another state.

Deceptions/Unfair Practices in Midwest’s Solicitation Calls on Behalf of FCF

38. Midwest’s solicitation calls on behalf of the Firefighters Charitable Foundation were misleading in the following ways, among others:

- a) The fact that the call was being made by professional fundraiser Midwest Publishing-DN, Inc. was not properly disclosed (“This is Derek Potts with *MPI* ...”);
- b) The solicitor repeatedly implied that he or she was part of the Firefighters Charitable Foundation by referring to FCF’s activities in the first person;
- c) The Midwest representative said that any donation would cover an entire year, but in fact contributors were contacted about every six months;
- d) The solicitor said that the Firefighters Charitable Foundation was “calling on our friends *right here in the state of Iowa*,” as if the caller and/or FCF were in Iowa.

Deceptions/Unfair Practices in Midwest’s Solicitation Calls on Behalf of Operation Lookout

39. Midwest’s solicitation calls on behalf of Operation Lookout, National Center for Missing Children were misleading in the following ways, among others:

- a) The solicitor repeatedly implied that he or she was part of Operation Lookout, by referring to Operation Lookout’s activities in the first person;
- b) The solicitor implied that the fundraiser and/or the charity were in Iowa (“we get our free services to any family *in our state* that has a missing or abducted child ...”; “we’re just calling our fine friends *here in the state* ...”);
- c) The presentation suggested that the call was made as part of a discrete “fundraiser” that was to end in two weeks, when in fact, upon information and belief, such fundraising calls are ongoing and virtually perpetual;
- d) The callers suggested that “gold” and “silver” pledges are set at established amounts, when in fact solicitors evidently vary the amounts at will (“Our gold pledge goes out for sixty ...”; “...our gold pledge goes out this year for a hundred dollars ...”).

Deceptions/Unfair Practices in Midwest's Scripts and Instructions

40. Midwest's own prescribed fundraising scripts and instructions for its telemarketers reflect the following misleading and/or unfair practices:

- a) Scripts inadequately disclose that the call is being made by Midwest Publishing-DN, Inc., a professional fundraiser;
- b) Scripts refer to "mailing headquarters in Des Moines," when in fact the Des Moines address is just a commercial mail drop and all mail is forwarded unopened from that address to Midwest;
- c) Scripts for calling businesses represent to each and every solicited business that "a lot of [INOA] members identify with your business ...";
- d) Scripts direct the solicitor to continue to press for a donation even after a would-be business donor has *twice* said "no";
- e) Instructions to telemarketers on how to respond to common questions instruct them to make the following false statements: "we're non-profit"; "this is the only chance I have to get you involved"; "[the non-profit] only calls when its really, really important"; "we just checked our records before calling and you haven't helped out yet" (in response to the consumer saying he/she has already donated); and "[the non-profit] has been in existence for decades."
- f) Telemarketers are also instructed to respond to the question "How do I know you're a legitimate association" by saying (in part): "... you make your check directly payable to the association." This invites the misimpression that the actual donation goes to the non-profit, when in fact the money is routed to the professional fundraiser and only about 15% goes to the non-profit.

CONSUMER FRAUD ACT VIOLATIONS

- 41. Paragraphs 1 through 40 are incorporated herein by reference.
- 42. Defendants' fundraising practices violate the prohibition of Iowa Code § 714.16 (2)(a) against misleading, deceptive, unfair, and omissive acts and practices, and otherwise violate that provision of Iowa law by making misleading affirmative representations about how donations would be used.

43. Although it is not necessary to establish reliance, damages or intent to deceive to obtain injunctive relief or reimbursement under the Consumer Fraud Act (*see* paragraph 16 above), establishing these factors, particularly intent, is nevertheless relevant *inter alia* to the Court's determination of the appropriate scope of injunctive relief and the appropriate amount of civil penalties. Those acts and practices of Defendants in violation of subsection (2)(a) of the Consumer Fraud Act as alleged in this Count did in fact induce reliance on the part of consumer victims, did in fact cause damage to consumers, and/or were in fact intentional.

PRAYER

Plaintiff prays the Court grant the following relief:

A. Pursuant to Iowa Code § 714.16 (7), and upon further request by Plaintiff addressed to the Court, enter a temporary restraining order and preliminary injunction restraining Defendants, and each of them, and (as applicable) such Defendant's directors, officers, principals, partners, employees, agents, servants, representatives, subsidiaries, affiliates, successors, assigns, merged or acquired predecessors, parent or controlling entities, and all other persons, corporations and other entities acting in concert or participating with Defendant who have actual or constructive notice of the Court's injunction, from engaging in the deceptive, misleading, omissive, and unfair practices alleged in this Petition or otherwise violating the Iowa Consumer Fraud Act, and/or from continuing to engage in any solicitation of donations in Iowa or from Iowa.

B. Pursuant to Iowa Code § 714.16 (7), after trial on the merits, make permanent the above-described injunctions, expanding their provisions as necessary by including *inter alia* such "fencing in" provisions as are reasonably necessary to ensure that Defendants and other enjoined persons and entities do not return to the unlawful practices alleged herein, or commit comparable

violations of law.

C. Pursuant to Iowa Code § 714.16 (7), enter judgment against Defendants, jointly and severally, for amounts necessary to restore to Iowa consumers all money acquired by means of acts or practices that violate the Consumer Fraud Act, and/or to effectuate the charitable giving intended by Iowa consumers in donating such money.

D. Pursuant to Iowa Code § 714.16 (7), enter judgment against Defendants, jointly and severally, for such additional funds as are necessary to ensure complete disgorgement of all ill-gotten gain traceable to the unlawful practices alleged herein.

E. Pursuant to Iowa Code § 714.16 (7), enter judgment against Defendants, jointly and severally, for up to \$40,000.00 for each separate violation of the Consumer Fraud Act.

F. Award Plaintiff interest as permitted by law.

G. Pursuant to Iowa Code § 714.16 (11), enter judgment against Defendants, jointly and severally, for attorney fees, state's costs and court costs.

H. Grant such additional relief as the Court deems just and equitable.

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Attorney General of Iowa



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