

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**  
**Civil Division**

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**DISTRICT OF COLUMBIA**  
a municipal corporation  
400 6<sup>th</sup> Street, N.W., 10<sup>th</sup> Floor  
Washington, D.C. 20001,

**PLAINTIFF,**

v.

**SMILEDIRECTCLUB, INC.**  
414 Union Street  
Nashville, TN 37219

**DEFENDANT.**

Case No.:

Judge:

**JURY TRIAL DEMANDED**

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**COMPLAINT FOR VIOLATIONS OF THE  
CONSUMER PROTECTION PROCEDURES ACT**

Plaintiff District of Columbia (the “District”), through the Office of Attorney General, brings this consumer protection enforcement action pursuant to the District of Columbia Consumer Protection Procedures Act (“CPPA”), D.C. Code §§ 28-3901, *et seq.* against Defendant SMILEDIRECTCLUB, INC. (“SDC”), which is an oral care company that offers dental aligners through online kits that it markets as a less expensive alternative to braces, often targeting lower-income consumers.

SDC prominently advertises: “More than 1.5 million smiles made – and counting.” But not all of SDC’s customers have been happy with their results. Consumers seeking a refund from SDC because they were dissatisfied or even harmed by SDC’s products, have faced SDC’s Faustian bargain, with the company requiring those consumers to sign onerous non-disclosure agreements (“NDAs”) in exchange for refunds. These NDAs *prohibited* consumers from sharing information about the harms caused by SDC’s products, under threat of lawsuits and fines. This

stifling of complaints prevented other District consumers from having complete, accurate information about SDC's products when making purchase decisions.

SDC offers a "Lifetime Smile Guarantee" under which it makes an unqualified "promise" to provide a full refund within the first 30 days of use of its aligners and a prorated refund after that time to any customer who is dissatisfied with its products. However, SDC consumers who seek a refund after 30 days are required to sign an oppressive NDA, under which they must refrain from making any negative statements about SDC or else face severe consequences, including a \$10,000 per violation penalty. The NDA also requires consumers to withdraw any complaints that they have filed against SDC and to take down any negative social media posts about the company or its products. SDC requires this NDA regardless of the reason for the refund—even where the consumer reports that SDC's products caused significant injuries requiring medical attention. As a result, some of the most negative reviews of SDC's products—containing the most critical information that District consumers would want to consider when deciding whether to purchase SDC's products—are concealed from public view.

In this time where consumers depend on unbiased, publicly shared information to make their purchasing decisions, and the marketplace relies on a free flow of information to function equitably, these unfair and deceptive tactics negatively impact not only [REDACTED] but all District consumers who are attempting to learn about SDC before a potential purchase and can only see a biased and deceptively curated sample of other consumers' experiences.

SDC's deceptive and unfair conduct violates the CPPA. The District brings this case to: void these harmful NDAs that SDC has unlawfully procured; permanently enjoin SDC from engaging in activities that violate the CPPA; obtain restitution for District consumers and civil

penalties as permitted by statute; and recover the District's fees and costs. In support of its claims, the District states as follows:

### **JURISDICTION AND PARTIES**

1. This Court has jurisdiction over the subject matter of this case pursuant to D.C. Code §§ 11-921 and 28-3909.

2. This Court has personal jurisdiction over Defendant SDC pursuant to D.C. Code § 13-423(a). [REDACTED]

3. Plaintiff District of Columbia, a municipal corporation empowered to sue and be sued, is the local government for the territory constituting the permanent seat of the government of the United States. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81(a)(1). The Attorney General is specifically authorized to enforce the District's consumer protection laws, including the CPPA, pursuant to D.C. Code § 28-3909.

4. SDC is a Delaware limited liability company with principal offices in Nashville, Tennessee.

5. SDC was founded in 2014 and became a publicly traded company in 2019.

### **FACTUAL ALLEGATIONS**

#### **SDC's Products and Services.**

6. SDC offers clear aligners as an alternative to traditional orthodontics.

7. Consumers who wish to purchase SDC's aligners can either order an impression kit online or visit one of SDC's brick-and-mortar locations or pop-up shops.

8. SDC markets its aligners as less expensive and faster than traditional orthodonture. It is also less expensive than other clear aligner competitors.

9. In its 10-K filed with the Securities and Exchange Commission for the fiscal year ending in December 2021, ("10-K"), SDC attributes its growth largely to the use of its products by lower-income consumers.

10. Its aligners cost around \$1950, which SDC states in its 10-K is up to 60% less than traditional, in-person orthodontal care.

11. SDC claims in its 10-K to be able to provide these cost savings by "removing the overhead cost of multiple in-person doctor visits" and monitoring a consumer's progress through its tele-dentistry platform, SmileCheck. In other words, although SDC asserts that dentists oversee the consumer's care, this work is generally done remotely.

12. Consumers pay for SDC's services either upfront, or through SDC's financing program via a monthly payment plan.

13. In its Initial Public Offering filed with the SEC in 2019, SDC claimed that its aligners produced results in less than half of the time of traditional braces (5-10 months, compared to 12-24 months for orthodontist visits).

14. In addition to aligners, SDC offers other dental products such as whitening kits, water flossers, and other ancillary oral care items.

### SDC's Refund-Backed 'Lifetime Smile Guarantee.'

15. In the consumer review section of its website, SDC advertises that it has a five-star rating (the highest rating) from 65,318 reviews with a nominal number of lower star reviews.

#### Glowing and grinning reviews.



<https://smiledirectclub.com/results/> downloaded 11/9/22.

16. That same webpage links to pages of positive reviews from consumers, with statements such as “Comfortable,” “Great service,” and “Very Easy. The impression kit didn’t take long at all and loved how simple it was.”

17. The website further claims, “More than 1.5 million smiles made – and counting” and states that SDC can help with dental problems such as crowding, spacing, underbite, overbite, and crossbite.

18. SDC advertises these positive reviews along with a guarantee that “Your new smile is guaranteed for life.”

19. SDC has even trademarked the phrase “Lifetime Smile Guarantee.”

20. In conjunction with this “guarantee,” SDC promises that, “[i]f you decide SmileDirectClub aligners aren’t for you within the first 30 days of use, we’ll refund your cost 100%. Even after the first 30 days, you can return your unused aligners for a prorated refund. That’s our promise to you.”

21. Nowhere in the Guarantee, or anywhere else on its website, does SDC disclose that a general requirement for consumers to obtain a refund after the first 30 days is that they must *also* sign an onerous NDA that suppresses negative views.

22. Rather, as detailed below, SDC endeavors to hide even the existence of these NDAs.

23. Nowhere in the Guarantee, or anywhere else on its website, does SDC disclose to consumers that the reviews on its website and elsewhere have been filtered, so that some of the most damning reviews have been removed from public view through SDC's use of NDAs.

**SDC's Oppressive NDA.**

24. If a consumer requests a refund more than 30 days after purchasing the product, SDC generally requires the consumer to sign a "General Release" (NDA) to receive a refund. These NDAs are generally form contracts with identical terms. The NDAs are a prerequisite to the receipt of refunds, even if the reason for the refund (such as injuries caused by SDC's products) did not become apparent until after the 30 days. Accordingly, in order to qualify under SDC's guarantee and obtain the return of even part of the thousands of dollars they paid for products that may be defective, harmful, or otherwise unsatisfactory, consumers have no choice but to "agree" to these NDAs. And through these NDAs, SDC goes to great lengths to suppress negative information about the company.

25. First, the NDA includes a gag clause that requires that the consumer not even disclose the existence of the NDA.

Releasor covenants and agrees that he/she shall keep strictly confidential and shall not make public, disseminate, release or otherwise reference, allude to, suggest to any person, agency or other entity, including but not limited to media or press, in any manner whatsoever, **the terms or existence of this General release or the facts underlying the Transaction.**

(emphasis added).

26. Second, the NDA requires that the consumer affirmatively remove any negative reviews the consumer already posted, and agree not make or communicate any negative comments about SDC or its products in the future:

. . . Releaser further covenants and agrees that he/she will not make, publish, or communicate **any statements or opinions that would disparage, create a negative impression of, or in any way be harmful** to the business or business reputation of SDC or its affiliates or their respective employees, officers, directors, products, or services.

(emphasis added).

27. Third, several provisions of the NDA require consumers to release all claims that they may have against SDC—including claims relating to injuries caused by the products, and even claims that they do not yet know about—and agree not to sue SDC in the future.

28. In addition to not suing, the NDA prohibits consumers from notifying government agencies or regulators about their problems with the product and to withdraw any filed complaints.

Releaser covenants and agrees that he/she has not filed any complaint with any local, state or federal agency or regulator (each, a “Complaint” and collectively, the “Complaints”), or, in the event that Releaser has filed any Complaint(s) prior to executing this Release, Releaser hereby agrees to withdraw any and all outstanding Complaints upon receipt of the Payment. Releaser further agrees that he/she will not file any future Complaints.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. Even if the consumer receives a subpoena or court order to provide testimony, the NDA requires the consumer to notify SDC so that the company may take “whatever legal action [SDC] deems appropriate, including, but not limited to seeking a protective order.”

31. Consumers are subject to damages for any breach of the NDA, including but not limited to \$10,000 *per violation*.

Violation of this General Release by Releaser, including by a violation of the confidentiality or covenant not to sue provisions, or the filing of a complaint or grievance shall be deemed to be a material breach and shall give SDC a right to seek remedies, including actual damages and/or injunctive relief as may be appropriate and provided by law and/or equity. SDC shall have the right to seek **actual damages** or to declare the **forfeiture of the Payment** by Releaser and require its repayment, at SDC's sole election. If Releaser violates this General Release, SDC shall be entitled, **as liquidated damages and not as a penalty, of Ten Thousand Dollars (\$10,000.00) per violation.** . . . In addition, Releaser shall pay to SDC any amounts which Releaser receives in exchange for any activity hereunder which results in a violation of this General Release and that such amounts shall be considered additional liquidated damages hereunder.

(emphases added).

32. This provision is no empty threat, as SDC has sued a consumer for breach of an NDA at least once in the past. *See, e.g., SmileDirectClub v. Minor*, No. 3:18-cv-00320 (M.D. Tenn.). The company often uses litigation as a tool to limit information about its products. For example, SDC sued media outlets that reported negative information about the company. *See SmileDirect Club v. Gizmodo Media Group, LLC* (Chancery Court, Davidson County, TN). And when state dental boards in California, Georgia, and Alabama established new rules or interpreted existing rules in a manner that restricted how SDC could do business, it sued them as well.

33. In a 'belts and suspenders' approach, SDC also quashes public accountability through its use of arbitration clauses. During the registration process on SDC's website, consumers must agree to arbitrate their disputes with SDC. This 'agreement' comes in the form of a clickwrap check box through which consumers agree to terms that they need not have viewed or read. SDC managed to have a class-action filed against it dismissed by obtaining an

order compelling the consumer to arbitrate. The consumer in that class-action, *Sollinger v. SmileDirectClub, LLC*, 19-cv-5977 (S.D. N.Y.), had alleged that SDC's aligners led to tooth pain and sensitivity. According to the complaint, the consumer's dentist advised him that his cracked teeth were caused by SDC's aligners.

[REDACTED]

[REDACTED]

[REDACTED]

35. Consumers across the country who have used SDC's products have signed SDC's NDA, thus depriving District consumers of valuable information about SDC's products.

**SDC's Aligners Have Caused Consumer Injury.**

36. Absent SDC's deceptive and unfair practice of requiring onerous NDAs, District consumers would have additional information about the significant harms that can be caused by SDC's products.

37. Some dentists have reported their patients' problems with SDC's aligners to the Food and Drug Administration through adverse event reports.

38. Some of these FDA reports indicate permanent injury or the risk of permanent injury. For instance:

- PATIENT TREATMENT FROM SMILE DIRECT CLUB WITHOUT SUPERVISION OF A DENTAL PROFESSIONAL. MOVEMENT OF TOOTH #9 WAS DONE TOO QUICKLY AND RESULTED IN KILLING THE TOOTH. THIS WOULD NOT HAVE HAPPENED IF THE TREATMENT USE OF A CLASS II MEDICAL DEVICE WAS OVERSEEN BY A DENTAL PROFESSIONAL. THE ISSUE WITH SMILE DIRECT CLUB IS EVIDENT FROM THIS CASE AND MANY OTHERS. FDA SAFETY REPORT ID # (B)(4).
- PT HAD CONTRACTED WITH SMILE DIRECT CLUB FOR DO-IT YOURSELF ORTHODONTICS. SHE PRESENTED TO ME WITH FRONT TEETH THAT WERE SO SORE SHE COULD NOT TOUCH THEM NOR HAVE HOT OR COLD FOOD. AN X-RAY DISCLOSED THICKENED LIGAMENTS AROUND FRONT TOOTH

WHICH INDICATES VERY HIGH TORQUING FORCES TO TEETH. THE ALIGNERS WERE MADE OUT OF A MATERIAL THAT WAS WAY TOO STIFF, AND WAY TOO LONG. EXCESSIVE FORCE WAS BUILT INTO THE ALIGNER SHE SHOWED ME, MAKING HER TEETH LOOSE AND SENSITIVE. PT HAD PROCEEDED WITH THIS MAIL-ORDER TREATMENT WITH NO CLEARANCE FROM ME, AND HER WISDOM TEETH NOT BEING REMOVED AS RECOMMENDED. FDA SAFETY REPORT ID# (B)(4).

- IRREVERSIBLE PULPITIS<sup>1</sup> AFTER SMILE DIRECT CLUB USAGE. FDA SAFETY REPORT ID# (B)(4).

39. A limited number of consumers who have rejected SDC's NDAs have complained to law enforcement or the Better Business Bureau.

40. Some of these reports indicate that the consumer suffered pain, damage, and considerable costs in remedying problems caused by SDC's aligners. For instance:

- One consumer reported that her teeth ended up being worse after using SDC aligners and she ended up needing dental work that cost \$18,000 after spending \$2,000 on SDC aligners.
- Another consumer reported that he only had minor cosmetic issues before using SDC aligners but ended up with an irregular and painful bite and other dental problems after using the product.
- A third consumer reported that the aligners caused pericoronitis when his teeth shifted, requiring painful surgery and teeth extraction.

41. In sum, SDC's aligners have caused both physical and financial injuries to some consumers.

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<sup>1</sup> Inside the innermost part of each tooth is an area called the pulp. The pulp contains the blood supply and nerves for the tooth. Pulpitis is a condition that causes painful inflammation of the pulp. It can occur in one or more teeth, and is caused by bacteria that invade the tooth's pulp, causing it to swell. <https://www.healthline.com/health/pulpitis> (downloaded 11/7/22)

42. However, consumer awareness of these types of issues has been suppressed through SDC's unfair and deceptive use of NDAs.

**COUNT ONE**

**(Deception and Material Omissions in Violation of the  
Consumer Protection Procedures Act)**

43. The District re-alleges and incorporates by reference paragraphs 1 through 42. The CPPA is a remedial statute that should be broadly construed. It establishes a right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.

44. Consumers obtain dental aligners and other oral hygiene products from Defendant for personal, household, or family purposes and, therefore, these services are consumer goods and services.

45. Defendant, in the ordinary course of business, offers to sell or supply consumer goods and services and is therefore a merchant.

46. Merchants who violate the CPPA may be subject to restitution, damages, civil penalties, temporary or permanent injunctions, the costs of the action, and reasonable attorneys' fees. D.C. Code § 28-3909.

47. The CPPA prohibits any person from engaging in unfair and deceptive trade practices, including by,

- a. "misrepresent[ing] as to a material fact which has a tendency to mislead," D.C. Code §28-3904(e);
- b. "fail[ing] to state a material fact if such failure tends to mislead," D.C. Code § 28-3904(f); and

- c. 3904(f-1) “[u]sing innuendo or ambiguity as to a material fact, which has a tendency to mislead” D.C. Code § 28-3904(f-1).

48. Defendant’s representations, including its statement that “[e]ven after the first 30 days, [consumers] can return your unused aligners for a prorated refund,” as well as its statements that it has a five-star rating from its customers, and very few negative reviews, are misrepresentations of material facts that have the tendency to mislead consumers in violation of D.C. Code § 28-3904(e), or alternatively, constitute ambiguities as to a material fact in violation of D.C. Code § 28-3904(f-1).

49. Defendant’s omissions, including its failure to disclose that consumers who seek a refund after 30 days must sign an NDA, as well as its failure to disclose that the overwhelmingly positive reviews on its website and elsewhere are distorted in part due to its NDAs which suppress negative reviews, are omissions of material facts that have the tendency to mislead consumers and are unlawful trade practices in violation of D.C. Code § 28-3904(f).

## **COUNT TWO**

### **(Unfair Practices in Violation of the Consumer Protection Procedures Act)**

50. The District re-alleges and incorporates by reference paragraphs 1 through 42.

51. The CPPA prohibits any person from engaging in unfair trade practices.

52. SDC’s actions, in requiring dissatisfied consumers to refrain from making negative comments about SDC and to delete posted negative comments have caused or are likely to cause substantial injury to consumers who seek unbiased reviews of SDC’s products when making potential purchasing decisions, including the expenditure of thousands of dollars for SDC’s products, but are instead provided with SDC’s distorted version of user’s experiences.

53. SDC's practice of selling aligners that have produced significant pain and injury to some consumers, while requiring negative reviews to be hidden through NDAs, caused or is likely to cause substantial injury to consumers who were unable to make fully informed choices about their purchase decision and suffered pain and injury from their use of SDC's aligners or other dental products.

54. SDC's imposition of these NDAs, and its related aggressive litigation tactics to enforce those NDAs, has also caused substantial harm to the public by limiting consumers' ability to share pertinent information with government regulators and law enforcement officials, thus hampering those entities' ability to monitor SDC's compliance with the law, protect the public, and remedy SDC's harmful conduct.

55. Additionally, SDC's threats to sue, litigation against consumers who had signed NDAs, and suppression of litigation filed by harmed consumers, caused or were likely to cause substantial injury to consumers as such actions caused many consumers to withdraw their negative reviews. Additionally, Defendant's actions reinforced the threats in the NDAs and further resulted in the elimination of negative information about SDC from the marketplace.

56. These substantial harms were not reasonably avoidable by consumers seeking a refund after 30 days, and for whom a refund was essential, as those consumers were given no choice but to sign the NDAs, and consumers seeking information about SDC's products were unlikely to know that NDAs were causing negative reviews to disappear from social media, government investigations, SDC's website, and other public sources of information.

57. Defendant's practices are not outweighed by countervailing benefits to consumers or to competition and thus constitute unfair practices in violation of D.C. Code 28-3904.

**PRAYER FOR RELIEF**

WHEREFORE, the District of Columbia respectfully requests this Court enter a judgment in its favor and grant relief against Defendants as follows:

- a) Issue injunctive and/or declaratory relief voiding contracts entered into by Defendant that violate the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28–3901, *et seq.*;
- b) Permanently enjoin Defendant’s violations of the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28–3901, *et seq.*;
- c) Order Defendant to pay restitution and damages pursuant to D.C. Code §§ 28–3909(a) and (b);
- d) Order the payment of civil penalties as permitted by statute pursuant to D.C. Code § 28–3909(b);
- e) Award the District the costs of this action and reasonable attorney’s fees pursuant to § 28–3909(b); and
- f) Grant such further relief as the Court deems just and proper.

**Jury Demand**

The District of Columbia demands a trial by jury by the maximum number of jurors permitted by law.

Dated: December 5, 2022

Respectfully submitted,

KARL A. RACINE  
Attorney General for the District of Columbia

JENNIFER JONES  
Deputy Attorney General  
Public Advocacy Division

