

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 06/20/06

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. 06 CV 4612

**STIPULATED JUDGMENT AND
ORDER FOR PERMANENT
INJUNCTION AGAINST
DEFENDANT MALVERN
MARKETING, LLC, ALSO D/B/A
PHASE ONE MARKETING**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC” or the “Commission”), has commenced this action by filing the Complaint herein, and Defendant Malvern Marketing, LLC also doing business as Phase One Marketing (“Phase One”), has waived service of the Summons and the Complaint. Plaintiff and Defendant Phase One, represented by the attorneys whose names appear hereafter, have agreed to settlement of this action without adjudication of any issue of fact or law.

THEREFORE, on the joint motion of Plaintiff and Defendant Phase One, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter and the parties 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).

2. Venue is proper as to all parties in this District.

3. The activities of Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The Complaint states a claim upon which relief may be granted against Defendant Phase One, under Sections 5(a), 5(m)(1)(A), and 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a), 45(m)(1)(A), and 53(b).

5. Defendant Phase One has entered into this Stipulated Judgment and Order for Permanent Injunction (“Order”) freely and without coercion. Defendant Phase One further acknowledges that it has read the provisions of this Order and is prepared to abide by them.

6. Plaintiff and Defendant Phase One hereby waive all rights to appeal or otherwise challenge or contest the validity of this Order.

7. Defendant Phase One has agreed that this Order does not entitle Defendant Phase One to seek or to obtain attorneys’ fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Defendant Phase One further waives any rights to attorneys’ fees that may arise under said provision of law.

8. Entry of this Order is in the public interest.

9. Plaintiff and Defendant Phase One stipulate and agree to this Order, without trial or final adjudication of any issue of law or fact, to settle and resolve all matters in dispute with Defendant Phase One arising from the Complaint to the date of entry of this Order. By Stipulating to this Order, Defendant Phase One does not admit any of the allegations set forth in the Complaint, other than jurisdictional facts.

10. This Order does not constitute, and shall not be interpreted to constitute, an

admission by Defendant Phase One or a finding by the Court that Defendant Phase One has engaged in any violations of law.

DEFINITIONS

For the purpose of this Order, the following definitions shall apply:

1. “Asset” means any legal or equitable interest in, or right or claim to, any real and personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.
2. “Customer” means any person who is or may be required to pay for goods or services offered through telemarketing.
3. “Settling Defendant” means Defendant Phase One. Phase One is a Delaware limited liability company.
4. “Established business relationship” means a relationship between the seller and a person based on: (a) the person’s purchase, rental, or lease of the seller’s goods or services or a financial transaction between the person and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (b) the person’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.
5. “National Do Not Call Registry” means the National Do Not Call Registry, which is the “do-not-call” registry maintained by the Commission pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).
6. “Representatives” means the Settling Defendant’s successors, assigns, members, officers, agents, servants, employees and those persons in active concert or participation with

them who receive actual notice of this Order by personal service or otherwise.

7. “Seller” means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration whether or not such person is under the jurisdiction of the Commission.

8. “Telemarketer” means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

9. “Telemarketing Sales Rule” or “Rule” means the FTC Rule entitled “Telemarketing Sales Rule,” 16 C.F.R. § 310, attached hereto as Appendix A or as may be hereafter amended.

10. “Telemarketing” means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term “further solicitation” does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer’s call or in a substantially similar catalog.

11. “Outbound telephone call” means a telephone call initiated by a telemarketer to

induce the purchase of goods or services or to solicit a charitable contribution.

12. "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, limited liability company, or other business entity.

ORDER

I. PROHIBITION AGAINST ABUSIVE TELEMARKETING PRACTICES

IT IS ORDERED that, in connection with telemarketing, the Settling Defendant and its Representatives are hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Telemarketing Sales Rule, including but not limited to:

A. Initiating any outbound telephone call to a person's telephone number on the National Do Not Call Registry of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller proves:

(1) the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

(2) the seller has an established business relationship with such person and that person has not previously stated that he or she does not wish to receive outbound telephone calls made by or on behalf of the seller; or

B. Initiating any outbound telephone call to a person when that person has previously 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 or made by or on behalf of the

charitable organization for which a charitable contribution is being solicited; or

C. Initiating any outbound telephone call to a telephone number within a given area code without the seller first having paid the required annual fee for access to the telephone numbers within that area code that are in the National Do Not Call Registry; and

D. Abandoning any outbound telephone call to a person by failing to connect the call to a representative within two seconds of the person's completed greeting, unless the following four conditions are met:

1. The Settling Defendant and its Representatives, employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured per day per calling campaign;

2. The Settling Defendant and its Representatives, for each telemarketing call placed, allow the telephone to ring for at least fifteen seconds or four rings before disconnecting an unanswered call;

3. Whenever a live operator is not available to speak with the person answering the call within two seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

4. The Settling Defendant and its Representatives, retain records, in accordance with 16 C.F.R. § 310.5 (b)-(d), establishing compliance with the preceding three conditions;

Provided, however, that if the Commission promulgates rules that modify or supersede the Telemarketing Sales Rule, in whole or part, the Settling Defendant shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such

rules.

II. CIVIL PENALTY AND RIGHT TO REOPEN

IT IS FURTHER ORDERED that:

A. Judgment in the amount of One Hundred and Twenty Thousand Dollars (\$120,000.00) is hereby entered against the Settling Defendant as a civil penalty, pursuant to Section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A). Based upon the Settling Defendant's sworn financial statement, signed and dated January 20, 2006, and information provided by the Settling Defendant to the Plaintiff or the Commission set forth in a statement of gross revenues for the relevant period; documents headed "Phase One Marketing, LLC Balance Sheet As of August 31, 2005" (Document No. PO-A0001-A0002), "Phase One Marketing, LLC Profit & Loss January through August 2005" (Document No. PO-A0003-A0004), Phase One Marketing, LLC Balance Sheet As of December 31, 2004" (Document No. PO-A0005-A0006), "Phase One Marketing, LLC Profit & Loss January through December 2004" (Document No. PO-A0007-A0008), and "U.S. Return of Partnership Income 2004" for Malvern Marketing, LLC (Single-Member) d/b/a Phase One Marketing, LLC (Treasury Form 1065) with schedules (Document No. PO-A0009-A0024); and the description of the Settling Defendant's current financial status and gross revenue set forth in the letter of Heather L. McDowell, Esq., dated October 31, 2005, (collectively, "financial statements"), full payment for the foregoing civil penalty is suspended except for Fifty Thousand Dollars (\$50,000.00), contingent upon the accuracy and completeness of the financial statements, as set forth in Subparagraphs C and D of this Paragraph.

B. Within forty-eight (48) hours of its execution of this Order, the Settling Defendant shall transfer Twenty-five Thousand Dollars (\$25,000.00), as the first installment of

the non-suspended civil penalty payment, to its attorney, who shall hold the entire sum for no purpose other than payment to the Treasurer of the United States after entry of this Order by the Court. Within sixty (60) days of its execution of this Order, the Settling Defendant shall transfer Twenty-five Thousand Dollars (\$25,000.00), as the second and final installment of the non-suspended civil penalty payment, to its attorney, who shall hold the entire sum for no purpose other than payment to the Treasurer of the United States after entry of this Order by the Court. Within five (5) days of the later of the transfer of the second and final installment payment of the civil penalty to its attorney, or receipt of notice of the entry of this Order or sixty (60) days of its execution of this Order, the Settling Defendant's attorney shall transfer such civil penalty payments, totaling Fifty Thousand Dollars (\$50,000.00), in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to: Director, Office of Consumer Litigation, U.S. Department of Justice Civil Division, P.O. Box 386, Washington, DC 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3353. Such transfer by the Settling Defendant's attorney shall constitute partial satisfaction of the judgment.

C. Upon payment by the Settling Defendant's attorney as provided in Subparagraph B of this Paragraph, the remainder of the civil penalty judgment shall be suspended subject to the conditions set forth in Subparagraph D of this Paragraph.

D. Plaintiff's agreement to this Order is expressly premised upon the truthfulness, accuracy and completeness of the Settling Defendant's financial statements and supporting documents submitted to the Commission, namely those identified in Subparagraph A of this Paragraph, which include material information upon which Plaintiff relied in negotiating and

agreeing to this Order, including, but not limited to, a statement of gross revenues for the relevant period. If, upon motion by Plaintiff, this Court finds that the Settling Defendant has failed to disclose any material asset or materially misstated the value of any asset in the financial statements and related documents described above, or have made any other material misstatement or omission in the financial statements and related documents described above, then this Order shall be reopened and suspension of the judgment shall be lifted for the purpose of requiring payment of civil penalty in the full amount of the judgment (\$120,000.00), less the sum of all amounts paid to the Treasurer of the United States pursuant to Subparagraph B of this Paragraph. *Provided, however*, that in all other respects this Order shall remain in full force and effect, unless otherwise ordered by the Court.

E. In accordance with 31 U.S.C. § 7701, the Settling Defendant is hereby required, unless it has done so already, to furnish to Plaintiff and the FTC their respective taxpayer identifying numbers (social security numbers or employer identification numbers) which shall be used for purposes of collecting and reporting on any delinquent amount arising out of the Settling Defendant's relationship with the government.

F. The Settling Defendant agrees that the facts as alleged in the Complaint filed in this action shall be taken as true for the purpose of a nondischargeability complaint in any bankruptcy proceeding.

G. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Plaintiff may initiate to enforce this Order.

III. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry

of this Order, the Settling Defendant, and its successors and assigns, shall maintain and make available to the Plaintiff or Commission, within ten (10) days of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this Order.

IV. DISTRIBUTION OF ORDER BY DEFENDANT AND ACKNOWLEDGMENTS OF RECEIPT

IT IS FURTHER ORDERED that the Settling Defendant, and its successors and assigns, shall within thirty (30) days of the entry of this Order, provide a copy of this Order including Appendix A to all of its owners, principals, members, officers, and directors, as well as managers, agents, servants, employees, and attorneys having decision-making authority with respect to the subject matter of this Order; secure from each such person a signed statement acknowledging receipt of a copy of this Order; and shall, within ten (10) days of complying with this Paragraph, file an affidavit with the Court and serve the Commission, by mailing a copy thereof, to the Associate Director of Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, setting forth the fact and manner of their compliance, including the name and title of each person to whom a copy of the Order has been provided.

V. NOTIFICATION OF BUSINESS CHANGES

IT IS FURTHER ORDERED that for a period of seven (7) years from the date of entry of this Order, the Settling Defendant, and its successors and assigns, shall notify the Associate Director of Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, DC 20580, at least thirty (30) days prior to any change in such Defendant's business, including, but not limited to, merger, incorporation, dissolution, assignment, and sale, which results in the emergence of a successor corporation or limited liability company, the creation or dissolution of a subsidiary or parent, or any other change, which may affect such

Defendant's obligations under this Order.

VI. COMMUNICATION WITH DEFENDANT

IT IS FURTHER ORDERED that for the purposes of compliance reporting, if undersigned counsel no longer represents the Settling Defendant, Plaintiff and the Commission are authorized to communicate directly with such Defendant.

VII. FEES AND COSTS

IT IS FURTHER ORDERED that each party to this Order hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action.

VIII. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

IX. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

X. COOPERATION WITH FTC AND USA COUNSEL

IT IS FURTHER ORDERED that the Settling Defendant shall, in connection with this action or any subsequent investigations related to or associated with the transactions or the occurrences that are the subject of the FTC's Complaint, cooperate in good faith with the FTC and the United States of America, and appear or cause its officers, members, employees, representatives, or agents to appear at such places and times as the FTC and the United States of America shall reasonably request, after written notice, for interviews, conferences, pretrial discovery, review of documents, and for such other matters as may be reasonably requested by

the FTC and the United States of America. If requested in writing by the FTC and the United States of America, the Settling Defendant shall appear or cause its officers, members, employees, representatives, or agents to appear and provide truthful testimony in any trial, deposition, or other proceeding related to or associated with the transactions or the occurrences that are the subject of the Complaint, without the service of a subpoena.

XI. COMPLETE SETTLEMENT

The Plaintiff and the Settling Defendant, by their respective counsel, hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter as to the Settling Defendant. The Plaintiff and the Settling Defendant further stipulate and agree that the entry of the foregoing Order shall constitute a full, complete and final settlement of this action as to the Settling Defendant.

IT IS FURTHER ORDERED, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay and the Clerk of the Court shall immediately enter this Order as a final order.

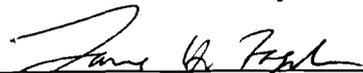
JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendant Phase One, pursuant to all the terms and conditions recited above.

//
//
//
//
//
//
//
//
//

FOR THE PLAINTIFF:
FOR THE UNITED STATES OF AMERICA

PETER D. KEISLER
Assistant Attorney General, Civil Division
U.S. DEPARTMENT OF JUSTICE

MICHAEL J. GARCIA
United States Attorney

 6/13/06

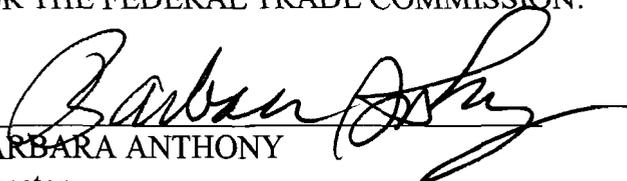
LAWRENCE H. FOGELMAN
Assistant U.S. Attorney
for the Southern District of New York
86 Chambers Street, Third Floor
New York, NY 10007
PHONE: 212-637-2719
FAX: 212-637-2730

EUGENE M. THIROLF
Director, Office of Consumer Litigation



ALLAN GORDUS
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
P.O. Box 386
Washington, D.C. 20044
PHONE: 202-307-1862
FAX: 202-514-8742
allan.gordus@usdoj.gov

FOR THE FEDERAL TRADE COMMISSION:



BARBARA ANTHONY
Director
Northeast Region

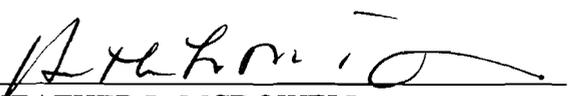
MICHELE STOLLS
THOMAS COHN

Attorneys
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

FOR DEFENDANT MALVERN MARKETING, LLC,
also doing business as PHASE ONE MARKETING:



Malvern Marketing, LLC,
also doing business as Phase One Marketing,
by Richard R. Syrek



HEATHER L. MCDOWELL
Attorney for Defendant Malvern Marketing, LLC,
also doing business as Phase One Marketing,
Venable, LLP
575 7th Street, NW
Washington, DC 20004-1601

SO ORDERED this 19th day of June, 2006.



UNITED STATES DISTRICT JUDGE