

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH ____

MILWAUKEE COUNTY

STATE OF WISCONSIN
17 West Main Street
Madison, Wisconsin 53703,

Plaintiff,

v.

Case No. 2014C00005

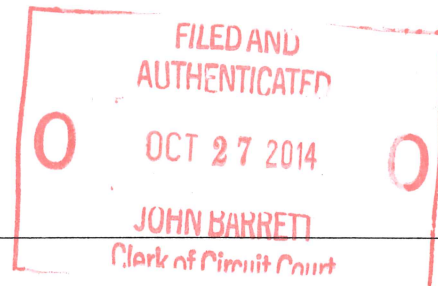
Complex Forfeiture: 30109

FLAT RATE PLUMBING, INC.
12900 West National Avenue
New Berlin, Wisconsin 53151,

LESTER M. GUMIENY, JR.
4530 South Racine Avenue
New Berlin, Wisconsin 53146,

ANDREW J. GOMEZ
3242 South Ventura Drive
New Berlin, Wisconsin 53151,

Defendants.



COMPLAINT

The State of Wisconsin, by its attorneys, J.B. Van Hollen, Attorney General, and Lewis W. Beilin, Assistant Attorney General, on behalf of the Department of Agriculture, Trade and Consumer Protection ("DATCP"), brings this action against the Defendants, Flat Rate Plumbing, Inc., Lester Gumieny, Jr. and Andrew J. Gomez, alleging misrepresentations and other violations of Wisconsin consumer

protection laws in connection with the sale of plumbing goods and services in Wisconsin. The State of Wisconsin brings this action to enforce compliance with the consumer protection laws that the defendants have violated, and to obtain redress for consumers who have suffered financial losses as a result of those violations. The State alleges as follows:

PARTIES

1. Plaintiff, the State of Wisconsin, is a sovereign state of the United States of America, with its principal offices at the State Capitol in Madison, Wisconsin. The address of the Wisconsin Department of Justice is 17 West Main Street, Post Office Box 7857, Madison, Wisconsin 53707-7857.

2. Defendant, Flat Rate Plumbing, Inc. ("Flat Rate") is a privately held Wisconsin corporation whose principal place of business is located at 12900 West National Avenue, New Berlin, Wisconsin 53151. The corporation's registered agent is Lester Gumieny, Jr., whose office is located at 12900 West National Avenue, New Berlin, Wisconsin 53151.

3. Defendant Lester R. Gumieny, Jr. ("Gumieny") is the owner of Flat Rate Plumbing, Inc. He is also a licensed Master Plumber. During the period covered by this *Complaint*, he has been in a position to control all the actions of Flat Rate's employees. He has had knowledge of the sales practices of his salesmen and technicians, and has actively encouraged and assisted the unfair practices described herein.

4. Defendant Andrew J. Gomez (“Gomez”) is a licensed Journeyman Plumber employed by Flat Rate as a plumbing technician. In that capacity he responds to customer service calls by personally visiting customer homes, where he has, on many occasions, sold plumbing goods and services to customers.

JURISDICTION AND VENUE

5. Wisconsin Statutes § 100.26(6) authorizes DATCP to commence a civil action in the name of the State of Wisconsin to obtain injunctive relief, forfeitures, and costs from Flat Rate for violations of the administrative rules (“orders,” in the terminology of section 100.26(6)) promulgated by DATCP pursuant to Wis. Stat. § 100.20. The Attorney General is filing this *Complaint* at the request of DATCP. Further, under Wis. Stat. § 100.20(6), this Court is authorized to “make such orders or judgments as may be necessary to restore to any person any pecuniary loss suffered because of the acts or practices involved” in this action. The Court also has jurisdiction pursuant to Wis. Stat. § 100.18(11)(d).

6. This Court may exercise personal jurisdiction over Flat Rate pursuant to Wis. Stat. § 801.05(1)(d), because Flat Rate is a Wisconsin domestic corporation.

7. This Court may exercise personal jurisdiction over Gumieny pursuant to Wis. Stat. § 801.05(1)(b) because he is a natural person domiciled in Wisconsin.

8. This Court may exercise personal jurisdiction over Gomez pursuant to Wis. Stat. § 801.05(1)(b) because he is a natural person domiciled in Wisconsin.

9. Venue is appropriate in Milwaukee County pursuant to Wis. Stat.

§ 801.50(2)(a) and (c), in that many of the violations alleged in this *Complaint* occurred in Milwaukee County, and the defendants do substantial business there.

FACTS

10. Flat Rate Plumbing, Inc. (“Flat Rate”) sells and provides plumbing, heating and air-conditioning, sewer and drain cleaning services and products to, primarily, residential customers in Milwaukee, Racine, Kenosha and Waukesha counties.

11. Since May 2008, twenty consumers have filed complaints with DATCP regarding Flat Rate’s business practices.

12. These complaints include allegations that Flat Rate, among other things, misrepresents consumers’ need for plumbing goods and services in order to sell unnecessary goods and services.

13. On January 11, 2010, following an investigation into its business practices, Flat Rate entered into an *Assurance of Voluntary Compliance* with DATCP, and agreed, among other things, to comply with Wisconsin consumer protection laws, including Wis. Stat. § 100.18(1) (fraudulent misrepresentations) and Wis. Admin. Code §§ ATCP 110.02 and 110.05 (home improvement practices).

14. Despite that agreement, Flat Rate has continued to engage in a pattern and practice of unfair and deceptive business practices involving the sale of plumbing and related services to homeowners.

15. Since January 2010, fifty-four Wisconsin consumers have filed complaints with the Better Business Bureau regarding Flat Rate's business practices.

16. Flat Rate has advertised itself, through a website and a radio advertisement, as offering cost-effective services at fixed or, "flat," rates that supposedly avoid the surprises that can accompany contracted work that is done on a time-and-materials basis.

17. In a radio advertisement, for instance, Flat Rate dramatizes the following conversation between the company and a would-be customer:

Customer: "Will you tell me how much to unstop my drain?"

Flat Rate: "\$99.00"

Customer: "But you haven't seen it."

Flat Rate: "Don't need to; doesn't matter. If it's a kitchen sink or any other small drain, the no-surprise plumbers at Flat Rate Plumbing will unclog almost any drain for \$99.00."

Customer: "Almost?"

Flat Rate: "Yeah, there are a few exceptions. But you can read all about them on the website before you call."

18. In fact, numerous Milwaukee-area residential homeowners have called Flat Rate over the years to help them with a small problem, such as a clogged drain, only to have Flat Rate's salesmen come to their homes and tell them that they had no choice but to spend large amounts – often thousands of dollars – for extensive work, simply to correct the problem at hand, when in fact the extensive work proposed by Flat Rate was not even necessary.

19. Flat Rate routinely sends two to three plumbers, an HVAC technician *and* a salesman to houses, even in response to small service jobs. The purpose for sending all these people is to look for ways to convince homeowners to agree to purchase big-ticket items and large-scale service jobs.

20. Upon arrival, the technicians and salesmen commonly ask the homeowner if they may tour the home, visit the basement, the upper floors, etc., sometimes even before they look at the specific location where the homeowner has had the problem.

21. After touring the home, the technicians approach the homeowner and propose large jobs. For instance, Flat Rate employees told a homeowner who called about a leaky pipe that the homeowner needed a major pipe replacement costing nearly \$8,000. Another homeowner who called solely about a malfunctioning toilet was told by Flat Rate that the homeowner's house needed almost \$10,000 in plumbing work, including replacement of the toilet and extensive re-piping.

22. These are not simply proposals made to a customer who might be interested in the purchase of extensive new fixtures and equipment. Rather, Flat Rate presents these large-scale projects as *necessary* to correcting the problem at hand, such as a clogged drain or leaky pipe. Flat Rate engages in deception to convince homeowners to agree to such purchases that they would not otherwise have agreed to.

23. On one occasion, Flat Rate's technician took a look at a homeowner's toilet (which was not flushing), and without even inspecting it or diagnosing the

problem told her that parts were unavailable for the toilet and that it would have to be replaced. Those statements were false.

24. Flat Rate's technicians have also falsely told customers that "all of your pipes need to be replaced because they are outdated," and that "if you ever want to sell this house you need to replace the pipes."

25. Upon a visual inspection of one customer's clogged bathtub, the Flat Rate employee went to the basement, looked at the cast iron pipes, and told the customer, "this is bad; these need to be replaced because the house is so old." The house in question was built in 1950. Many homes built around that time have perfectly functioning pipes, and this customer's problem did not require such an extensive pipe replacement. Flat Rate's statement was false.

26. In the case of one homeowner who reported a leaky pipe in the basement, Flat Rate said it would be necessary to replace the entire drain stack, at a cost of \$7,248, simply in order to fix the leak. The suspicious homeowner declined the proposal, and contacted a different plumber, who was able to fix the leak in an entirely professional and competent manner for about \$200.

27. Some of these homeowners, when presented with such large, unexpected proposals, tell the salesmen that they would have difficulty paying such large amounts of money. In such situations, Flat Rate technicians offer the would-be customer a credit card from GE Capital Retail Bank and represent that the credit can be approved on-the-spot, over the phone. Flat Rate has assisted numerous customers in financing purchases in this way.

28. Flat Rate technicians, including on information and belief Gomez, have without consent cut or otherwise damaged homeowners' pipes in order to persuade them to purchase replacement equipment. By commencing work prior to obtaining approval the technicians effectively compel the homeowner to go forward with the proposal Flat Rate is offering.

29. Numerous customers victimized by Flat Rate's practices are 62 years of age or older, or are persons with an impairment of a physical, mental or emotional nature that substantially limits at least one major life activity.

30. Gomez personally made some or all of the misrepresentations to homeowners in the sales referred to in this *Complaint*. Upon information and belief, he has sold plumbing goods to other homeowners, as well, through the use of false or deceptive statements. It is his role within Flat Rate to personally respond to service calls, visit homes, and sell jobs to the homeowners, even when, in some instances, the job is actually completed by another plumber.

31. Gumieny has coached and instructed his employees to engage in the deceptive practices described herein. He has shown some employees how to damage potential customers' plumbing equipment in order to induce the purchase of replacement parts or repair work. As owner of the company, he implemented an employee-bonus system that rewards the employees in proportion to the price of the jobs they sell, thereby creating an incentive to sell unnecessary goods and services. At all times relevant to this *Complaint*, Gumieny has been in a position to know and control all aspects of Flat Rate's sales practices.

VIOLATIONS

HOME IMPROVEMENT PRACTICES VIOLATIONS

COUNT ONE

Wis. Admin. Code § ATCP 110.02(3): Bait Selling

32. Plaintiff re-alleges paragraphs 1 through 31 as if fully set forth herein.

33. The defendants are “sellers” within the meaning of Wis. Admin. Code § ATCP 110.01(5) because they are engaged in the business of making or selling home improvements. As relevant here, “home improvement” is defined to mean “the remodeling, altering, repairing, painting, or modernizing of residential or non-commercial property or the making of additions thereto”

34. Wisconsin Administrative Code § ATCP 110.02(3)(f) prohibits a seller from misrepresenting that certain products or materials are unavailable or that there will be a long delay in their manufacture, delivery, service or installation in order to induce a buyer to purchase other or higher priced substitute products or materials from the seller.

35. The defendants violated Wis. Admin. Code § ATCP 110.02(3)(f) by falsely telling consumers that parts were not available for their equipment and could not be repaired, in order to induce the sale of other or higher priced substitute products.

COUNT TWO

Wis. Admin. Code § ATCP 110.02(9): Prohibited sales representations

36. Plaintiff realleges paragraphs 1 through 35 as if fully set forth herein.

37. Wisconsin Administrative Code § ATCP 110.02(9)(c) prohibits any seller of home improvements from misrepresenting that a customer's present equipment, material, product, home or part thereof is dangerous or defective, or in need of repair or replacement.

38. The defendants violated Wis. Admin. Code § ATCP 110.02(9)(c) by making misrepresentations to consumers regarding the condition of consumers' existing equipment or need for repair or replacement.

COUNT THREE

Wis. Admin. Code § ATCP 110.02(7): Prohibited performance

39. Plaintiff re-alleges paragraphs 1 through 38 above as if fully set forth herein.

40. Wisconsin Administrative Code § ATCP 110.02(7)(a) prohibits any seller of home improvements from delivering materials, beginning work, or using other tactics to pressure the buyer into a home improvement contract.

41. The defendants violated Wis. Admin. Code § ATCP 110.02(7)(a) by causing damage to consumers' piping in order to pressure buyers into home improvement contracts.

COUNT FOUR

Wis. Admin. Code § ATP 110.02(11): General misrepresentations in home improvement sales

42. Plaintiff re-alleges paragraphs 1 through 41 above as if fully set forth herein.

43. Wisconsin Administrative Code § ATP 110.02(11) prohibits any seller of home improvements from making any false, deceptive or misleading representation in order to induce any person to enter into a home improvement contract.

44. The defendants violated Wis. Admin. Code § ATP 110.02(11) when they made false, deceptive or misleading representations to consumers to induce them to enter into home improvement contracts.

FRAUDULENT MISREPRESENTATIONS

COUNT FIVE

Wis. Stat. § 100.18(1): Fraudulent Misrepresentations

45. Plaintiff re-alleges paragraphs 1 through 44 above as if fully set forth herein.

46. Wisconsin Statutes § 100.18(1) provides, in relevant part, that no person or firm, with intent to sell merchandise or a service, shall make to the public (which can mean even a single potential customer), any assertion, representation or statement of fact which is untrue, deceptive or misleading.

47. The defendants violated Wis. Stat. § 100.18(1) by making false, misleading or deceptive statements to the public with intent to sell plumbing goods

and services, including but not limited to the misrepresentations described in the preceding paragraphs.

RELIEF REQUESTED

WHEREFORE, Plaintiff State of Wisconsin prays for the following relief from the Court:

A. A judgment that the defendants violated the statutes and rules cited herein.

B. A permanent injunction, on appropriate terms, restraining defendants' future business activities to prevent future violations of the statutes and rules cited herein.

C. A forfeiture, pursuant to Wis. Stat. § 100.26(4), of not less than \$50 nor more than \$200 for each violation of Wis. Stat. § 100.18(1).

D. A forfeiture, pursuant to Wis. Stat. § 100.26(6), of not less than \$100 nor more than \$10,000 for each violation of the provisions of Wis. Stat. § ATCP chs. 110 cited herein.

E. A supplemental forfeiture, pursuant to Wis. Stat. § 100.264, of not more than \$10,000, for violations under Wis. Stat. §§ 100.18 and 100.20 perpetrated against persons 62 years of age or older, or persons with an impairment of a physical, mental or emotional nature that substantially limits at least one major life activity.

F. An order, pursuant to Wis. Stat. §§ 100.18(11)(d) and 100.20(6), that the defendants make restitution to persons who suffered pecuniary loss as a result of the violations described herein.

G. An order that the defendants pay DATCP the costs of its reasonable and documented costs of investigation, preparation and prosecution of this matter.

H. An order that the defendants pay the State of Wisconsin Department of Justice the costs of its reasonable and necessary expenses of prosecution, including attorney's fees.

I. An order that the defendants pay costs pursuant to Wis. Stat. ch. 814.

J. Such other and further relief as the Court deems appropriate.

Dated at Madison, Wisconsin this 24th day of October 2014.

Respectfully submitted,

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