

STUART F. DELERY

Assistant Attorney General

MAAME EWUSI-MENSAH FRIMPONG

Deputy Assistant Attorney General

MICHAEL S. BLUME

Director, Consumer Protection Branch

RICHARD GOLDBERG

Assistant Director, Consumer Protection Branch

ANN F. ENTWISTLE

Ann.F.Entwistle@usdoj.gov

Trial Attorney

Consumer Protection Branch

U.S. Department of Justice

450 Fifth Street, NW - Suite 6400 South

Washington, DC 20530

Telephone: (202) 305-3630

S. AMANDA MARSHALL, OSB # 95347

United States Attorney

District of Oregon

NEIL J. EVANS, OSB # 965515

neil.evans@usdoj.gov

Assistant United States Attorney

United States Attorney's Office

District of Oregon

1000 S.W. Third Avenue, Suite 600

Portland, Oregon 97204-2902

Telephone: (503) 727-1000

Facsimile: (503) 727-1117

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Case No. 3:12-cv-02006-HZ

Plaintiff,

v.

FIRST AMENDED COMPLAINT FOR  
CIVIL PENALTIES, CONSUMER  
REDRESS, PERMANENT INJUNCTION  
AND OTHER EQUITABLE RELIEF

SMART TOOLS LLC, a Wyoming Limited  
Liability Company,

KIRSTIN HEGG, individually and as an  
officer of Smart Tools LLC,

CURTIS DAWN, individually and as an  
officer of Smart Tools LLC,

Defendants.

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or “the Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 56(a)(1), for its complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), and 16(a), of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 56(a), to obtain monetary civil penalties, a permanent injunction and other equitable relief such as temporary and preliminary injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, or appointment of a receiver for the Defendants’ violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s

Trade Regulation Rule entitled “Disclosure Requirements and Prohibitions Concerning Business Opportunities” (“Business Opportunity Rule” or “Rule”), 16 C.F.R. Part 437, as amended. The amended Business Opportunity Rule became effective on March 1, 2012, and has since that date remained in full force and effect.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), and 56(a). This action arises under 15 U.S.C. § 45(a).
3. Venue in the United States District Court for the District of Oregon is proper under 28 U.S.C. §§ 1391(b)-(c) and 1395(a), and 15 U.S.C. § 53(b).

### **PLAINTIFF**

4. This action is brought by the United States of America on behalf of the Federal Trade Commission. The Commission is an independent agency of the United States government given statutory authority and responsibility by the FTC Act, as amended, 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Business Opportunity Rule, 16 C.F.R. Part 437, as amended, which requires specific disclosures and prohibits certain misrepresentations in connection with the sale of a business opportunity.

### **DEFENDANTS**

5. Defendant Smart Tools LLC is a limited liability company with its principal place of business at 22611 SW 96th Drive, Tualatin, Oregon 97062. Defendant Smart Tools LLC

offers for sale, sells, and promotes business opportunities to consumers. Defendant Smart Tools LLC transacts or has transacted business in the District of Oregon.

6. Defendant Kirstin Hegg is the Vice President of Smart Tools LLC. At all times material to this Complaint, acting alone or in concert with others, Defendant Hegg has formulated, directed, controlled, or participated in the acts and practices of Defendant Smart Tools LLC, including the acts and practices set forth in this Complaint. Defendant Hegg resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.
7. Defendant Curtis Dawn is the President of Smart Tools LLC. At all times material to this Complaint, acting alone or in concert with others, Defendant Dawn has formulated, directed, controlled, or participated in the acts and practices of Defendant Smart Tools LLC, including the acts and practices set forth in this Complaint. Defendant Dawn resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

### **COMMERCE**

8. At all times material to this complaint, Defendants have maintained a substantial course of trade in the offering for sale and sale of business opportunities, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

### **THE DEFENDANTS’ BUSINESS PRACTICES**

#### *The Defendants’ Business Opportunity*

9. Defendants have marketed and sold a work-at-home business opportunity that promises prospective purchasers they can earn up to \$38,943 per year by locating people who are eligible for a partial refund of their FHA mortgage loan insurance premium and charging

them a fee for information on how to obtain the refund. People who are eligible for these refunds include certain past borrowers of FHA mortgage loans who paid up-front mortgage insurance premiums at loan closing and did not default on their mortgage.

While the U.S. Department of Housing and Urban Development has attempted to notify these borrowers of their refund eligibility, some eligible borrowers have not requested or received their refunds.

10. Defendants solicit prospective purchasers by mass mailing postcards that state, among other things:

Re: IMMEDIATE OPPORTUNITY to work as  
Government Insurance Refund Processor

- Starting at up to \$38,943 per year DOE  
\*\*\*
- Processing Gov't Insurance Refunds to homeowners
- No experience necessary

11. Prospective purchasers who call the toll-free number provided on the postcard are connected to a recorded message informing them that for a fee of \$3.91, Defendants will send them a manual with the instructions and forms needed to “process refunds” and “earn up to \$38,943 per year working full or part-time with no experience needed,” because “for every refund you process, you may be paid between \$300 and \$800.”

12. In describing Defendants’ program, Defendants’ recorded messages have included the following statements:

[T]here are two ways to get lists of people who are owed refunds. . . . [Y]ou can order them directly from the government and pay a fee or you can get them for free when you join our exclusive Smart Tools membership. . . . [Y]ou could pay anywhere from \$35 to \$175 each month for fresh lists.

\* \* \*

As a free service to our exclusive Smart Tools members, we provide unlimited access to all 50 states of people owed refunds so you can process refunds from

any state you choose. If you were to pay the government for every list in each state, you'd pay \$5,500. However, as a Smart Tools exclusive member, you'll get access to all 50 states for free.

13. To participate in the business opportunity Defendants offer, prospective purchasers must first pay the fee of \$3.91 for the manual by credit or debit card. Defendants next send prospective purchasers two email communications, and then, by first class mail, the manual. Defendants' manual describes how to identify lists of people who are owed refunds, and it offers to provide ongoing access to these lists and software to make refund processing easier through a Smart Tools membership service that involves recurring monthly charges of \$29.99, after the expiration of a free trial period.
14. Only on page 8 of the 31-page manual do Defendants disclose – inconspicuously and inadequately – that “HUD has recently” made the lists of people who are owed refunds available for free online.
15. Defendants' website repeats the claim that to obtain lists of consumers who are due refunds, the prospective purchaser must either pay the government “a ‘per state’ fee” and keep paying it “every time you want an update” or the prospective purchaser can access, purportedly for “free,” Defendants' database of names from all 50 states. In fact, however, to obtain access to Defendants' database, consumers must pay a membership fee of \$29.99 per month.
16. Defendants' representation that they will provide prospective purchasers with “unlimited access to all 50 states of people owed refunds” is an offer to provide a list of customers for the purchasers' refund processing services.

### ***Earnings Claims and Misrepresentations***

17. Defendants' postcards, recorded telephone messages, and website have represented, expressly or by implication, that prospective purchasers of their business opportunity will earn a substantial income. Among other things, Defendants' postcards and recorded messages have claimed that prospective purchasers can "earn up to \$38,943 per year working full or part-time with no experience needed" and that "for every refund you process, you may be paid between \$300 and \$800." In numerous instances, consumers who purchase defendants' business opportunity have not earned substantial income.
18. Defendants have represented, expressly or by implication, that the government charges substantial fees for access to lists of people owed refunds, but that members of Defendants' membership program will receive the list for "free." These statements are false. In fact, these lists are available for free on the Department of Housing and Urban Development's website, and in fact, Defendants charge a monthly membership fee for access to their lists.

***Failures to Provide Required Disclosures***

19. Defendants have failed to provide the written disclosure document the Business Opportunity Rule requires be given to prospective purchasers prior to their purchase of business opportunities. The disclosure document provides potential purchasers with basic information about the seller, litigation involving the seller, the seller's cancellation and refund policies, information supporting any earnings claims the seller makes, and contact information for prior purchasers, to ensure that prospective purchasers can verify the seller's earnings and other claims before they buy.
20. Defendants have engaged in the foregoing business practices since at least March 1, 2012, the date the amended Business Opportunity Rule became effective, and have

engaged in the same or similar business practices related to the sale of business opportunities since at least 2010.

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

21. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”
22. Misrepresentations or deceptive omissions of material fact constitute deceptive acts or practices prohibited by Section 5(a) of the FTC Act.
23. As set forth below, Defendants have engaged and continue to engage in violations of Section 5(a) of the FTC Act in connection with the advertising, marketing and sale of their business opportunity.

### **COUNT ONE**

#### **Deceptive Substantial Income Claim**

24. In numerous instances in connection with the advertising, marketing, promotion, offering for sale, or sale of Defendants’ business opportunity, Defendants have represented, directly or indirectly, expressly or by implication, that purchasers of Defendants’ business opportunity are likely to earn substantial income.
25. In truth and in fact, in numerous instances in which Defendants have made the representation in Paragraph 23, purchasers of Defendants’ business opportunity have not earned substantial income.
26. Therefore, Defendants’ earnings representations as set forth in Paragraph 23 are false, or were not substantiated at the time the representations were made, or both, and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

### **COUNT TWO**



**Deceptive Cost of List Claim**

27. In numerous instances, in connection with the advertising, marketing, promotion, offering for sale, or sale of Defendants' business opportunity, Defendants have represented, directly or indirectly, expressly or by implication, that the government charges substantial fees for lists of consumers due FHA mortgage insurance premium refunds.
28. In truth and in fact, the government does not charge substantial fees for FHA mortgage insurance premium refunds. The government provides free access to these lists.
29. Therefore, Defendants' representation as set forth in Paragraph 26 constitutes a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

**VIOLATIONS OF THE BUSINESS OPPORTUNITY RULE**

30. Defendants are "sellers" who have sold or offered to sell "business opportunities" as defined by the Business Opportunity Rule, 16 C.F.R. § 437.1(c) and (q). Under the Business Opportunity Rule, a "seller" is a person who offers for sale or sells a business opportunity. 16 C.F.R. § 437.1(q). Under the Rule, a "business opportunity" means a "commercial arrangement" in which a "seller solicits a prospective purchaser to enter into a new business," the "prospective purchaser makes a required payment" and the "seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will: . . . [p]rovide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services." 16 C.F.R. § 437.1(c).
31. Among other things, the Business Opportunity Rule requires sellers to provide prospective purchasers with a disclosure document and any required attachments. The disclosure document must be in the form, and use the language, set forth in the Business

Opportunity Rule and its Appendix A. In the disclosure document, the seller must disclose to prospective purchasers five categories of information, including basic identifying information about the seller, any earnings claims the seller makes, the seller's litigation history, any cancellation and refund policy the seller offers, and contact information of prior purchasers. 16 C.F.R. § 437.3(a)(1)-(5). Furthermore, this information must be disclosed at least seven (7) days before the prospective purchaser signs a contract or makes a payment. 16 C.F.R. § 437.2. The pre-sale disclosure of this information enables a prospective purchaser to contact prior purchasers and take other steps to assess the potential risks involved in the purchase of the business opportunity.

32. Defendants have made earnings claims in connection with the sale of their business opportunity, as defined by the Business Opportunity Rule, 16 C.F.R. § 437.1(f). Under the Business Opportunity Rule, an "earnings claim" means "any oral, written, or visual representation to a prospective purchaser that conveys, expressly or by implication, a specific level or range of actual or potential sales, or gross or net income or profits." 16 C.F.R. § 437.1(f).
33. The Business Opportunity Rule prohibits sellers from making earnings claims unless the seller: (1) has a reasonable basis for the claim at the time it is made; (2) has in its possession written materials to substantiate the claim at the time it is made; (3) furnishes an Earnings Claim statement to prospective purchasers in conjunction with the disclosure document, containing, among other things, information regarding the time frame captured by the earnings claim, the characteristics of the purchasers, and the number and percentage of all persons who purchased the business opportunity within the time frame and achieved at least the stated level of earnings; and (4) makes written substantiation of

the earnings claim available to any prospective purchaser who requests it. 16 C.F.R. § 437.4(a).

34. Defendants have made earnings claims in connection with the sale of their business opportunities in the general media, as defined by the Business Opportunity Rule. 16 C.F.R. § 437.1(h). Under the Business Opportunity Rule, “general media” means “any instrumentality through which a person may communicate with the public, including, but not limited to, television, radio, print, Internet, billboard, Web site, commercial bulk email, and mobile communications.” 16 C.F.R. § 437.1(h).
35. The Business Opportunity Rule prohibits sellers from making earnings claims in the general media unless the seller has a reasonable basis for and written substantiation of any earnings claims and states in immediate conjunction with those claims the beginning and ending dates when the represented earnings were achieved, and the number and percentage of all persons who purchased the seller’s business opportunity prior to that ending date who achieved at least the stated level of earnings. 16 C.F.R. § 437.4(b).
36. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Business Opportunity Rule constitutes an unfair or deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

### **COUNT THREE**

#### **Disclosure Document Violations**

37. In numerous instances in connection with the offer for sale, sale, or promotion of business opportunities, Defendants have failed to furnish prospective purchasers with a disclosure document and any required attachments within the time period prescribed by the Business Opportunity Rule.

38. Defendants' acts and practices, as described in paragraph 36 above, violate the Business Opportunity Rule, 16 C.F. R. §§ 437.2 and 437.3(a), and Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

#### **COUNT FOUR**

##### **Earnings Disclosure Violations**

39. In numerous instances, Defendants have made earnings claims to prospective purchasers in connection with the offering for sale, sale, or promotion of a business opportunity while, among other things: (1) lacking a reasonable basis for the earnings claim at the time it was made; (2) lacking written substantiation for the earnings claim at the time it was made; or (3) failing to provide an Earnings Claim statement to the prospective purchaser, as required by the Business Opportunity Rule.
40. Defendants' acts and practices, as described in paragraph 38 above, violate the Business Opportunity Rule, 16 C.F.R. § 437.4(a) and Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

#### **COUNT FIVE**

##### **General Media Earnings Claims Violations**

41. Defendants have made earnings claims in the general media in connection with the offering for sale, sale, or promotion of a business opportunity while failing to state in immediate conjunction with those claims the beginning and ending dates when the represented earnings were achieved, and the number and percentage of all persons who purchased Defendants' business opportunity prior to that ending date who achieved at least the stated level of earnings.

42. Defendants' acts and practices, as described in paragraph 40 above, violate the Business Opportunity Rule, 16 C.F.R. § 437.4(b)(3) and Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

**CONSUMER INJURY**

43. Consumers nationwide have suffered and will continue to suffer substantial injury as a result of the Defendants' violations of Section 5(a) of the FTC Act and the Business Opportunity Rule. In addition, Defendants have been unjustly enriched as a result of their unlawful acts and practices. Absent injunctive relief by this Court, the Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

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

44. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.
45. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the Business Opportunity Rule, including the rescission or reformation of contracts and the refund of money.
46. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as

amended, and as implemented by 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of up to \$16,000 for each violation of the Business Opportunity Rule.

47. Defendants' violations of the Business Opportunity Rule were committed with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

48. Each offer for sale and each sale of a business opportunity in which Defendants have violated the Rule in one or more ways described above constitutes a separate violation for which Plaintiff seeks monetary civil penalties.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, United States of America, pursuant to Sections 5(a), 5(m)(1)(A), 13(b), 16(a) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a) and 57b, and the Court's own equitable powers, requests that the Court:

(1) Enter judgment against the Defendants and in favor of Plaintiff for each violation of the FTC Act and Business Opportunity Rule alleged in this Complaint;

(2) Award Plaintiff monetary civil penalties and disgorgement of ill-gotten monies for each violation of the Business Opportunity Rule;

(3) Award such relief as this Court finds necessary to redress injury to consumers resulting from violations of the Business Opportunity Rule and the FTC Act, including but not limited to rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies;

(4) Enter a permanent injunction to prevent future violations of the FTC Act and the Business Opportunity Rule by the Defendants; and

(5) Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

DATED this XXX day of July, 2013.

Respectfully submitted,

OF COUNSEL:

DAVID SHONKA  
Acting General Counsel

ROBERT J. SCHROEDER  
Regional Director  
Northwest Region

Kathryn C. Decker, Attorney  
Federal Trade Commission  
915 Second Avenue, Suite 2896  
Seattle, WA 98174  
Telephone: (206) 220-4486  
Facsimile: (206) 220-6366

FOR THE UNITED STATES OF AMERICA:

STUART F. DELERY  
Acting Assistant Attorney General  
MAAME EWUSI-MENSAH FRIMPONG  
Deputy Assistant attorney general  
MICHAEL S. BLUME  
Director, Consumer Protection Branch  
RICHARD GOLDBERG  
Assistant Director, Consumer Protection Branch

s/ Ann F. Entwistle

Ann F. Entwistle  
Trial Attorney  
Consumer Protection Branch  
U.S. Department of Justice  
450 Fifth Street, NW, Suite 6400 South  
Washington, DC 20530  
Telephone: (202) 305-3630