

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CENTRAL FLORIDA INVESTMENTS,
INC., a Florida corporation,

WESTGATE RESORTS, LTD., a Florida
limited partnership, and

CFI SALES & MARKETING, L.L.C., a
Florida limited liability company,

Defendants.

Case No. 6:09-cv-104-02L-19-GJK

**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), 53(b), and 56(a), 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 Central Florida Investments, Inc. (“CFI”) is a Florida corporation with its principal place of business at 5601 Windhover Drive, Orlando, Florida 32819. Defendant CFI is both a telemarketer and a seller of goods or services, including timeshares and vacations at timeshare resorts. CFI transacts or has transacted business in this District.
5. Defendant Westgate Resorts, Ltd. (“Westgate”) is a Florida limited partnership with its principal place of business at 5601 Windhover Drive, Orlando, Florida 32819. Defendant Westgate is a seller of goods or services, including timeshares and vacations at timeshare resorts, to consumers that has caused telemarketers, such as the other two defendants (CFI and CFI Sales & Marketing, L.L.C.), to call consumers to induce the purchase of goods or services from Westgate. Westgate transacts or has transacted business in this District. Defendant Westgate is owned by Defendant CFI. CFI dominates or controls the acts and practices of Westgate.

6. Defendant CFI Sales & Marketing, L.L.C. (“CFI Sales”) is a Florida limited liability company with its principal place of business at 5601 Windhover Drive, Orlando, Florida 32819. Defendant CFI Sales is a telemarketer that initiates outbound telephone calls to induce consumers to purchase goods or services from CFI and Westgate. CFI Sales transacts or has transacted business in this District. Defendant CFI Sales is owned by Defendant CFI. CFI dominates or controls the acts and practices of CFI Sales.

**THE TELEMARKETING SALES RULE
AND THE NATIONAL DO NOT CALL REGISTRY**

7. 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.
8. 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.

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 September 2, 2003, sellers, telemarketers, and other permitted organizations have been able to access the Registry over the Internet at telemarketing.donotcall.gov to download the registered numbers.
11. 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).
12. A seller or telemarketer may call a consumer's number on the Registry if it can prove that the seller has an "established business relationship" with the consumer, and so long as the consumer has not subsequently made an entity-specific do-not-call request stating that he or she does not wish to receive calls made by or on behalf of the seller. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii). An "established business relationship" may be based on, among other things, "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).
13. The Commission has warned that the "established business relationship" exemption is to be narrowly crafted and should be consistent with "consumer expectations." 68 Fed. Reg. 4580, 4591-94. In particular, the key issue in showing an established

business relationship based on a consumer inquiry is whether, under all the circumstances, the consumer has taken an action such as would “reasonably lead to an expectation of a prompt follow-up telephone contact.” *Id.* at 4593.

14. A seller or telemarketer may also call a consumer’s number on the Registry if it can prove that the seller has obtained an “express agreement, in writing” of the consumer to place calls to that consumer’s number, and so long as the consumer has not subsequently made an entity-specific do-not-call request stating that he or she does not wish to receive calls made by or on behalf of the seller. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i); 68 Fed. Reg. 4580, 4634. Such written agreement shall clearly evidence such consumer’s authorization that calls made by or on behalf of a specific party may be placed to that consumer, and shall include the telephone number to which the calls may be placed and the signature of that consumer.
15. The Commission has explicitly stated that such written agreement must be “clear and conspicuous,” and that it must include the consumer’s signature demonstrating the consumer’s assent to be called by or on behalf of the particular seller for telemarketing purposes. 68 Fed. Reg. 4580, 4634. The Commission staff also has expressly stated that attempting to obtain a consumer’s “express agreement” through subterfuge does not constitute an affirmative defense to the Rule’s do-not-call requirements. If a seller requests in writing a consumer’s permission to call, the request cannot be hidden, and a consumer must provide consent affirmatively, such as by checking a box. “The Written Permission to Call Exemption,” *Complying with the*

Telemarketing Sales Rule at p. 44, available at

<http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.pdf>.

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 are “seller[s]” or “telemarketer[s]” engaged in “telemarketing,” as defined by the Amended TSR, 16 C.F.R. § 310.2.
18. CFI is a seller of timeshares and vacations at timeshare resorts to consumers. CFI also is a telemarketer that initiates, or causes others to initiate on its behalf, outbound telephone calls to consumers in the United States to induce the purchase of its goods or services.
19. Westgate is a seller of timeshares and vacations at timeshare resorts to consumers. Westgate has caused telemarketers, such as CFI and CFI Sales, to initiate outbound calls to consumers in the United States to induce the purchase of goods or services from Westgate, including timeshares and vacations at timeshare resorts.
20. CFI Sales is a telemarketer that initiates outbound telephone calls to consumers in the United States to induce the purchase of goods or services from CFI and Westgate.
21. Defendants 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.

22. On or after October 17, 2003, defendants have called consumers' telephone numbers that are on the National Do Not Call Registry.
23. On or after October 17, 2003, defendants purchased telephone numbers of consumers that had been obtained through a website called Brandarama.com. During the relevant period, Brandarama.com was operated by the online lead-generating firm Active Response Group, LLC. Brandarama.com offered to send free and discounted products from various sellers to consumers. It required consumers who wanted to obtain such a product to complete an online form, which requested their telephone number and other personal information. The form stated that the shipping department required the information. Defendants purchased telephone numbers of consumers who answered a travel-related survey question on the online form, such as "Which travel destination are you interested in receiving free information on?" and "Select your favorite travel destination," from among a drop-down list of cities where defendants operate timeshare resorts. The online form did not identify defendants. The website's only reference to defendants appeared at the end of either the site's privacy policy statement or its terms and conditions statement. The online form contained a pre-checked box indicating that consumers had agreed to the site's privacy policy statement and its terms and conditions statement, which were accessible to consumers via hyperlinks. Consumers were not required to access those statements before submitting their responses to the online form. Defendants called

the consumers whose numbers had been obtained through Brandarama.com, many of whose telephone numbers were on the Registry, to market vacations at defendants' timeshare resorts.

24. By responding to Brandarama.com's offer of free and discounted products, as described in paragraph 23, a consumer did not make an "inquiry or application regarding a product or service offered by" any defendant, under the Rule's do-not-call requirements. Brandarama.com, as described in paragraph 23, would not lead a reasonable consumer to expect that, by providing the requested information, the consumer would receive a prompt follow-up call from any defendant. Defendants, thus, did not have an established business relationship for calls to numerous consumers' numbers on the Registry.
25. By responding to Brandarama.com's offer of free and discounted products, as described in paragraph 23, a consumer did not provide express written agreement to receive calls made by or on behalf of any of the defendants under the Rule's do-not-call requirements. Brandarama.com did not advise consumers clearly and conspicuously that, by providing their telephone numbers and responding to the travel-related survey question, they were giving express authorization to be contacted by defendants for telemarketing purposes. Accordingly, defendants did not obtain express written agreement that clearly evidences the consumer's authorization for calls by or on behalf of any defendant. Defendants, thus, did not have an express written agreement for calls to numerous consumers' numbers on the Registry.

26. At all times relevant to this complaint, defendants 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)

27. In numerous instances, in connection with telemarketing, defendants 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).

CONSUMER INJURY

28. Consumers in the United States have suffered and will suffer injury as a result of defendants’ violations of the TSR. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and harm the public interest.

THIS COURT’S POWER TO GRANT RELIEF

29. 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.
30. 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), 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).

31. 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, 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 the Court's own equitable powers, requests that the Court:

- A. Enter judgment against defendants and in favor of plaintiff for each violation alleged in this complaint;
- B. Award plaintiff monetary civil penalties from each defendant for every violation of the TSR;
- C. Enter a permanent injunction to prevent future violations of the TSR and the FTC Act by defendants; and
- D. Award plaintiff such other and additional relief as the Court may determine to be just and proper.

Dated: 1-14-09

Respectfully submitted,

OF COUNSEL:

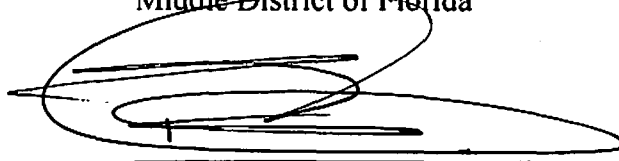
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