

1 WILLARD K. TOM
General Counsel

2 CHARLES A. HARWOOD
3 Regional Director

4 NADINE SAMTER, WA State Bar No. 23188
5 MIRY KIM, WA State Bar No. 31456
Federal Trade Commission
6 915 Second Avenue, Suite 2896
Seattle, WA 98174
7 Phone: (206) 220-6350
Facsimile: (206) 220-6366
8 email: nsamter@ftc.gov
mkim@ftc.gov

9 ATTORNEYS FOR PLAINTIFF

10
11 **UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF IDAHO**

13
14 FEDERAL TRADE COMMISSION,

15 Plaintiff,

16 v.

17 APPLY2SAVE, INC., a corporation;
18 SLEEPING GIANT MEDIA WORKS, INC.,
a corporation; and DEREK R.
19 OBERHOLTZER, individually and as an
officer of Apply2Save, Inc., and Sleeping
20 Giant Media Works, Inc.,

21 Defendants.

Civil Action No.

22
23 **COMPLAINT FOR PERMANENT**
24 **INJUNCTION AND OTHER**
25 **EQUITABLE RELIEF**

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

- 27 1. The FTC brings this action under Section 13(b) of the Federal Trade Commission Act
28 (“FTC Act”), 15 U.S.C. § 53(b), 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).

1 **JURISDICTION AND VENUE**

- 2 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and
3 1345, and 15 U.S.C. §§ 45(a) and 53(b).
4 3. Venue is proper in this district under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. § 53(b).

5 **PLAINTIFF**

- 6 4. The FTC is an independent agency of the United States Government created by statute.
7 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),
8 which prohibits unfair and deceptive acts or practices in or affecting commerce.
9 5. The FTC is authorized to initiate federal district court proceedings, by its own attorneys,
10 to enjoin violations of the FTC Act and to secure such equitable relief as may be
11 appropriate in each case, including restitution and disgorgement. 15 U.S.C. §§ 53(b) and
12 56(a)(2)(A).

13 **DEFENDANTS**

- 14 6. Defendant Apply2Save, Inc. (“A2S”), is an Idaho corporation with its principal place of
15 business at 7905 Meadowlark Way, Suite A, in Coeur D’Alene, Idaho. A2S transacts or
16 has transacted business in this district and throughout the United States. At all times
17 material to this Complaint, acting alone or in concert with others, A2S has advertised,
18 marketed, distributed, or sold mortgage loan modification and foreclosure relief services
19 to consumers throughout the United States.
20 7. Defendant Sleeping Giant Media, Inc. (“Sleeping Giant”), is a Nevada corporation,
21 licensed to business in Idaho, with its principal place of business at 7905 Meadowlark
22 Way, Suite A, in Coeur D’Alene, Idaho. Sleeping Giant transacts or has transacted
23 business in this district and throughout the United States. At all times material to this
24 Complaint, acting alone or in concert with others, Sleeping Giant has advertised,
25 marketed, distributed, or sold mortgage loan modification and foreclosure relief services
26 to consumers throughout the United States.
27 8. Defendant Derek R. Oberholtzer (“Oberholtzer”) is the president of A2S and Sleeping
28 Giant. At all times material to this Complaint, acting alone or in concert with others, he

1 has formulated, directed, controlled, had the authority to control, or participated in the
2 acts and practices of A2S and Sleeping Giant, including the acts and practices set forth in
3 this Complaint. Defendant Oberholtzer resides in this district and in connection with the
4 matters alleged herein, transacts or has transacted business in this district and throughout
5 the United States.

6 9. Defendants A2S and Sleeping Giant (collectively, “Corporate Defendants”) have
7 operated as a common enterprise while engaging in the deceptive acts and practices
8 alleged below. Defendants have conducted the business practices described below
9 through interrelated companies that have common ownership and office locations.
10 Because these Corporate Defendants have operated as a common enterprise, each of them
11 is jointly and severally liable for the acts and practices alleged below. Individual
12 Defendant Derek Oberholtzer has formulated, directed, controlled, had the authority to
13 control, or participated in the acts and practices of the Corporate Defendants that
14 constitute the common enterprise.

15 10. On June 9, 2009, A2S filed a voluntary petition for relief under the liquidation provision
16 of Chapter 7 of the Bankruptcy Code, 11 U.S.C. §101 et seq., in the United States
17 Bankruptcy Court for the District of Idaho, Case No. 09-20607-TLM. J. Ford Elsaesser
18 was appointed Chapter 7 Trustee.

19 11. The instant action against Defendants is not stayed by 11 U.S.C. §362(a)(1), (2), (3), or
20 (6) because it is an action brought by the FTC to enforce the FTC’s police and regulatory
21 power as a governmental unit pursuant to 11 U.S.C. §362(b)(4) and, thus, falls within an
22 exemption to the automatic stay.

23 **COMMERCE**

24 12. At all times material to this Complaint, Defendants have maintained a substantial course
25 of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act,
26 15 U.S.C. § 44.
27
28

DEFENDANTS' BUSINESS PRACTICES

- 1
- 2 13. Since at least May 2008, Defendants have engaged in a course of conduct to advertise,
- 3 market, offer to sell, and sell to consumers purported mortgage loan modification and
- 4 foreclosure relief services. Defendants marketed their services to homeowners who are
- 5 in financial distress, delinquent on their mortgage loans, or in danger of losing their
- 6 homes to foreclosure. Defendants have charged consumers from \$595 to \$995 in up-
- 7 front fees for their services.
- 8 14. Defendants marketed their services through the website www.apply2save.com. The
- 9 website www.apply2save.com urged consumers to call a toll-free number. The website
- 10 also requested that consumers complete a short form and submit the completed form to
- 11 Defendants, after which a representative would contact the consumer.
- 12 15. Defendants' www.apply2save.com website contained various statements to induce
- 13 consumers to purchase Defendants' mortgage loan modification and foreclosure relief
- 14 services, including the following:
- 15 a. Initially we are focused on helping the millions of
- 16 consumers that are faced with a mortgage problem.
- 17 Whether you have an ARM that has recently skyrocketed, a
- 18 severe loss in property value, have suffered a loss in
- 19 income, or you simply are finding that your current
- 20 mortgage payment is more than you can handle . . . our loss
- 21 mitigation specialists can help you.
- 22 b. We follow a proven, step-by-step process that will correct
- 23 your existing mortgage problem by negotiating a solution
- 24 with your lender that best fits your unique financial
- 25 situation.
- 26 c. Our #1 goal is to work with you and your lender to ensure
- 27 that you and your family can keep your home now and in
- 28 the future, stopping the foreclosure process immediately

1 and permanently.

2 d. **Q. What is loss mitigation?**

3 A. Loss mitigation consists of a variety of procedures set up by the
4 government and lenders to assist homeowners threatened by foreclosure.
5 The goal of loss mitigation is to help the homeowner to stay in their home,
6 and protect their credit history.

7 e. **Q. How long is this going to take?**

8 A. Working with your lender to reach a suitable
9 arrangement can take anywhere from a few days to several
10 months. It all depends on your current financial position,
11 and whether or not foreclosure proceedings have already
12 been started. Typically, it takes several weeks to complete
13 a workout agreement and stop foreclosure proceedings.

14 f. **Q. I've already talked with my lender. They just want
15 to get paid. Can you still help me?**

16 A. Most of our clients have experienced this kind of inflexibility from
17 their lenders before calling us. We get your bank to listen to your needs.
18 Our integrity and professionalism have earned us a reputation that allows
19 us to be heard when no one else can get through the red tape. We will use
20 our experience and connections to your advantage.

21 g. Because of our extensive experience, as well as our close
22 working relationships with mortgage lenders, we are able
23 to help you successfully navigate through those
24 complexities and rules, which may otherwise be
25 overwhelming for you as you work to save your home.
26 First we perform a thorough assessment of your personal
27 finances, and analyze your lender's loss mitigation policies.
28 Then our professional loss mitigators will negotiate with

1 your lender to get you the best possible solution to your
2 home foreclosure problem.

3 16. Consumers spoke to Defendants' telemarketers when they called the toll-free telephone
4 number provided on Defendants' website or when Defendants called consumers after
5 receiving consumers' information via the online form.

6 17. During the telemarketing sales calls, Defendants' representatives collected information
7 from consumers, including details about the consumers' mortgages and income. In
8 numerous instances, after consumers provided this information, the telemarketers told
9 consumers that they qualified for a loan modification. In numerous instances, during the
10 sales calls, Defendants' telemarketers reiterated the claims made on their website and
11 made strong misrepresentations that they could save consumers' homes from foreclosure
12 or obtain loan modifications for them in almost any circumstance.

13 18. In numerous instances, in the sales calls, Defendants' telemarketers promised consumers
14 that Defendants would help modify consumers' mortgage loans to make their payments
15 more affordable and claimed that they could prevent foreclosure. In numerous instances,
16 Defendants' telemarketers told consumers that they had several years' experience in loan
17 modifications and foreclosure relief and that they had special relationships with lenders
18 that enabled them to negotiate with lenders to lower consumers' interest rates and modify
19 their mortgage loans. The net impression of the telemarketing sales pitch was that
20 Defendants could obtain a mortgage loan modification or stop foreclosure proceedings
21 for consumers in all or virtually all instances.

22 19. In numerous instances, Defendants' telemarketers represented that Defendants would
23 obtain a loan modification for consumers within a specified period of time, typically no
24 more than a couple of months.

25 20. In numerous instances, Defendants' telemarketers told consumers that they must pay
26 \$595 up-front and \$595 when the consumers' loan modification package goes to the
27 lender. Defendants' telemarketers further told consumers that the second payment was
28 due after A2S had begun negotiations with the lender. In numerous instances,

1 Defendants' telemarketers also gave consumers the option of paying the full fee up-front
2 for \$995, for a savings of \$200 on the entire fee.

3 21. In numerous instances, Defendants represented to consumers that they were entitled to a
4 full refund of the up-front fees if they cancelled before the loan modification package
5 was sent to the lender or A2S began negotiating with the lender.

6 22. In numerous instances, after consumers paid Defendants' up-front fee, Defendants failed
7 to answer or return consumers' telephone calls or provide updates about the status of
8 Defendants' purported communications with consumers' lenders. In other instances,
9 Defendants misrepresented that lenders were the cause for delay when, in reality,
10 Defendants had made little or no effort to contact the lenders. In numerous instances,
11 Defendants charged consumers' credit cards or bank accounts for the second fee, even
12 though the consumers' lenders had not been contacted.

13 23. In numerous instances, Defendants failed to obtain mortgage loan modifications. Many
14 consumers learned from their lenders that Defendants had not even contacted the lender
15 or that Defendants had only minimal, non-substantive contacts with the lender. Some
16 consumers who paid for Defendants' services have been able to obtain mortgage loan
17 modifications and avoid foreclosure only through their own efforts and not because of
18 any service provided by Defendants.

19 24. Some consumers whose loan packages were never sent to the lender or for whom A2S
20 had performed no services failed to obtain or had difficulty obtaining promised refunds.
21 Some have received refunds only after making repeated requests or complaining to
22 entities such as the Better Business Bureau. Some who received refunds later discovered
23 that their refund checks did not clear when deposited in their banks.

24 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

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

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

1 **COUNT I**

2 **Misrepresentations Regarding Loan Modification Success**

- 3 27. In numerous instances, in connection with the advertising, marketing, promotion,
4 offering for sale, or sale of mortgage loan modification and foreclosure relief services,
5 Defendants have represented, directly or indirectly, expressly or by implication, that
6 Defendants will obtain a mortgage loan modification or stop foreclosure in all or virtually
7 all instances.
- 8 28. In truth and in fact, Defendants did not obtain a mortgage loan modification or stop
9 foreclosure in all or virtually all instances.
- 10 29. Therefore, Defendants' representation as set forth in Paragraph 27 of this Complaint is
11 false and misleading and constitutes a deceptive act or practice in violation of Section
12 5(a) of the FTC Act, 15 U.S.C. § 45(a).

13 **COUNT II**

14 **Misrepresentations Regarding Refunds**

- 15 30. In numerous instances, in connection with the advertising, marketing, promotion,
16 offering for sale, or sale of mortgage loan modification and foreclosure relief services,
17 Defendants have represented, directly or indirectly, expressly or by implication, that
18 Defendants would give a full refund of all up-front fees to consumers who canceled
19 Defendants' loan modification or foreclosure relief services before Defendants forward
20 the consumer's loan modification package to, or begin negotiating with, the consumer's
21 lender.
- 22 31. In truth and in fact, in numerous instances in which Defendants have made the
23 representation set forth in Paragraph 30 of this Complaint, Defendants did not give a full
24 refund of all up-front fees to consumers who canceled Defendants' loan modification or
25 foreclosure relief services before Defendants forwarded the consumer's loan
26 modification package to, or began negotiating with, the consumer's lender.
- 27 32. Therefore, Defendants' representation as set forth in Paragraph 30 of this Complaint is
28 false and misleading and constitutes a deceptive act or practice in violation of Section

1 5(a) of the FTC Act, 15 U.S.C. § 45(a).

2 **CONSUMER INJURY**

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

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

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

15 **PRAYER FOR RELIEF**

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

- 18 A. Award Plaintiff such preliminary injunctive and ancillary relief as may be
19 necessary to avert the likelihood of consumer injury during the pendency of this
20 action and to preserve the possibility of effective final relief, including but not
21 limited to, temporary and preliminary injunctions, an order freezing assets, and
22 limited expedited discovery;
- 23 B. Enter a permanent injunction to prevent future violations of the FTC Act by
24 Defendants;
- 25 C. Award such relief as the Court finds necessary to redress injury to consumers
26 resulting from Defendants' violations of the FTC Act, including but not limited
27 to, rescission or reformation of contracts, restitution, the refund of monies paid,
28 and the disgorgement of ill-gotten monies; and

1 D. Award Plaintiff the costs of bringing this action, as well as such other and
2 additional relief as the Court may determine to be just and proper.
3

4 Dated: July 14, 2009

Respectfully submitted,

5 WILLARD K. TOM
6 General Counsel

7
8 /s/Nadine Samter
9 NADINE SAMTER
10 MIRY KIM
11 Federal Trade Commission
12 915 Second Avenue, Suite 2896
13 Seattle, WA 98174
14 (206) 220-6350

15
16 Attorneys for Plaintiff
17 FEDERAL TRADE COMMISSION
18
19
20
21
22
23
24
25
26
27
28