

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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VIVIAN RICHMAN and BEVERLY BAIDA,
individually and on behalf of all
others similarly situated,

Plaintiffs,

- against -

CAROL WRIGHT PROMOTIONS, INC. d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, and
CAROLWRIGHTGIFTS.COM, and now known as
COX TARGET MEDIA SALES, INC.,
DR. LEONARD'S HEALTHCARE CORP. d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, and CAROLWRIGHTGIFTS.COM,
DRL HOLDINGS INC. d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, and CAROLWRIGHTGIFTS.COM,
CAROL WRIGHT GIFTS, INC. d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, and CAROLWRIGHTGIFTS.COM,
COX TARGET MEDIA, INC. d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, CAROLWRIGHTGIFTS.COM,
GENESIS DIRECT FORTY-THREE, LLC d/b/a
CAROL WRIGHT GIFTS, COX DIRECT, and CAROLWRIGHTGIFTS.COM, and
PROTEAM.COM, INC. f/k/a GENESIS DIRECT, LLC d/b/a CAROL WRIGHT GIFTS, COX
DIRECT, and CAROLWRIGHTGIFTS.COM

Defendants.
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Index No. 26824/02

Date Purchased: 10/15/02

SECOND
AMENDED
CLASS ACTION
COMPLAINT

Plaintiffs Vivian Richman and Beverly Baida, individually and on behalf of all others
similarly situated, complaining of the Defendants Carol Wright Promotions, Inc., Dr. Leonard's
Healthcare Corp., DRL Holdings Inc., Carol Wright Gifts, Inc., Cox Target Media, Inc., Genesis
Direct Forty-Three, LLC, and Proteam.com, Inc. f/k/a Genesis Direct, LLC (collectively, the
"Defendants"), respectfully allege as follows:

Parties and Jurisdiction

1. Plaintiff Richman is a resident of Queens County, New York
2. Plaintiff Baida is a resident of Queens County, New York
3. Upon information and belief, Defendant Carol Wright Promotions, Inc. is a foreign corporation, formed under the laws of and domiciled in the State of Delaware.
4. Upon information and belief, Defendant Carol Wright Promotions, Inc. has changed its corporate name to Cox Target Media Sales, Inc.
5. Upon information and belief, Defendant Dr. Leonard's Healthcare Corp. is a foreign corporation, formed under the laws of and domiciled in the State of Delaware.
6. Upon information and belief, Defendant DRL Holdings Inc. is a foreign corporation, formed under the laws of and domiciled in the State of Delaware.
7. Upon information and belief, Defendant DRL Holdings Inc. has merged into Dr. Leonard's Healthcare Corp and/or is its successor in interest.
8. Upon information and belief, Defendant Carol Wright Gifts, Inc. is a foreign corporation, formed under the laws of and domiciled in the State of Delaware.
9. Upon information and belief, Defendant Cox Target Media, Inc. is a foreign corporation, formed under the laws of and domiciled in the State of Delaware.
10. Upon information and belief, Defendant Genesis Direct Forty-Three, LLC is a foreign limited liability company, formed under the laws of and domiciled in the State of Delaware.
11. Upon information and belief, Defendant Proteam.com, Inc. f/k/a Genesis Direct, LLC is a foreign corporation, formed under the laws of and domiciled in the State of Delaware, or is a successor in interest to Genesis Direct, LLC.

12. Carol Wright Promotions, Inc. has at various times relevant done business under and is the owner of record with the United States Patent and Trademark Office of the registered service mark "Carol Wright Gifts," and also does business under the assumed names "Cox Direct," and "carolwrightgifts.com."

13. Upon information and belief, Dr. Leonard's Healthcare Corp. is the record registrant of the domain name "carolwrightgifts.com."

14. Upon information and belief, Dr. Leonard's Healthcare Corp. is the record owner of said domain name, "carolwrightgifts.com."

15. Upon information and belief, Dr. Leonard's Healthcare Corp. is the record owner of the website which is located at and has the Internet web address of "http://www.carolwrightgifts.com."

16. Upon information and belief, Dr. Leonard's Healthcare Corp, and DRL Holdings Inc. are the successors or assigns of all rights to the trade, service, and domain names using the name "Carol Wright Gifts," and all of the defendants, including Carol Wright Promotions, Inc., regularly do business using that name.

17. Upon information and belief, Carol Wright Gifts, Inc. owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

18. Upon information and belief, Cox Target Media, Inc. owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

19. Upon information and belief, Genesis Direct Forty-Three, LLC owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

20. Upon information and belief, Dr. Leonard's Healthcare Corp. owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

21. Upon information and belief, DRL Holdings Inc. owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

22. Upon information and belief, Proteam.com, Inc. f/k/a Genesis Direct, LLC owned and operated the Carol Wright Gifts catalog business during all or a portion of the relevant statutory periods alleged herein.

23. Defendants during the relevant statutory periods alleged herein have sold merchandise to consumers by catalog under the assumed name of "Carol Wright Gifts."

24. Defendants during the relevant statutory periods alleged herein have sold merchandise to consumers over the Internet through the website www.carolwrightgifts.com.

25. Defendants are regularly engaged in the business of selling and shipping merchandise to consumers across the nation and into Queens County, New York.

26. Upon information and belief, Defendants send millions of printed catalogs to consumers across the nation and within the State of New York.

27. Upon information and belief, Defendants accept and during the relevant statutory periods have accepted telephone, facsimile, and mail orders from thousands of consumers, nationally, as

well as from New York residents, and have shipped millions of dollars of goods across the nation and into New York State each year.

28. Defendants, at all relevant times, have transacted business within New York State and have contracted to supply goods or services in the state.

29. By virtue of Defendants' transacting business within the state and contracting to supply goods or services within the state, as aforesaid, this Court has jurisdiction over the Defendants pursuant to CPLR 302.

30. Venue is proper in this County by virtue of the residence of the Plaintiffs in Queens County, pursuant to CPLR 503(a).

Factual Background

31. Sometime in July 2000, Plaintiff Richman placed an order to purchase two items, for a total of \$13.98, from the Carol Wright Gifts catalog.

32. In addition to the \$13.98 purchase price, Richman was charged \$4.40 for postage and handling.

33. Further, Richman was charged \$1.50 for what Defendants called "Rush Service & Free Replacement For Orders Lost or Damaged."

34. Finally, Defendants charged Richman New York Sales Tax in the total amount of \$1.64, collecting said sum as sales tax on the \$13.98 in merchandise she purchased, on the \$4.40 "postage & handling" fee, and on the \$1.50 "rush service & free replacement" fee.

35. On or about May 16, 2002, Plaintiff Baida placed an order to purchase an item from Defendants' Carol Wright Gifts catalog for \$18.99.

36. In addition to the \$18.99 purchase, Baida was charged \$4.40 for "postage & handling."

37. Further, Ms. Baida was charged \$1.50 for Defendants' so-called "rush service & free replacement" fee.

38. Finally, Defendants charged Ms. Baida New York Sales Tax in the total amount of \$2.05, collecting said sum as sales tax on the \$18.99 in merchandise she purchased, on the \$4.40 "postage & handling" fee, and on the \$1.50 "rush service & free replacement" fee.

39. Defendants' catalogs falsely represent that the \$1.50 "rush service & free replacement" fee was necessary to obtain a replacement of merchandise ordered from the Defendants. However, this is false as Defendants' order forms state, "100% Satisfaction Guaranteed! As a Carol Wright Gifts shopper, you must be 100% satisfied. If you are not satisfied with any item, return it for exchange or refund. No questions asked!"

40. Defendants' order forms explicitly guaranteeing free return or replacement nevertheless misrepresent that the consumer should pay a \$1.50 fee for a service already provided for free.

41. In charging what is in essence an insurance policy on merchandise accompanied with its own guarantee, the Defendants deceptively sought to impose a charge for nothing.

Class Allegations

42. Plaintiffs Richman and Baida bring this action on their own behalf and on behalf of a class of all similarly situated persons, nationally, who purchased a product from the Defendants, and paid a "rush service & free replacement" fee.

43. Pursuant to CPLR 901, this action may be maintained as a class action because:

- (A) The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. The class consists of all individuals within the United States who purchased products from Defendants and were charged a "rush service & free replacement" fee. Based on the fact that each and every customer order is shipped and the

“rush service & free replacement fee” is assessed on every shipment, the numerosity requirement is met.

- (B) There are questions of law or fact common to the class that predominate over any questions affecting only individual members. The common question involved here is whether or not it was lawful for Defendants to charge Plaintiffs and the class members a “rush service & free replacement” fee on products purchased and shipped.
- (C) The claims or defenses of the representative parties are typical of the claims or defenses of the class. The Plaintiffs, like all members of the proposed class, were charged the “rush service & free replacement” fee. Plaintiffs have no claims or defenses that are hostile to the claims or defenses of the class.
- (D) The representative parties will fairly and adequately protect the interests of the class. Plaintiffs Richman and Baida are appropriate class representatives because they do not have any interests antagonistic to the class members. Further, Plaintiffs have retained counsel experienced in the maintenance of consumer class actions.
- (E) The class action is superior to other available methods for the fair and efficient adjudication of the controversy. The expense and burden of individual litigation would make it difficult, if not impossible, for the class members to redress the wrongs done, given the small amount of the unlawful fee charged. Individualized litigation would also present the potential for inconsistent or contradictory judgments and would magnify the delay and expense to all parties and the court system.

PLAINTIFFS’ FIRST CAUSE OF ACTION

Violation of General Business Law §349

44. Plaintiffs hereby restate, reallege, and incorporate herein by reference paragraphs 1-43 as if set forth fully in this Court.

45. Plaintiffs bring this Cause of Action, individually, and on behalf of the class described in paragraph 40 above.

46. General Business Law §349(h) provides in pertinent part:

[A]ny person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions.

47. The Defendants' action in charging a "rush service & free replacement" fee was a deceptive act that was "consumer oriented."

48. In charging said "rush service & free replacement" fee, the Defendants' action had a broad impact on consumers at large.

49. The Defendants charging said "rush service & free replacement" fee, and the express and implied false representations that payment of the fee would result in "rush service" or "free replacement" was a deceptive act or practice likely to mislead a reasonable consumer acting reasonably under the circumstances.

50. Defendants compelled the class members to pay a fee for "rush service" yet no rush service was provided to the class members despite payment of the fee. Defendants compelled the class members to pay a fee for "free replacement" when in fact, they had already agreed to provide 100% satisfaction, including free replacement, without payment of the fee.

51. The Defendants' imposition of a "rush service & free replacement" fee was a sham and a fraud, designed solely to gouge \$1.50 from each class member on every purchase made under the deceptive and misleading pretense that the consuming public would gain the benefit of "rush service" or "free replacement" by the payment of said fee. In fact, the fee provided no such benefits.

52. The Defendants' actions were willful and intentional because, in imposing charges on the general public for which the consuming public received no benefit whatsoever, a substantial sum of money was accumulated.

53. Because Defendants' actions in imposing the "rush service & free replacement" fee was the product of an extensive and intentional marketing scheme, it had an impact on

consumers at large that is far broader than a mere contractual dispute between the individual members of the class and the Defendants.

54. As a proximate result of Defendants' deceptive acts and practices, Plaintiffs and the class members have been injured and suffered damage.

55. Consequently, Defendants violated General Business Law §349(h), and should be made liable to the members of the class in the amounts set forth in the statute and as may be determined by the finder of fact at time of trial.

56. The claims of New York consumers, such as the Plaintiffs, are brought under General Business Law §349. Plaintiffs also bring claims on behalf of non-New York residents under the similar consumer protection statutes of the class members' respective states.

PLAINTIFFS' SECOND CAUSE OF ACTION
Breach of Contract

57. Plaintiffs hereby restate, reallege, and incorporate herein by reference paragraphs 1-56 as if set forth fully in this Count.

58. Plaintiffs bring this Count, individually, and on behalf of the class described in paragraph 40 above.

59. Defendants charged Plaintiffs and the members of the class a fee of \$1.50 for "rush service & free replacement."

60. By so charging Plaintiffs and the members of the class, Defendants sought to enter into a contract separate and apart from the contract for the sale and purchase of merchandise. This separate contract was designed to possibly: (a) provide rush service, and (b) provide free replacement of their items.

61. Defendants' contract was illusory in that Defendants were already obligated under their prior merchandise and satisfaction guarantee. As the Defendants did not provide any

additional service in consideration for the \$1.50 paid by each of the class members (over and above services they had already promised to perform), they have breached the contract as to Plaintiffs and each class member.

PLAINTIFFS' THIRD CAUSE OF ACTION

Unjust Enrichment

62. Plaintiffs hereby restate, reallege, and incorporate herein by reference paragraphs 1-61 as if set forth fully in this Count.

63. Plaintiffs bring this Count, individually, and on behalf of the class described in paragraph 40 above.

64. A party is unjustly enriched when it retains a benefit to the detriment of another party against fundamental principles of justice, equity, and good conscience.

65. Defendants represented to Plaintiffs and the class members that they were paying a fee in return for rush service or for insurance on goods lost or damaged during shipping.

66. This representation was false because no meaningful additional service or insurance was provided in return for the payment of said fee.

67. Defendants have reaped a tremendous benefit and amassed substantial profits by virtue of collecting \$1.50 for each order placed. That the Defendants have collected such earnings and retained such benefit to the detriment of Plaintiffs and the members of the class violates the fundamental principles of justice, equity and good conscience.

68. Plaintiffs and the class members have all been deceptively obligated to pay a fee to Defendants that was falsely represented to be for rush service and for their assurance that items shipped could be replaced free of charge.

69. Defendants have been and continue to be unjustly enriched through the above-described conduct.

70. Defendants should be required to return the monies they have unjustly obtained to the detriment of Plaintiffs and the class.

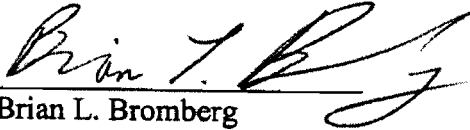
WHEREFORE, Plaintiffs Richman and Baida request that judgment be entered in their favor, individually and on behalf of the class, against Carol Wright Promotions, Inc., Dr. Leonard's Healthcare Corp., DRL Holdings Inc., Carol Wright Gifts, Inc., Cox Target Media, Inc., Genesis Direct Forty-Three, LLC, and Proteam.com, Inc. f/k/a Genesis Direct, LLC, jointly and severally, on the First, Second, and Third Counts, and request the following relief:

- (A) Actual damages sustained by the class members or fifty dollars, whichever is greater;
- (B) Damages not to exceed 3 times the actual damages, up to \$1,000, by virtue of the knowing and willful violation of GBL §349;
- (C) An injunction against the Defendants enjoining them from charging deceptive and misleading fees similar to those charged here;
- (D) Adjudging the Defendants to have breached the "rush service and free replacement" contract and awarding damages of \$1.50 a class member plus interest, costs, disbursements, and attorney fees;
- (E) Certifying the proposed class, appointing Plaintiffs as class representatives and their attorneys as class counsel;
- (F) Awarding declaratory relief in the form of an order requiring Defendants to disgorge all monies unjustly received through their false representations and omissions regarding the rush service and free replacement fee;
- (G) Awarding reasonable attorney fees, costs, and disbursements of this action; and
- (H) Awarding such other and further relief as this Court deems just, equitable, and equitable.

Dated: New York, New York
October 9, 2003

Respectfully submitted,

BRIAN L. BROMBERG, P.C.


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