

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

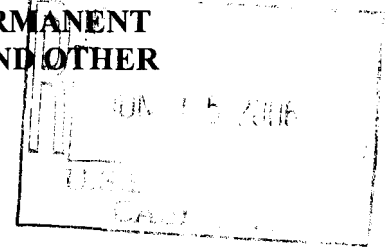
MALVERN MARKETING, LLC, also d/b/a
PHASE ONE MARKETING, a Delaware limited
liability company, and

PEOPLES BENEFIT SERVICES, INC., a
Pennsylvania corporation,

Defendants.

Case No. _____

**COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION, AND OTHER
RELIEF**



Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or “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), and 53(b), and Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (the “Telemarketing Act”), 15 U.S.C. § 6105, to obtain monetary civil penalties, a permanent injunction, and other equitable relief for Defendants’ violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule (the “TSR” or “Rule”), 16 C.F.R. Part 310, as amended by 68 Fed. Reg. 4580, 4669 (January 29, 2003).

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 is proper in this District under 28 U.S.C. §§ 1391(b)-(c) and 1395(a), and 15 U.S.C. § 53(b).

DEFENDANTS

4. Defendant Malvern Marketing, LLC, also d/b/a Phase One Marketing, (“POM”) is a Delaware limited liability company with its principal place of business at 6 E. Clementon Road, Suite B1, Gibbsboro, New Jersey 08026. Defendant POM is a telemarketer that initiates outbound telephone calls to induce consumers to purchase the goods or services of Peoples Benefit Services, Inc. POM transacts or has transacted business in this District.
5. Defendant Peoples Benefit Services, Inc. (“PBS”) is a Pennsylvania corporation with its principal place of business at 20 Moores Road, Frazer, Pennsylvania 19355. PBS is a seller of goods or services to consumers that has caused telemarketers, such as Defendant POM, to call consumers to induce the purchase of goods or services from PBS. PBS transacts or has transacted business in this District.

THE TELEMARKETING SALES RULE AND THE NATIONAL DO NOT CALL REGISTRY

6. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108, in 1994. On August 16, 1995, the FTC adopted the Telemarketing Sales Rule (the

“Original TSR”), 16 C.F.R. Part 310, which became effective on December 31, 1995. On January 29, 2003, the FTC amended the TSR by issuing a Statement of Basis and Purpose (“SBP”) and the final amended TSR (the “Amended TSR”). 68 Fed. Reg. 4580, 4669.

7. Among other things, the Amended TSR established a “do-not-call” registry, maintained by the Commission (the “National Do Not Call Registry” or “Registry”), of consumers who do not wish to receive certain types of telemarketing calls. Consumers can register their telephone numbers on the Registry without charge either through a toll-free telephone call or over the Internet at donotcall.gov.
8. Since September 2, 2003, sellers, telemarketers, and other permitted organizations have been able to access the Registry over the Internet at telemarketing.donotcall.gov to obtain a Subscription Account Number (SAN) to download the registered numbers.
9. Consumers who receive telemarketing calls to their registered numbers can complain of Registry violations the same way they registered, through a toll-free telephone call or over the Internet at donotcall.gov, or by otherwise contacting law enforcement authorities.
10. Since October 17, 2003, sellers and telemarketers have been prohibited from calling numbers on the Registry in violation of the Amended TSR. 16 C.F.R. § 310.4(b)(1)(iii)(B).
11. A seller or telemarketer may call a consumer’s number on the Registry if it can prove an affirmative defense for the call, such as that the seller has an “established business relationship” with the consumer, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii), and the consumer has not made an entity-specific do-not-call request stating that he or she does not wish to

receive calls from that seller, 16 C.F.R. § 310.4(b)(1)(iii)(A). An established business relationship means a relationship between a seller and the consumer based on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call. 16 C.F.R. § 310.2(n)(1). An established business relationship can also be based on the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call. 16 C.F.R. § 310.2(n)(2).

12. In limited circumstances, sellers and telemarketers can show an established business relationship between a consumer and a member of the seller's corporate family, such as a subsidiary or affiliate. Only those calls that the consumer would reasonably expect to receive fall within an established business relationship. Unless a defendant can prove consumers would reasonably expect to receive the call, based on the nature and type of goods or services offered and the identity of the subsidiary or affiliate, the defendant does not have an established business relationship defense for the call. 68 Fed. Reg. 4580, 4594; 68 Fed. Reg. 45134, 45139.
13. Since December 31, 1995, sellers and telemarketers have been prohibited from initiating an outbound telephone call to any person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A).
14. Since October 1, 2003, sellers and telemarketers have been prohibited from abandoning any outbound telephone call by not connecting the call to a representative within two (2) seconds of the consumer's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv).

15. Since October 17, 2003, sellers and telemarketers have been generally prohibited from calling any telephone number within a given area code unless the seller first has paid the annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry. 16 C.F.R. § 310.8(a) and (b). Regardless of whether a member of the seller's corporate family has paid for access, each separate division, subsidiary, or affiliate that is separately incorporated and has or markets under a different name must pay a separate annual fee for access to the Registry. In particular, if the name difference reflects a distinction that is more than geographic, such as product or service, then the separately-incorporated entity is required to pay a separate fee for access.
16 C.F.R. § 310.8 (c); 68 Fed. Reg. 45134, 45139.
16. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR 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).

DEFENDANTS' BUSINESS ACTIVITIES

17. Defendants PBS and POM are "seller[s]" or "telemarketer[s]" engaged in "telemarketing," as defined by the Amended TSR, 16 C.F.R. § 310.2. Defendants PBS and POM have engaged in telemarketing by a plan, program, or campaign conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.
18. PBS is a seller of prescription drug discount cards, dental discount cards, health-related discount cards, and an online referral service to consumers. PBS has caused telemarketers, such as Defendant POM, to call consumers in the United States to induce

the purchase of goods or services from PBS.

19. At all times relevant to this action, most of the PBS products telemarketed by POM were health-related discount cards. In exchange for a monthly fee, consumers receive discounts on prescription drugs, and/or medical or dental care, from participating providers.
20. The Defendants also telemarket a medical referral service that is administered by a third-party. In exchange for a monthly fee, consumers are given access to a list of doctors that the program has identified as the “best doctors” in their fields.
21. PBS provided consumer leads to POM, which POM expected PBS to first cross-check against the National Do Not Call Registry and against its own in-house do-not-call list of telephone numbers for people who specifically asked not to be called by PBS.
22. Between October 17, 2003 and February 13, 2004, Defendants POM and PBS called, or caused others to call on PBS’s behalf, tens of thousands of consumers’ telephone numbers on the National Do Not Call Registry in violation of the Amended TSR.
23. In numerous instances, PBS did not have an established business relationship with the consumers that were called on its behalf. The Defendants called consumers who had recently purchased insurance products, including accidental death, term life and whole life insurance, sold by members of PBS’s corporate family. But such consumers did not reasonably expect telemarketing calls from PBS, given the identities of the affiliates involved and the nature and type of goods or services offered. Looking to the consumers’ expectations, Defendants lacked an established business relationship. For example, consumers who had recently purchased life insurance from a PBS affiliate operating under a different name would not reasonably expect to receive a call selling

drug discount cards offered by PBS. Defendants thus do not have an established business relationship or other affirmative defense, for calls to tens of thousands of consumers' telephone numbers on the National Do Not Call Registry.

24. Between October 17, 2003 and February 13, 2004, Defendant PBS has initiated or has caused telemarketers such as Defendant POM to initiate tens of thousands of calls to consumers who have previously stated that they do not wish to receive calls by or on behalf of PBS.
25. On or after October 1, 2003, Defendants PBS and POM have abandoned outbound telephone calls to consumers by failing to connect the call to a representative within two (2) seconds of the consumer's completed greeting.
26. On or after October 17, 2003, Defendant PBS has called, or has caused telemarketers such as Defendant POM to call telephone numbers in area codes across the country without first paying the annual fee for access to the telephone numbers within such area codes that are included in the National Do Not Call Registry.
27. On or after October 17, 2003, Defendant POM, on behalf of Defendant PBS, has called telephone numbers in area codes across the country without Defendant PBS first paying the annual fee for access to the telephone numbers within such area codes that are included in the National Do Not Call Registry.
28. From October 17, 2003 until on or about September 14, 2005, PBS accessed the Registry using the Subscription Account Number of one of its corporate affiliates. However, PBS was required to pay a separate fee for access to the Registry. PBS is a separately-incorporated entity that markets a distinct product under a different name than its affiliate, and that difference in name reflects more than a geographic distinction; indeed,

it identifies a different product.

29. At all times relevant to this Complaint, Defendants POM and PBS have maintained a substantial course of trade or business in the offering for sale and sale of goods or services via the telephone, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

VIOLATIONS OF THE TELEMARKETING SALES RULE

Count I Violating the National Do Not Call Registry

30. In numerous instances, in connection with telemarketing, Defendants POM and PBS engaged in or caused others to engage in initiating an outbound telephone call to a person’s telephone number on the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

Count II Ignoring Entity-Specific Do Not Call Requests

31. In numerous instances, in connection with telemarketing, Defendants POM and PBS engaged in or caused others to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of the seller whose goods or services are being offered in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A).

Count III Abandoning Calls

32. In numerous instances, in connection with telemarketing, Defendants POM and PBS have abandoned, or caused others to abandon, an outbound telephone call by failing to connect the call to a sales representative within two (2) seconds of the completed

greeting of the person answering the call in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iv) and § 310.4(b)(4).

Count IV
Failing to Pay National Registry Fees

33. In numerous instances, in connection with telemarketing, Defendants POM and PBS have initiated, or caused others to initiate, an outbound telephone call to a telephone number within a given area code without Defendant PBS, either directly or through another person, first paying the required annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.8.

CONSUMER INJURY

34. Consumers in the United States have suffered and will suffer injury as a result of Defendant POM's and PBS's violations of the TSR. Absent injunctive relief by this Court, Defendants POM and PBS are likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

35. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief to prevent and remedy any violation of any provision of law enforced by the FTC.
36. 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) (1997), authorizes this Court to award monetary civil penalties of not more than \$11,000 for each violation of the TSR.

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

37. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by Defendants' violations of the Rule and the FTC Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A) and 53(b), and pursuant to its own equitable powers:

- A. Enter judgment against Defendants POM and PBS and in favor of Plaintiff for each violation alleged in this Complaint;
- B. Award Plaintiff monetary civil penalties from Defendants POM and PBS for every violation of the TSR;
- C. Permanently enjoin Defendants POM and PBS from violating the TSR and the FTC Act;
- D. Order Defendants POM and PBS to pay the costs of this action; and
- E. Award plaintiff such other and additional relief as the Court may determine to be just and proper.

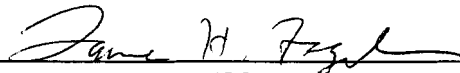
Respectfully submitted,

FOR THE UNITED STATES OF AMERICA
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Dated: 6/13/06



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