

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

STATE OF NEW MEXICO, ex rel.
HECTOR H. BALDERAS, Attorney General,

Plaintiff, Case assigned to Ellenwood, Kathleen McGarry

v.

No. D-101-CV-2022-00484

LIVINGSTON HEARING AID CENTER, INC.,
a foreign corporation,

Defendant.

COMPLAINT FOR RESTITUTION, CIVIL PENALTIES, AND INJUNCTIVE RELIEF

COMES NOW the State of New Mexico, *ex rel.* Hector H. Balderas, Attorney General, by and through Assistant Attorney General Brian E. McMath (collectively, “Plaintiff”), and brings this Complaint for restitution, civil penalties, and injunctive relief against Livingston Hearing Aid Center, Inc. (hereafter, “LHAC”). In support of his Complaint, states:

I. INTRODUCTION

According to Census.gov, more than 318,000 New Mexicans are now over the age of 65.¹ In 2016, Catron County boasted the second-highest median age in the country,² and nearby Silver City is a popular retirement destination.³ Four of New Mexico’s thirty-three counties report median ages of 50 years old or more.⁴

According to the National Institutes of Health, one out of every four citizens between the ages of 65 and 74 has disabling hearing loss. For ages 75 and older, the number jumps to one in

¹ <https://www.census.gov/content/dam/Census/library/publications/2019/acs/acs-41.pdf> (last visited Mar. 22, 2022).

² <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html> (last visited Mar. 22, 2022).

³ <https://www.newmexico.org/places-to-go/regions-cities/southwest/silver-city/> (last visited Mar. 22, 2022).

⁴ <https://www.census.gov/content/dam/Census/library/visualizations/2017/comm/cb17-100-median-age.pdf> (last visited Mar. 22, 2022) (Catron, Sierra, Lincoln, and Harding counties).

two.⁵ Thus, the aging of New Mexico’s population has coincided with an increase in New Mexicans’ reliance on assistive medical devices like hearing aids. While hearing aids can be prescribed by a doctor specializing in diagnosing and treating diseases of the ears (an otolaryngologist), consumers can also obtain hearing aids from audiologists (state-licensed non-M.D. professionals who measure hearing and fit hearing aids) and hearing aid dispensers (state-licensed individuals who measure hearing and fit hearing aids). As of July 2018, 143 audiologists and 87 hearing aid dispensers held active licenses within the state of New Mexico.

Livingston Hearing Aid Center, Inc. (hereafter, “LHAC”) is a Texas-based corporation engaged in the business of marketing, fitting, programming, selling, and maintaining hearing aids at ninety-three retail locations across the Southwest, including eighteen locations in New Mexico. As described in detail below, LHAC utilizes aggressive and misleading sales tactics and advertising campaigns to convince elderly New Mexicans that if they act quickly and make an appointment with LHAC in the next few days, they can try LHAC’s products (which regularly retail for thousands of dollars each) free of charge or get other “limited time only” deals. In reality, consumers need not act quickly because the advertised “deals” are available essentially on a permanent basis and the urgency suggested by LHAC’s advertising is a sham designed to motivate elderly customers to act. Despite claims to the contrary, LHAC’s 45-day product trial period (which they are legally required to offer everyone) is not actually free at all, and can cost consumers \$300 or more in fees that LHAC fails to disclose until the consumer is ready to buy. LHAC employees routinely inflate manufacturer suggested retail prices to give the appearance of larger discounts, refuse to accept returns consumers attempt to make during their statutorily-required trial period, and engage in other reprehensible behavior, all while serving predominantly

⁵ <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing> (last visited Mar. 22, 2022).

elderly customers and customers for whom English is a second language. LHAC uses this potent combination of false urgency, blatant omission of key details, and misleading and aggressive sales tactics to obtain quick appointments and quick sales from New Mexico's most vulnerable citizens.

II. PARTIES, JURISDICTION, & VENUE

1. Plaintiff Hector Balderas is the duly elected Attorney General of the State of New Mexico. The Attorney General has the statutory authority to enforce laws for the protection of the public pursuant to NMSA 1978, Section 8-5-2(B) (1975). This includes enforcing the New Mexico Unfair Practices Act (hereafter, "UPA") (*see* NMSA 1978, Sections 57-12-1 to -26 (1967, as amended through 2019)) the New Mexico False Advertising Act (hereafter, "FAA") (*see* NMSA 1978, Sections 57-15-1 to -10 (1965, as amended through 1967)), and the Retail Installment Sales Act (hereafter, "RISA") (*see* NMSA 1978 Sections 56-1-1 to -16 (1965, as amended through 1983)). New Mexico brings this claim in its *parens patriae* capacity pursuant to New Mexico's quasi-sovereign interest in the health and well-being of its residents. New Mexico possesses an interest in this matter apart from the interests of private parties. New Mexico acts herein as a representative of its citizens to redress injuries that affect the general population of New Mexico in a substantial way.

2. Defendant LHAC is a foreign corporation organized under the laws of the state of Texas in August 1977, with its principal place of business in Lubbock, TX and retail locations in Texas, New Mexico, Colorado, and Arizona.

3. LHAC is registered with the New Mexico Secretary of State to conduct business in New Mexico, maintains an in-state principal place of business in Clovis, NM, and owns and operates retail locations in Clovis, Las Cruces, Albuquerque, Santa Fe, Hobbs, Los Lunas, Ruidoso,

Roswell, Alamogordo, Gallup, Truth or Consequences, Silver City, Carlsbad, Grants, Farmington, Deming, and Portales.

4. This Court has subject-matter jurisdiction over this case pursuant to N.M. Const. Art. VI Sec. 13.

5. This Court has personal jurisdiction over LHAC under NMSA 1978 Section 38-1-16(A) and under New Mexico's "sufficient minimum contacts" test, *Sproul v. Rob & Charlie's, Inc.*, 2013-NMCA-072, ¶ 13, 304 P.3d 18.

6. Venue is proper in this County under NMSA 1978, Section 38-3-1(F), as Plaintiff resides in this County, and under NMSA 1978, Section 57-12-8(A), because Plaintiff alleges LHAC maintains a location in this County where it is using, has used, and/or is about to use practices which Plaintiff has alleged to be unlawful under the UPA.

7. Plaintiff brings this action exclusively under the laws of the State of New Mexico. The instant Complaint does not confer diversity jurisdiction upon the federal courts pursuant to 28 U.S.C. § 1332. This action is brought by the State of New Mexico as the sole plaintiff, and no class action or mass action is raised herein. Any alleged class or mass action is expressly disavowed. To the extent that anything in this Complaint is alleged to be to the contrary, this paragraph is controlling. Accordingly, any improvident or dilatory attempt by Defendants to remove this case to federal court on the basis of Section 1332 of Title 28, United States Code, would be without any reasonable basis in fact or law.

III. FACTUAL BACKGROUND

8. LHAC is engaged in the business of marketing, fitting, programming, selling, and maintaining hearing aids within the state of New Mexico.

9. Due to the nature of the products and services LHAC provides, the overwhelming majority of LHAC's customers are elderly.⁶ In fact, many of LHAC's advertising messages are explicitly directed at consumers over the age of 65.

10. As a dispenser of hearing aids, LHAC is subject to various requirements contained within New Mexico's Speech-Language Pathology, Audiology and Hearing Aid Dispensing Practices Act and its attendant regulations. *See* NMSA 1978 § 61-14B-2 (1996, as amended through 2015) (hereafter, "DPA"); *see also* 16.26.1 to .11 NMAC (1971, as amended through 2015).

11. LHAC employs "audiologists" and "hearing aid dispensers" within the state of New Mexico as those terms are defined in the DPA, and those audiologists and hearing aid dispensers are also subject to various requirements contained within the DPA and its attendant regulations, in particular 16.26.9.8 NMAC (hereafter, "DPA Ethics Code").

12. LHAC's trade directly affects consumers within the state of New Mexico.

LHAC'S MISLEADING ADVERTISING PRACTICES

13. LHAC advertises heavily throughout New Mexico via newspaper, direct mail, television, Facebook, and on its own website. Between March 2017 and January 2018, LHAC created more than 1,000 unique advertising messages and distributed those messages in at least fifteen different cities and towns across New Mexico to an as-yet unknown number of consumers. Upon information and belief, these advertisements reached thousands of New Mexico consumers.

14. LHAC's advertising routinely omits material facts about its return policy and fees associated therewith, resulting in a bait-and-switch after consumers have made the decision to purchase and causing consumers to incur obligations they were not previously informed of.

⁶ <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing#4> ("Nearly 25 percent of those aged 65 to 74 and 50 percent of those who are 75 and older have disabling hearing loss.") (last visited Mar. 22, 2022).

15. Further, LHAC knowingly and willfully creates false urgency among consumers by making misleading or outright false claims that certain prices and/or opportunities are limited in time or scope when, in truth, those prices or opportunities appear to be available to everyone at nearly any time.

MATERIAL MISREPRESENTATIONS REGARDING TRIAL PERIODS AND FEES

16. The DPA Ethics Code dictates that any consumer who is provided with a hearing aid must also be provided a trial period of no less than 45 consecutive days. *See* 16.26.9.8(I)(2)(b) NMAC.

17. LHAC's advertising routinely uses this 45 day trial period to entice customers by referring to the trial period as a "special offer" that is available "for a limited time" or to "the first [number of] customers."

18. Contrary to both 16.26.9.8(I)(2)(b) NMAC, consumers have been told via LHAC's misrepresentations that they have substantially less time than the legally mandated 45 days.

19. LHAC regularly advertises trial periods (e.g., "30 day test drive" or a "10-Day Challenge") that are substantially shorter than the legally-mandated 45-day trial period. These advertisements are devoid of any details that would enable a consumer to know that, by law, the consumer can keep the hearing aids for up to 45 days with no penalty.

20. When a consumer decides to return a hearing aid to LHAC within the legally-required trial period, LHAC employees refuse to accept the returns.

21. In several documented instances, LHAC employees either refused to accept returns outright, or falsely informed consumers that they had to return their hearing aids on the final day of the trial period.

22. According to LHAC's Bills of Sale and Instrument Delivery Checklists, consumers that return their hearing aids within the trial period will receive a full refund "less \$300 for office preparation and restocking fee."

23. However, LHAC entices consumers with offers of hearing aids "at no cost," with a "100% money back satisfaction guarantee," a "45 day risk free trial," a "no obligation trial," and other similar language. LHAC's advertising makes no mention anywhere of the \$300 fee.

24. LHAC's omission of the \$300 fee from its advertising messages is deliberate and willful, and specifically designed to motivate consumers to try out a hearing aid which they believe will cost them nothing unless and until they decide to keep it.

25. Upon information and belief, consumers are not informed of the \$300 fee until after they have been exposed to the advertisement, made an appointment, attended the appointment, undergone a hearing evaluation, selected a hearing aid, and decided to embark on a 45-day trial they have previously been led to believe will be "risk free."

26. LHAC employees will occasionally "waive" the \$300 fee as a sales tactic, typified by a handwritten cross-out of that term on the Bill of Sale.

27. However, between March 2017 and January 2018 alone, at least twenty New Mexico consumers, all of them elderly, were charged the previously undisclosed \$300 fee.

28. LHAC's practice of "waiving" the previously undisclosed fee may, tends to, or does mislead consumers to believe they have "negotiated" a better deal when, in truth, the fee should not have been charged in the first instance because it was never previously disclosed.

29. In at least one instance between March 2017 and January 2018, LHAC charged a New Mexico consumer the \$300 fee even after claiming to "waive" the fee on the consumer's Bill of Sale. In other words, LHAC failed to disclose the fee in its advertising, improperly charged the fee

after failing to disclose it, promised the consumer LHAC would remove the fee it never should have included, and then charged the consumer the fee anyway.

30. Upon information and belief, LHAC has improperly charged other New Mexico consumers the \$300 “office preparation and restocking fee” before March 2017 and after January 2018.

31. Upon information and belief, LHAC has charged other New Mexico consumers the \$300 fee after “waiving” the fee on the consumer’s Bill of Sale before March 2017 and after January 2018.

MATERIAL MISREPRESENTATIONS REGARDING FINANCING

32. LHAC’s advertising regularly references monthly payment plans, often in concert with the “free trial,” “no cost,” and “no obligation” language described above.

33. LHAC offers financing options to consumers, including plans provided by Wells Fargo, HealthiPlan, CareCredit, and LHAC’s own In-House Payment Plan (hereafter, “IHPP”).

34. For the typical customer that chooses to finance with Wells Fargo, HealthiPlan, or CareCredit, LHAC opens a credit account on the customer’s behalf on the date the customer takes possession of their hearing aid(s), i.e. on the first day of the customer’s legally mandated 45-day trial period that LHAC advertises as “no obligation” and “risk free.”

35. In several documented instances, this practice of applying for credit at the beginning of a customer’s legally required trial period has resulted in that customer receiving demands for payment from the finance company prior to the expiration of the trial period.

36. In several documented instances, this practice has also resulted in the customer incurring interest and other finance charges prior to the expiration of the trial period.

37. This business practice, which results in both demands for payment and the incurring of interest and other finance charges during the purportedly “risk free” trial period, is contrary to the plain language of LHAC’s advertising messages and LHAC’s regulatory obligation to provide a 45-day trial period.

38. LHAC’s omission of these details from its advertising messages is both deliberate and willful, and is designed specifically to entice consumers to make an appointment where, for the first time, they are informed that the “risk free” trial period is not “risk free” at all.

39. Customers opting to use LHAC’s IHPP financing are assessed a ten percent fee and are required to pay a thirty percent down payment before they take delivery of their hearing aids.

40. According to LHAC’s own internal training documents, “[t]here are no exceptions to this requirement” (emphasis in original).

41. This business practice, which requires customers to pay substantial amounts of money before being allowed to try out their hearing aids for the legally-mandated 45 days, contradicts the plain “no obligation,” “risk free” language of LHAC’s advertising messages.

42. By willfully and knowingly omitting and misrepresenting material facts about its return policy and about the various obligations LHAC will cause consumers to incur during the purportedly “risk free,” “no obligation” trial period, LHAC’s advertising and employees mislead elderly consumers to believe that the 45-day trial is, in fact, “risk free” and that they can try out their hearing aids without incurring any additional obligations.

CREATING FALSE URGENCY TO OBTAIN APPOINTMENTS

43. LHAC’s advertising is replete with offers of “free hearing screenings” and “free video inspections” of consumer’s ears that are available for a “limited time only” and urging consumers to “call today” because “appointment times are limited.”

44. Contrary to the plain language of its advertising, LHAC does not appear to ever charge consumers for hearing screenings or video inspections, either during the “limited time” advertised or at any other time. Thus, neither the “free” offers nor the “appointment times” are limited in the fashion LHAC’s advertising suggests.

45. LHAC knowingly and willfully misrepresents that these services may only be obtained for free for a limited time when, in truth, these services are rarely if ever charged for.

46. By creating a false sense of urgency through these “limited time” offers, LHAC misleads customers into believing that they must act quickly or lose out on a deal that the customer is not, in fact, at risk of losing out on.

47. In many of its advertising messages, LHAC urges consumers to “participate in a field test” of “a remarkable new hearing instrument” or to call LHAC to “see if [they] are qualified” to participate in a “product study” to “evaluate . . . technology” that LHAC claims to be limited to “the first” number of consumers who call and/or limited to consumers over the age of 65.

48. These “participants” are often promised free hearing evaluations as part of their “participation,” and are promised that they may “qualify to keep” the hearing aids they are “testing” at “little to no cost” by virtue of participating in the “field test” or “study.”

49. However, contrary to the plain language of its advertisements, neither LHAC nor its vendors participate in, create, sponsor, or coordinate “field tests” or “product studies,” and there is no actual distinction between a “participant” and an ordinary customer in terms of what they are offered or what they may qualify for.

50. In truth, LHAC is knowingly and willfully mislabeling its legally-mandated 45-day trial period as a “research study” that entitles “participants” to nothing more or less than an ordinary customer would be offered or what LHAC is legally obligated to provide.

51. In several of its advertising campaigns, LHAC misrepresents the length of time it is legally required to allow consumers to try out its products by advertising these “research studies” as “30 day test drives” or “10-Day Challenges.”

52. By creating a false sense of urgency, LHAC knowingly and willfully misleads elderly customers into believing that they must act quickly or risk losing out on an opportunity that, in truth, is no different than what LHAC typically offers.

53. By falsely suggesting that these “studies” are sanctioned by manufacturers or medical researchers, LHAC knowingly and willfully misleads elderly consumers into believing that they can “qualify” for an opportunity that, in truth, is no different (or, in the case of the 30- and 10-day trials, even less generous or advantageous) than what LHAC typically offers or what LHAC is legally obligated to provide.

54. By advertising trial periods of less than the legally-mandated 45 days, LHAC knowingly and willfully misleads elderly consumers into believing that they must decide whether to keep their hearing aids much sooner than they are legally required to decide.

55. LHAC’s advertising often includes urgent messages in large print declaring that certain prices, discounts, dollars-off discounts, and coupons “expire this week” or are valid for a certain number of days only.

56. However, the majority of the “expires this week” offers are in fact permanent offers not limited by time in any way, available to any consumer at any time despite the urgent expiration language contained in the advertisements.

57. Upon information and belief, LHAC always or nearly always offers each customer some sort of offer, discount, or special pricing regardless of contrary messaging in LHAC’s

advertisements, indicating customers will always or nearly always receive an offer, a discount, or special pricing even if LHAC's advertising claims such deals are in limited supply.

58. In fact, most of LHAC's advertising containing offers that "expire this week" are distributed multiple times across multiple dates with no actual expiration date included, meaning the term "expires this week" is untethered to any actual week, rendering the language as nothing more than an empty threat designed to spur elderly customers to act.

59. LHAC's advertising often includes "coupons" offering special, limited-time-only pricing on items like batteries, hearing aid repairs, and cleanings, which "expire this week" as well.

60. In addition, the pricing advertised on these "coupons" is often either (i) a permanent price that is in no way time-limited despite the claims made in the advertising, or (ii) actually higher than the regularly charged price of that item or service.

61. By knowingly and willfully misrepresenting the expiration dates or durations of particular offers which never actually expire, LHAC misleads elderly consumers into believing that they must act quickly or risk losing out on an opportunity.

MATERIAL MISREPRESENTATIONS REGARDING PRICING

62. LHAC includes the "manufacturer suggested retail price" ("MSRP") for the items being purchased on each customer's Bill of Sale.

63. LHAC's advertising messages offer "[dollars] off MSRP" and "[percentage] off MSRP," again as supposedly limited-time-only offers that LHAC falsely claims must be acted upon quickly.

64. Upon information and belief, LHAC never charges customers the actual MSRP because every or nearly every customer, regardless of which location they do business with, when they

purchase, or what product they purchase, is given some type of discount, promotion, or special pricing.

65. Upon information and belief, LHAC is engaged in false reference pricing, described as follows by a federal appeals court:

Most consumers have, at some point, purchased merchandise that was marketed as being ‘on sale’ because the proffered discount seemed too good to pass up. Retailers, well aware of consumers’ susceptibility to a bargain, therefore have an incentive to lie to their customers by falsely claiming that their products have previously sold at a far higher ‘original’ price in order to induce customers to purchase merchandise at a purportedly marked-down ‘sale’ price. Because such practices are misleading—and effective—the California legislature has prohibited them.

Hinojos v. Kohl’s Corp., 718 F.3d 1098, 1101 (9th Cir. 2013).

66. Worse yet, LHAC routinely inflates the MSRP over and above even what the manufacturer of the device actually suggests, knowingly and willfully misleading elderly consumers to believe they are receiving a much larger discount than they actually receive.

67. As an example, according to Starkey (an LHAC hearing aid vendor), the MSRP for its Muse i1600 CIC hearing aid was \$4,196 as of August 2017.

68. When Consumer J.W., age 86, bought two Muse i1600 CIC hearing aids from LHAC in September 2017, LHAC informed him that the MSRP for those hearing aids was \$5,095 each, more than twenty percent higher than Starkey’s actual MSRP and more than five times LHAC’s actual cost to purchase those hearing aids from Starkey.

69. Consumer J.W. was then “given” an “LHAC Discount” of \$2,345 on each hearing aid, resulting in a final price of \$2,750 per hearing aid.

70. Upon information and belief, LHAC's misrepresentation regarding MSRP likely deceived Consumer J.W. into believing he was receiving a discount amount (\$4,690) more than sixty percent higher than the discount he actually received (\$2,892).

LHAC'S LANGUAGE BARRIERS

71. LHAC provides at least one corporate form in Spanish, and employs several Spanish speakers at a number of its locations.

72. Upon information and belief, LHAC often sells hearing aids to Spanish speakers, but LHAC does not provide Bills of Sale, Delivery Checklists, IHPP Enrollment Forms, or invoices in Spanish.

73. While LHAC does employ a dozen Spanish speakers across the state, LHAC employs no Spanish speakers at its Carlsbad, Grants, Hobbs, Los Lunas, Roswell, Ruidoso, or Truth or Consequences locations, as well as at least one of its three Albuquerque locations.

74. Upon information and belief, LHAC has knowingly and willfully sold hearing aids to Spanish speakers at those locations without providing their customer with a sales pitch or forms he or she could understand.

75. Upon information and belief, LHAC often sells hearing aids to Diné speakers as well, predominantly at its locations near the borders of the Navajo Nation.

76. LHAC does not provide any corporate forms of any type in Diné, and employs no Diné speakers at any of its locations in New Mexico.

77. LHAC has knowingly and willfully sold hearing aids to Diné speakers without providing those customers with a sales pitch or forms they could understand.

LHAC'S IN-HOUSE PAYMENT PLAN

78. Among other financing options, LHAC offers its own IHPP to consumers wishing to defray the costs of their hearing aids. The IHPP program is offered only to those consumers who fail to qualify for other financing options, suggesting that most IHPP participants are low-income.

79. Under an IHPP agreement, consumers who have been turned down for all other financing options are allowed to spread the cost of their hearing aids out over a negotiated number of monthly installments in return for a fee of ten percent of the purchase price and a down payment of thirty percent of the new purchase price (i.e. the original purchase price plus ten percent).

80. Thus, each IHPP Enrollment Form is, in fact, a retail installment contract as that term is defined in the Retail Installment Sales Act ("RISA"), NMSA 1978 Section 56-1-1(H).

81. Each consumer wishing to participate in the IHPP is instructed to fill out an In-House Payment Plan Enrollment Form which, even if completely filled out, includes only:

- i. LHAC location;
- ii. Patient name and address;
- iii. Date of transaction;
- iv. "Financial Arrangements" including "Sale Price," "Total Price (with 10% Fee)," "30% Down Payment (must be collected before fit)," "# of Payments," and "Monthly Payment;"
- v. Banking information, either via a voided check or debit card information;
- vi. An "Accountholder Agreement" authorizing LHAC to charge the consumer's bank account and making a reference to "late fees"; and
- vii. The consumer's signature and date.

82. Contrary to the RISA, LHAC's IHPP Enrollment Forms contain none of the following information:

- i. A "NOTICE TO THE BUYER" as required by Section 56-1-2(B) of the RISA;
- ii. The difference between the "cash sale price" and the down payment, as required by Section 56-1-2(E)(3);
- iii. The principal balance as required by Section 56-1-2(E)(6); or
- iv. Written confirmation that the "late fees which may be incurred" are to be calculated and collected in accordance with Section 56-1-2(K).

83. Contrary to the RISA, LHAC has consumers sign IHPP Enrollment Forms containing blank spaces where essential provisions of the transaction should have been, or Enrollment Forms containing incorrect essential provisions.

84. LHAC miscalculates consumers' payment amounts, resulting in consumers owing LHAC money even after completing their payment plan.

85. LHAC also miscalculates the "30% Down Payment" and/or the "10% Fee," forcing consumers to deposit more than the IHPP Enrollment Form required.

IV. LEGAL CAUSES OF ACTION

COUNT I VIOLATIONS OF THE NEW MEXICO UNFAIR PRACTICES ACT NMSA 1978 § 57-12-3

86. Plaintiff re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

87. LHAC is a "person" as defined in the New Mexico Unfair Practices Act ("UPA"), Section 57-12-2(A).

88. LHAC is engaged in "trade" or "commerce" as defined in Section 57-12-2(C).

89. LHAC's advertising and sales practices as alleged herein are:

- i. Oral or written statements, visual descriptions, or other representations that are false or misleading;
- ii. Representations made knowingly in connection with the sale of goods and in the regular course of LHAC's trade or commerce within the state of New Mexico; and
- iii. Representations of the type that may, tend to, or do deceive or mislead any person.

90. By knowingly and willfully (i) misleading consumers about the \$300 restocking fee, (ii) engaging in false reference pricing, (iii) misleading consumers about the amount or existence of price reductions, and (iv) assigning meaningless expiration dates of its supposed "deals," LHAC is knowingly making false or misleading statements of fact as defined by Section 57-12-2(D)(11) and in violation of Section 57-12-3.

91. By knowingly and willfully (i) misleading consumers about the expiration dates of supposed "deals," (ii) fabricating supposedly limited-participation "research studies," (iii) misstating the length of time consumers have to decide whether to keep their hearing aids, and (iv) creating false urgency where none exists in order to obtain sales appointments from consumers, LHAC is knowingly making false or misleading statements of fact as defined by Section 57-12-2(D)(12) and in violation of Section 57-12-3.

92. By knowingly and willfully (i) exaggerating the quality and exclusivity of LHAC's purported "deals," (ii) misleading consumers about the exclusivity of its 45-day trial period, (iii) misleading consumers about the existence of "research studies," and (iv) exaggerating the discounts consumer receive by inflating MSRP figures, LHAC is using exaggeration, innuendo, or ambiguity as to material facts as defined by Section 57-12-2(D)(14) and in violation of Section 57-12-3.

93. By knowingly and willfully (i) requiring consumers to return or purchase hearing aids sooner than 45 days, (ii) refusing to accept returns prior to the end of a trial period, (iii) falsely informing consumers that its trial period is “100% risk free” and “no obligation,” (iv) charging consumers a restocking fee after claiming to have waived the fee, and (v) miscalculating down payments required to secure financing, LHAC is representing that its customer transactions involve rights, remedies or obligations that they do not involve as defined by Section 57-12-2(D)(15) and in violation of Section 57-12-3.

94. By knowingly and willfully (i) tricking elderly New Mexicans into believing that they must act quickly in order to secure a good deal, (ii) trying to charge and then “waiving” fees that never should have been charged, (iii) fabricating “research studies” purportedly designed for those over the age of 65, (iv) refusing to accept returns until the very last day of a trial period, if at all, and (v) inflating MSRPs which LHAC has never actually charged, LHAC is taking advantage of the lack of knowledge, experience, or capacity of elderly New Mexicans to a grossly unfair degree as defined by Section 57-12-2(E)(1) and in violation of Section 57-12-3.

95. By knowingly and willfully taking thousands of dollars from non-English-speaking customers while (i) failing to provide staff that speak the customer’s language and (ii) failing to provide Bills of Sale, Delivery Checklists, IHPP Enrollment Forms, invoices, and other documents in the customer’s language, LHAC is taking advantage of the lack of knowledge, experience, or capacity of New Mexico’s non-English-speaking population to a grossly unfair degree as defined by Section 57-12-2(E)(1) and in violation of Section 57-12-3.

96. Pursuant to Sections 57-12-8 and -11 of the UPA, LHAC’s violations subject LHAC to injunctions, restitution, disgorgement, and civil penalties of up to \$5,000.00 per violation.

COUNT II
VIOLATIONS OF THE NEW MEXICO FALSE ADVERTISING ACT
NMSA 1978 § 57-15-2

97. Plaintiff re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

98. LHAC is a corporation engaged in false advertising in the conduct of business, trade, or commerce or in the furnishing of a service as proscribed by the FAA, Sections 57-15-1 and -2.

99. As alleged herein, LHAC's advertising is misleading in many material respects and omits many material facts. LHAC's advertising is violative of the FAA because:

- i. It misrepresents material facts about the value and/or exclusivity of LHAC's various purported "sales," limited-time offers, "research studies," and other enticements;
- ii. It misrepresents and/or flatly omits material facts regarding LHAC's 45-day return policy and its associated fees and obligations;
- iii. It misrepresents and/or flatly omits material facts regarding LHAC's IHPP financing program; and
- iv. It creates a false urgency where no urgency actually exists.

100. Plaintiff has provided notice to LHAC pursuant to Section 57-15-3 of the FAA.

101. Pursuant to Sections 57-15-4 and -5 of the FAA, LHAC's violations subject LHAC to injunctions and civil penalties of up to \$500 per violation.

COUNT III
VIOLATIONS OF THE NEW MEXICO RETAIL INSTALLMENT SALES ACT
NMSA 1978 § 56-1-2

102. Plaintiff re-alleges all prior paragraphs of this Complaint as if set forth fully herein.

103. The hearing aids LHAC sells are "goods" as that term is defined in the Retail Installment Sales Act ("RISA"), NMSA 1978 Section 56-1-1(A).

104. Each signatory consumer to these IHPP Enrollment Forms is a "retail buyer" or "buyer" as defined in Section 56-1-1(E).

105. LHAC is a "person" as defined in Section 56-1-1(P), regularly and principally engaged in the business of selling goods to retail buyers, making LHAC a "retail seller" or "seller" as defined in Section 56-1-1(F).⁷

106. The "10% Fee" assessed as part of each IHPP transaction as described above is a "time price differential" as defined in Section 56-1-1(J).

107. The "Sale Price" included in the "Financial Arrangements" section of each IHPP Enrollment Form is the "cash sale price" as that term is defined in Section 56-1-1(K).

108. The "Total Price (with 10% Fee)" in the "Financial Arrangements" section of each IHPP Enrollment Form is the "time sale price" as that term is defined in Section 56-1-1(M).

109. Each IHPP Enrollment Form is therefore a "retail installment contract" as defined in Section 56-1-1(H), and each IHPP transaction is a "retail installment transaction" as that term is defined in Section 56-1-1(G).

110. Under the RISA, all retail installment sales contracts must be "completed as to all essential provisions, except as otherwise provided" NMSA 1978 § 56-1-2(A).

111. Because LHAC's IHPP Enrollment Forms do not contain numerous essential provisions as required under Section 56-1-2, LHAC's IHPP Enrollment Forms each amount to numerous violations of the RISA even when fully filled out by LHAC and/or the consumer.

⁷ While the term "retail seller" does not include the sale of "services of a professional licensed by the state," the allegations relevant to that statutory definition arise solely from the *goods* sold by LHAC, not the *services* provided by their licensed audiologists and hearing aid dispensers. *Cf.* NMSA 1978 § 56-1-1(A) and § 56-1-1(B).

112. Further, it is a violation of the RISA for parties to sign retail installment contracts that “contain[] blank spaces of items which are essential provisions of the transaction” NMSA 1978 § 56-1-2(H).

113. Because LHAC instructs or permits consumers to sign IHPP Enrollment Forms that are incomplete, LHAC’s incomplete IHPP Enrollment Forms each amount to further violations of the RISA.

114. Pursuant to Section 56-1-9 of the RISA, LHAC is barred from recovering any time price differential, fees, or delinquency or collection charges arising from any IHPP installment transaction that does not conform to the RISA.

115. Pursuant to Section 56-1-10 of the RISA, LHAC’s violations subject LHAC to injunctions to prevent further violations.

WHEREFORE, Plaintiff respectfully requests that:

A. For LHAC’s UPA violations, the Court:

1. Find that LHAC has knowingly and willfully violated, and continues to violate, the UPA;
2. Award Plaintiff civil penalties of up to \$5,000 for each willful violation per Section 57-12-11;
3. Enjoin LHAC from violating the UPA per Section 57-12-8(B); and
4. Order LHAC to pay restitution to affected consumers for any monies which were collected or acquired through any practice found to be unlawful under the UPA per Section 57-12-8(B).

B. For LHAC’s FAA violations, the Court:

1. Find that LHAC has violated and continues to violate the FAA;

2. Award civil penalties of up to \$500 per violation per Section 57-15-4; and
3. Enjoin LHAC from violating the FAA per Section 57-15-5(A).

C. For LHAC's RISA violations, the Court:

1. Find that LHAC's IHPP Enrollment Forms are retail installment contracts subject to the RISA;
2. Find that LHAC's IHPP Enrollment Forms each violate the RISA;
3. Order LHAC to pay restitution to affected consumers for any monies LHAC is barred from collecting per Section 56-1-9; and
4. Enjoin LHAC from violating the RISA per Section 56-1-10.

D. The Court award Plaintiff's costs of this action; and

E. The Court award such other relief as the Court deems just and proper in law and equity.

Respectfully submitted,

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