

CAUSE NO. D-1-GV-08-002744

STATE OF TEXAS,

Plaintiff,

v.

BROADWAY PHOTO, LLC,

Defendant.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

250TH JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION
AND REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff, STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbott, complains of BROADWAY PHOTO, LLC, (hereinafter "Broadway") Defendant, and for cause of action would respectfully show as follows:

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. Proc. 190.2(b)(3); 190.3(a).

JURISDICTION

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the State of Texas and in the public interest under the authority granted him by Section 17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. Section 17.41 *et seq.* (Vernon 2002 and Supp 2007) ("DTPA") upon the ground that the Defendant has engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by Sections

17.46(a) and (b) of the DTPA.

DEFENDANT

3. Defendant Broadway is a corporation based and incorporated in New York and doing business in this State. Broadway's principal place of business is at 337 E. 89th St., Brooklyn, NY 11236. Defendant engages in business in the State of Texas but does not maintain a regular place of business in this state nor has Defendant designated an agent for service of process. This suit arises out of Defendant's business in this state as more specifically described below. Pursuant to the Texas Civil Practices & Remedies Code § 17.044, Defendant can be served by certified mail, return receipt requested, directed to Defendant through the Texas Secretary of State as an agent for service of process at the following address: Citations Section, Room 214, 1019 Brazos, Austin, Texas 78701.

VENUE

4. Venue for this cause of action lies in Travis County, Texas, because, under § 17.47(b) of the DTPA, venue is proper because Defendant has done business in the county of suit.

PUBLIC INTEREST

5. Because Plaintiff State of Texas has reason to believe that Defendant has engaged in, and will continue to engage in the unlawful practices set forth below, Plaintiff State of Texas has reason to believe that Defendant has caused, and will continue to cause damage to residents of the State of Texas and cause adverse effects to legitimate business enterprises that conduct their trade and commerce in a lawful manner in this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

6. Defendant has at all times described below engaged in conduct which constitutes trade and commerce as those terms are defined in the DTPA Section 17.45(6).

ACTS OF AGENTS

7. Whenever it is alleged in this Petition that Defendant did any act, it is meant that:
- A. Defendant performed or participated in the act, or
 - B. Defendant's officers, agents, or employees, performed or participated in the act on behalf of and under the authority of the Defendant.

NOTICE BEFORE SUIT

8. The Consumer Protection Division informed Defendant of the alleged unlawful conduct described below at least 7 days before filing suit as required by DTPA Section 17.47(a).

STATEMENT OF FACTS

9. Broadway offers and sells digital cameras and other electronics nationwide, including in Travis County, Texas, from the Web site broadwayphoto.com. On information and belief, Defendant has, at various times in the past used multiple other Web sites, including but not limited to amphotoworld.com, digitalliquidators.com, preferredphoto.com, wilddigital.com, and milleniumcamera.com. Consumers are often referred to Broadway's Web sites through price comparison Web sites. On everyprice.com and lowpricedigital.com, for example, Broadway is listed as a "Trusted Seller" or as having obtained the "Customer's Trust Award," and its digital cameras, plasma/LCD televisions, and other electronics are consistently identified as having the lowest prices when compared to other sellers.

10. Lured by the promise of low prices, consumers are often drawn to Broadway's Web sites in

search of a bargain from a trusted source. After arriving at Broadway's Web site and selecting the desired goods, consumers are invited to use a credit card to purchase the goods directly through the Web site. After inputting and submitting their shipping and credit card information, consumers are informed that their orders are being processed.

11. Shortly after ordering the merchandise, however, consumers report that Broadway sends an email requesting that consumers call to confirm their orders.

12. Instead of confirming consumers' orders, however, Broadway begins an aggressive, high-pressured attempt to upsell consumers with additional, over-priced accessories such as memory cards and batteries.

13. Broadway uses underhanded tactics to persuade consumers to purchase such over-priced accessories. For example, when consumers are attempting to purchase a digital camera, Broadway often misrepresents that the camera's battery is deficient for normal use and that an additional battery must be purchased for the camera to work properly.

14. When consumers refuse to purchase the additional, over-priced accessories, Broadway will often inform consumers that the goods they are purchasing are "grey market"¹ and that the U.S.A. models can be purchased for an additional cost. Broadway may alternatively inform consumers that the orders are being processed and then send the consumers an e-mail stating that, because the goods are on an extended back-order, the consumers' orders have been cancelled.

15. Broadway generally does not disclose that any particular good is "grey market" prior to consumers submitting their credit card and contact information to Broadway.

¹ The "grey market" refers to goods that manufacturers intend to be sold in foreign countries but have been diverted to the United States. Because of the difference in exchange rates and what the foreign market will bear, the goods often cost less when sold in the United States. When dealing with "grey market" electronics, however, the problem for consumers is that instruction manuals and on-screen text may be in a foreign language. Also, manufacturers will not

VIOLATIONS OF THE DTPA

16. The State adopts by reference the information contained in paragraphs 1-15 and alleges that Defendant, in the course and conduct of trade and commerce, has directly and indirectly engaged in false, misleading, and deceptive acts and practices declared to be unlawful by the DTPA Section 17.46(a), including the following:

- A. Defendant, as alleged and detailed above, has represented that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(5);
- B. Defendant, as alleged and detailed above, has represented that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, when they are of another. TEX. BUS. & COM. CODE ANN §§ 17.46 (b)(7);
- C. Defendant, as alleged and detailed above, advertised goods or services with the intent not to sell them as advertised. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(9);
- D. Defendant, as alleged and detailed above, advertised goods or services with intent not to supply a reasonable expectable public demand without disclosing a limitation of quantity. TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(10);
- E. Defendant, as alleged and detailed above, failed to disclose information concerning goods or services which was known at the time of the transaction when failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

typically honor any warranty for such goods.

TEX. BUS. & COM. CODE ANN. §§ 17.46 (b)(24).

APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

17. Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the laws of the State of Texas as alleged in this Petition. Unless enjoined by this Honorable Court, Defendant will continue to violate the laws of the State of Texas and cause loss and damage to the people of this State. Therefore, Plaintiff requests a Temporary Injunction and Permanent Injunction be issued.

PRAYER FOR RELIEF

18. WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendant, Defendant's successors, assigns, officers, agents, servants, employees, and attorneys and any other person in active concert or participation with Defendant from engaging in false, misleading, or deceptive acts or practices, including the following:

- A. Misrepresenting that goods or services sold or distributed by Defendant have characteristics, benefits, or quantities which they do not have, including
 - i. misrepresenting that any goods are new or original if they are not;
 - ii. misrepresenting that any goods are in-stock or available if they are not; and
 - iii. misrepresenting that digital cameras are United States models when they are not.

- B. Misrepresenting that goods or services sold or distributed by Defendant are of a

particular standard, quality or grade, if they are another, including

- i. misrepresenting the performance or reliability of any goods; and
- ii. misrepresenting the extent to which additional goods or accessories are necessary to ensure the ordinary operation of a good.

- C. Advertising that goods are available or in-stock if the Defendant knows that such goods are not currently available or in-stock, including failing to clearly and conspicuously disclose that goods are out-of-stock prior to a consumer's purchase of such goods;
- D. Failing to clearly and conspicuously disclose that any good is "grey market" or an otherwise foreign model not originally intended to be sold in the United States.

19. In addition, Plaintiff State of Texas respectfully prays that this Court will:

- A. Adjudge civil penalties in favor of Plaintiff State of Texas of not more than \$20,000 against the Defendant per violation of the DTPA pursuant to Tex. Bus. & Com. Code §17.47(c);
- B. Award such relief as this Court finds necessary to redress injury to consumers resulting from Defendant's violations of the DTPA, including but not limited to reformation or rescission of contracts, disgorgement of ill-gotten gains, and cancellation of purported debts.
- C. Award the State of Texas attorney's fees and costs pursuant to TEX. GOVT. CODE §402.006(c) for bringing this action, as well as such other and additional equitable relief as this Court may determine to be just and proper.

Respectfully submitted,

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