

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA *ex rel.*
THOMAS J. MILLER,
ATTORNEY GENERAL OF IOWA

Plaintiff,

v.

ROBERT SCHERMERHORN, in his
corporate and personal capacities,

Defendant.

EQUITY NO. _____

PETITION IN EQUITY

COMES NOW the State of Iowa ex rel. Attorney General of Iowa, Thomas J. Miller, by Assistant Attorney General J. Andrew Cederdahl (hereinafter the "State") pursuant to the provisions of Iowa Code section 552A, the Iowa Buying Club Memberships Law, and Iowa Code section 714.16, the Iowa Consumer Fraud Act, and submits this Petition in Equity:

PARTIES

1. Upon information and belief, Defendant Robert Schermerhorn (hereinafter "Schermerhorn") resides at 2668 St. Joseph Dr. East, Ste. 3, Dunedin, FL 34698.
2. Schermerhorn sells a product called the "Miracle Scraper" and contemporaneously enrolls consumers into the "VIP Auto Discount Club" through the sale of the scrapers.
3. The State's Subpoena #2830 to Miracle Scraper and Schermerhorn requested Schermerhorn to "provide all documents establishing Respondent Miracle Scraper as a legal entity (e.g. articles of incorporation, partnership agreement, etc.). Include a copy of its operating agreement, and any amendments thereto." Schermerhorn answered under oath as follows: "None in Respondent's possession. The Miracle Scraper is the product provided."

VENUE

4. “A civil action pursuant to this section [, the Iowa Consumer Fraud Act,] may be commenced in the county in which the person against whom it is brought resides, has a principal place of business, or is doing business, or in the county where the transaction or any substantial portion of the transaction occurred, or where one or more of the victims reside.” Iowa Code section 714.16(10).

5. Venue is proper in Polk County, Iowa because Schermerhorn’s response under oath to the State’s Subpoena #2830 indicates that at least one victim of his activities resides within Polk County.

APPLICABLE LEGAL PRINCIPLES

6. Iowa Code section 555A.1(1)-(3) of the Iowa Buying Club Memberships Law (hereinafter “BCM”) defines buying clubs and memberships as follows:

1. “Buying club” means a corporation, partnership, unincorporated association, or other business enterprise which sells or offers for sale to the public generally memberships or certificates of membership.

2. “Contract” means the agreement by which a person acquires a membership in a buying club.

3. “Membership” means certificates, memberships, shares, bonds, contracts, stocks, or agreements of any kind or character issued upon any plan offered generally to the public entitling the holder to purchase merchandise, materials, equipment, or service, either from the issuer or another person designated by the issuer, either under a franchise or otherwise, whether it be at a discount, at cost plus a percentage, at cost plus a fixed amount, at a fixed price, or on any other similar basis.

7. The BCM requires sales of buying club memberships to follow some of the same notice and other requirements of those engaged in sales regulated by the Iowa Door-to-Door Sales Act, Iowa Code section 555A. “The requirements of section 555A.1 through 555A.5, relating to door-

to-door sales, shall apply to sales of buying club memberships, irrespective of the place or manner of sale of the purpose for which they are purchased....” Iowa Code section 552A.3.

8. In particular, the following requirements of the Iowa Door-to-Door Sales Act apply to sales of buying club memberships “transacted through the internet by a company engaged in the sale of goods through the internet”:

Every seller shall furnish the buyer with a fully completed receipt or copy of any contract pertaining to a door-to-door sale at the time of its execution, which is in the same language as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller; and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of ten points, a statement in substantially the following form: You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right. Iowa Code section 555A.2

Every seller shall furnish each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned “Notice of Cancellation,” which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language as that used in the contract: NOTICE OF CANCELLATION (enter date of transaction) You may cancel this transaction, without any penalty or obligation, within three business days from the above date... Iowa Code section 555A.3.

A seller shall:

...

2. Not include in any contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this chapter including specifically the right to cancel the sale in accordance with the provisions of this chapter.

...

4. Not misrepresent in any manner the buyer’s right to cancel.

5. Honor any valid notice of cancellation by a buyer and within ten business days after the receipt of the notice shall refund all payments made under the contract or sale, return any goods or property traded in, in substantially as good condition as when received by the seller, and cancel and return any negotiable instrument executed by the buyer in

connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

6. *Not negotiate, transfer, sell or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the seventh business day following the day the contract was signed or the goods or services were purchased.*

7. *Within ten business days of receipt of the buyer's notice of cancellation notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods. Iowa Code section 555A.4 subsections (2), (4)-(7).*

Rescission of any contract pursuant to this chapter or the failure to provide a copy of the contract to the buyer as required by this chapter shall void any contract, note, instrument, or other evidence of indebtedness executed or entered into in connection with the contract and shall constitute a complete defense in any action based on the contract, note, instrument, or other evidence of indebtedness brought by the seller, the seller's successors or assigned unless a successor or assignee of the seller after the seventh business day following the day the contract was signed has detrimentally relied upon a representation of the buyer that the contract has not been rescinded... Iowa Code section 555A.5.

9. "A violation of [chapter 555A] is a violation of section 714.16, subsection 2, paragraph 'a' [the Iowa Consumer Fraud Act]." "The rights, obligations, and remedies provided in this chapter shall be in addition to any other rights, obligations, or remedies provided by law or in equity." Iowa Code section 552A.5(1)-(2).

10. Iowa Code sections 714.16(2)(a), (1)(f) and (1)(n) of the Iowa Consumer Fraud Act (hereinafter "CFA") forbids deceptive and unfair acts, uses, practices and advertisements as follows:

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.

It is deceptive advertising within the meaning of this section for a person to represent in connection with the lease, sale, or advertisement of any merchandise that the advertised merchandise has certain performance characteristics,

accessories, uses, or benefits or that certain services are performed on behalf of clients or customers of that person if, at the time of the representation, no reasonable basis for the claim existed. The burden is on the person making the representation to demonstrate that a reasonable basis for the claim existed.

...

(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.

11. Iowa Code section 714.16(1)(j) of the CFA defines "person" to include "any natural person or the person's legal representative, partnership, corporation (domestic and foreign), company, trust, business entity or association, and any agent, employee, salesperson, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof."

12. Iowa Code section 714.16(1)(i) of the Iowa Consumer Fraud Act defines "merchandise" to "include[] any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or services."

13. A civil action pursuant to the Iowa Consumer Fraud Act is in equity. Iowa Code section 714.16(7).

14. Iowa Code section 714.16(7) provides that the State may request several remedies from this Court against persons who violate the Iowa Consumer Fraud Act, including:

- a. permanent injunctive relief prohibiting the persons from continuing the practice, engaging in the practice or doing an act in furtherance of the practice;

- b. orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices;
- c. orders or judgments as necessary to restore any person in interest any moneys or property, real or personal, which have been acquired by means of a practice declared to be unlawful by the Iowa Consumer Fraud Act;
- d. disgorgement of moneys or property acquired by persons who acquired moneys or property by any means declared to be unlawful by the Iowa Consumer Fraud Act;
- e. civil penalties 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 by the Iowa Consumer Fraud Act; and
- f. imposition of a civil penalty of not more than five thousand dollars for each day of intentional violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under authority of the Iowa Consumer Fraud Act.

15. “In an action brought under this section, the attorney general is entitled to recover costs of the court action and any investigation which may have been conducted, including reasonable attorneys' fees, for the use of this state.” Iowa Code section 714.16(11).

COMMON FACTS

16. As of filing of this Petition, the Better Business Bureau’s page for the “Miracle Scraper Team” reflects 796 consumer complaints including allegations of unfair and deceptive billing conduct allegedly occurring to consumers across the United States.¹

¹ The Better Business Bureau gives the “Miracle Scraper Team” an “F” rating.

17. It appears that at least 280 Iowa consumers were impacted by Schermerhorn's fraudulent behavior.

18. Schermerhorn sells a product called the "miracle scraper" – a device that scrapes snow and ice off cars.

19. Consumers who purchase the "miracle scraper" receive an email confirming the order of the scraper. However, hidden beneath the signature of the email is the following:

Before You go, check out this special offer!

As a valued member of the Miracle Scraper family, we're excited to announce our partnership with award winning VIP Auto Discount Club to help keep everyone in our family safe on the roads all year round!

And to kick things off this winter, we've PAID for your first months (sic) membership for you! No typo's [sic] there!

You get to try VIP Auto Discount 100% free for the next 30 days, on us!

After that you will be automatically enrolled for just just [sic] \$9.95 a month for unlimited access to the many incredible benefits of being a VIP member such as:

- \$100 Gas gift voucher
- Your 24 HR Roadside Assistant +1 (877) 681-6464
- 2 Oil & Filter Changes per year (up to \$34.95 each!)
- Industry leading discounts on towing services
- Up to 20% off various maintenance services
- FREE tire rotations across US and Canada
- Amazing Rental Car Discounts
- Lockout Services
- And much, much more!

For a full list of member benefits simply head to the website linked here. Or if you wish to cancel your free membership simply call the VIP Auto Discount Customer hotline at +1 (877) 681-6464.

Enjoy!

20. Schermerhorn's process of selling "miracle scrapers" to initiate his negative-option, nonconsensual onloading of Iowa consumers into a monthly fee is a business enterprise that sells

or offers for sale memberships to the public, and enrollment into the “VIP Auto Discount Club” is a membership under the BCM.

21. Schermerhorn was required to comply with the notice provisions of the BCM.

22. Schermerhorn failed to comply with the notice requirements of the BCM.

23. Schermerhorn’s failures to abide by the BCM requirements renders all “VIP Auto Discount Club” contracts and ensuing monthly \$9.95 fees to Iowa consumers void.

24. Even were Schermerhorn’s activities in enrolling consumers in to the “VIP Auto Discount Club” not subject to the BCM, the fraudulent billing tactics he employed were both deceptive and unfair.²

25. Reasonable consumers would not anticipate the need to look beneath the signature line of the confirmation email verifying their purchases of “miracle scrapers” to ensure they had not been automatically enrolled into separate program with a monthly fee.

26. Schermerhorn’s practice of making the first month of the membership “free” entails a lesser likelihood that reasonable consumers will notice, or necessarily need to review, future billing statements upon which the nonconsensual \$9.95 fee for the “VIP Auto Discount Club” would appear.

27. Schermerhorn’s policy requiring all consumers who purchase the “miracle scraper” online to call a separate telephone number for the “VIP Auto Discount Customer hotline” in order to cancel the subscriptions they never agreed to is unnecessary additional stress designed to dissuade consumers from exercising their preferences and rights.

² “[D]eceptive and unfair practices are distinct lines of inquiry.... [W]hile a practice may be both deceptive and unfair, it may be unfair without being deceptive.” State ex rel. Miller v. Vertrue, Inc., 834 N.W.2d 12, 30 (Iowa 2013).

28. To any extent Schermerhorn lied to Iowa consumers who attempted to cancel their subscriptions, that either the subscription was owed despite failures to comply with the BCM or that consumers were not entitled to full refunds for paid subscriptions, such behavior is misleading, deceptive and unfair.

29. To any extent Schermerhorn continued to bill Iowa consumers who attempted to exercise their rights to cancel their memberships into the “VIP Auto Discount Club,” his activities were unfair.

30. A Consumer Protection Division investigator interviewed a fraction of the Iowa consumers who have been impacted by Schermerhorn, and not a single one with whom he spoke alleged they knew they were being enrolled into the “VIP Auto Discount Club” or even used its alleged benefits.

CAUSES OF ACTION

I. VIOLATIONS OF THE IOWA BUYING CLUB MEMBERSHIPS LAW

31. The State re-alleges and incorporates Paragraphs 1 through 30 as if fully set forth herein.

32. Schermerhorn’s failures to comply with the Iowa Buyer Club Memberships Law are separate violations of the Iowa Consumer Fraud Act justifying the remedies found therein.

33. The Court should hold that all contracts for monthly fees pursuant to the “VIP Auto Discount Club” are void considering Schermerhorn’s failure to comply with the Iowa Buyer Club Memberships Law.

II. DECEPTIVE AND UNFAIR PRACTICES VIOLATING THE IOWA CONSUMER FRAUD ACT

34. The State re-alleges and incorporates Paragraphs 1 through 33 as if fully set forth herein.

35. Schermerhorn's tactics are both unfair and deceptive practices and advertisements justifying the remedies of the Iowa Consumer Fraud Act and as elaborated within the State's prayer.

III. ONGOING CONSUMER FRAUD JUSTIFYING PRELIMINARY INJUNCTIVE RELIEF

36. The State re-alleges and incorporates Paragraphs 1 through 35 as if fully set forth herein

37. To any extent Schermerhorn has any control over the activities of the "VIP Auto Discount Club," he should be ordered to immediately cease billing Iowa consumers for \$9.95 per-month and to cease enrolling Iowa consumers into membership clubs without following the requirements of the BCM.

PRAYER

WHEREFORE, the Attorney General of the State of Iowa respectfully requests that the Court grant the following relief:

1. It is the State's contention that its Petition and other evidentiary documents establish that the Defendants are using unlawful business practices, including but not limited to unfair practices, deception, fraud, false pretenses, false promises and misrepresentations against Consumers, all in violation of Iowa Code section 714.16, such that preliminary injunctive relief is necessary to stop these unlawful practices pending conclusion of the action.
2. No bond is required, as Iowa R. Civ. P. 1.207 provides that in an action by the state, no security shall be required of the state.
3. The State certifies, pursuant to I.R.Civ.P. 1.1504, that no prior petition seeking a temporary injunction or injunctive relief against these parties has been previously presented to the Court.

4. The Plaintiff, State of Iowa, requests pursuant to I.R.Civ.P. 1.1507 that the Court set this Petition in Equity for a hearing after further motion by the State, and send notice to the Defendants of the time and place of hearing.
5. Plaintiff, the State of Iowa requests the Court allow the State to submit a proposed Order following the hearing on the State's Petition in Equity.
6. Pursuant to Iowa Code § 714.16(7), and upon further request by the State addressed to the Court via motion, enter a **TEMPORARY INJUNCTION restraining the Defendant** (and the Defendant's agents, employees, independent contractors, salespersons, servants, representatives, officers and directors, principals, partners, members, affiliates, predecessors, successors, assigns, merged or acquired predecessors, parent or controlling entities and all other persons, corporations, and business entities acting in concert or participating with the Defendant who have actual or constructive notice of the Court's injunction), individually, in conjunction with others, or directing others to do on their behalf, from creating, incorporating, filing, employing, or using any for-profit or non-profit corporation and any other form of corporate entity, for the purpose of conducting any business activities involving the sale of "miracle scrapers" and all buyer club memberships a) from any Iowa location and b) with Iowa consumers.
7. Pursuant to the Iowa Buyer Club Membership Law ("BCM"), **DECLARE VOID** all contracts and fees executed and earned in contravention of the requirements of the notice requirements of the BCM.
8. Pursuant to Iowa Code § 714.16(7) and after trial on the merits, enter a **PERMANENT INJUNCTION restraining the Defendant**, and each of the Defendant's agents,

employees, independent contractors, salespersons, servants, representatives, officers and directors, principals, partners, members, affiliates, predecessors, successors, assigns, merged or acquired predecessors, parent or controlling entities and all other persons, corporation, and business entities acting in concert or participating with the Defendant who have actual or constructive notice of the Court's injunction, from engaging in the deceptive, misleading, unfair, unlawful acts, practices and statements alleged in this Petition or otherwise violation of the Iowa Consumer Fraud Act;

9. Enter judgment against the Defendant for amounts necessary to restore to consumers all money acquired by means of acts or practices that violate the Consumer Fraud Act, Iowa Code § 714.16;
10. Enter judgment against Defendant for funds as are necessary to ensure complete disgorgement of all ill-gotten gains traceable to the unlawful practices alleged herein, pursuant to Iowa Code § 714.16(7);
11. Enter judgment against the Defendant for up to \$40,000 for each separate violation of the Iowa Consumer Fraud Act pursuant to Iowa Code § 714.16(7);
12. Award the State interest as permitted by law;
13. Enter judgment against the Defendant for mandatory attorney fees, state's costs, and court costs, pursuant to Iowa Code § 714.16(11); and
14. Grant such additional relief as the Court deems just and equitable.

Respectfully submitted,

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