FILED
U.S. DISTRICT COURT
EVANSVILLE DIVISION
2004 JAN -5 AM 10: 16
SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

STATE OF INDIANA ex rel. Attorney General STEPHEN CARTER, Plaintiff, v. PHILLIPS NUTRITIONALS, INC. d/b/a Institute of Natural Health, d/b/a Foxfire Corporation, d/b/a Premier Products, WAYNE PHILLIPS, individually and as an officer and director of Phillips Nutritionals, Inc., and ANITA PHILLIPS, individually and as an officer and director of Phillips Nutritionals, Inc., Defendants.	)	Civil Action No. 3:04-CV-001 RLY - WGH

COMPLAINT FOR PERMANENT INJUNCTION, CONSUMER RESTITUTION, COSTS, AND OTHER RELIEF

Plaintiff, State of Indiana, by Attorney General Stephen Carter and Deputy Attorney General Justin G. Hazlett, alleges as follows:

1. This is an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 through 6108, the implementing Telemarketing Sales Rule, 16 C.F.R. §§ 310.1 through 310.9, the Indiana Deceptive Consumer Sales Act, Indiana Code §§ 24-5-0.5-1

through 24-5-0.5-12, and the Indiana Telephone Solicitations Act, Ind. Code §§ 24-5-12-1 through 24-5-12-25.

2. Plaintiff, through this action, seeks a permanent injunction, consumer restitution, costs, and other relief for Defendants' violations of the above-referenced Acts and Rule.

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction over Plaintiff's federal law claims under 28 U.S.C. §§ 1331 and 1337(a), and under 15 U.S.C. § 6103. The court has subject matter jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

4. Venue in this district is proper under 15 U.S.C. § 6103(e) and 28 U.S.C. § 1391(b) and (c).

PARTIES

5. Plaintiff, State of Indiana, is one of the fifty sovereign states of the United States. Stephen Carter is the duly elected Attorney General of Indiana, and brings this action in his official capacity as authorized by Ind. Code § 4-6-3-2, Ind. Code § 24-5-0.5-4(c), Ind. Code § 24-5-12-23, and by 15 U.S.C. § 6103.

6. Defendant Phillips Nutritionals, Inc., is a Nevada corporation holding a certificate of authority to transact business as a foreign corporation in Indiana. Defendant engages in the business of soliciting and selling beauty products and other personal goods. Defendant's offices and principal place of business are located at 2416 S. Rotherwood Avenue, Evansville, Indiana. Defendant has conducted and continues to conduct business in the Southern District of Indiana. Defendant has conducted and continues to conduct its business under the names "Institute of Natural Health," "Foxfire Corporation," and, upon information and belief, "Premier Products."

7. Defendant Wayne Phillips is an Indiana resident residing at 917 Woodbridge Court, Newburgh, Indiana. Defendant is, and at all times relevant hereto has been, Secretary of the corporate defendant, Phillips Nutritionals, Inc., as well as a member of the board of directors of Phillips Nutritionals, Inc. As such, Defendant has participated in and directed the activities of Phillips Nutritionals, Inc., and has used Phillips Nutritionals, Inc. to deceive and harm Indiana consumers, and consumers of other states.

8. Defendant Anita Phillips is an Indiana resident residing at 917 Woodbridge Court, Newburgh, Indiana. Defendant is, and at all times relevant hereto has been, President and Treasurer of the corporate defendant, Phillips Nutritionals, Inc., as well as a member of the board of directors of Phillips Nutritionals, Inc. As such, Defendant has participated in and directed the activities of Phillips Nutritionals, Inc., and has used Phillips Nutritionals, Inc. to deceive and harm Indiana consumers, and consumers of other states.

DEFENDANTS' ACTIVITIES

9. Defendants have offered and offer beauty products and other personal goods to consumers in Indiana and other states, soliciting sales of their products through third party telemarketers. Defendants' products are fungible, and are subject to depletion by usage.

10. The sales solicitations conducted by Defendants' third party telemarketers involve the telemarketers placing telephone sales calls to consumers. During these calls, the telemarketers ask the consumer to take a survey. The purpose of this survey is to elicit information from the consumer that will allow the telemarketer to identify those products of Defendants that the consumer may wish to purchase. Upon eliciting this information, the telemarketer offers specific product to the consumer.

11. As part of their solicitations and sales, Defendants represent, through the oral statements of their telemarketing agents and through written invoices shipped to consumers, that the consumer transactions, or the products themselves, involve the consumers' rights to receive and use Defendants' products during a free trial period after paying for only "shipping and handling" charges. The Defendants further represent that consumers will be charged for the product, as well as for additional shipments of product, only if the consumers do not cancel their participation in the trial before the expiration of the free trial period.

12. Sometime after Defendants' telemarketers report that a consumer has accepted the free trial offer, Defendants or others acting on Defendants' behalf ship goods to the consumer.

13. Despite Defendants' representations to consumers regarding the free trial offer, Defendants:

a. Submit, or have submitted, billing information for payment from the accounts of consumers before the expiration of the free trial period, in some cases even before consumers have received the product subject to the free trial offer; and,

b. Submit, or have submitted, billing information for payment from the accounts of consumers who have already timely canceled their participation in the free trial.

14. Defendants also ship, or have shipped, additional goods to consumers, and submit, or have submitted, billing information for payment from the accounts of consumers who have canceled their participation in the free trial or who have otherwise requested that Defendants not send product to them.

15. Defendants submit, or have submitted, the billing information referred to in numbered paragraphs 13 and 14 above without the consumers' express verifiable authorization.

16. Defendants submit, or have submitted, the billing information referred to in numbered paragraphs 13 and 14 above without the consumers' express informed consent.

17. In some of their transactions, Defendants submitted billing information for payment from the accounts of consumers who had refused Defendants' offer of a free trial or who had otherwise refused Defendants' offers.

18. In at least some of their transactions, Defendants posses or possessed preacquired account information, which they use or used to gain access to consumers' accounts.

19. In some of the transactions, Defendants' telemarketers identified themselves as representatives of or otherwise affiliated with third parties such as Visa, Visa Rewards Program, and Centers for Disease Control when they were not representatives or otherwise affiliated with these entities or programs. Upon information and belief, Defendants' telemarketers engaged in this activity to deceive consumers and facilitate the deceptive acquisition of billing information from the consumers.

20. As a result of Defendants' activities described above, Indiana and other states' consumers have incurred unwarranted charges to their accounts. Some of the consumers suffering such charges are set forth in the attached Exhibit A, which represents a partial compilation of the complaints Plaintiff has received from consumers aggrieved by Defendants' activities.

21. Defendants have engaged in the activities described herein since at least February of 2003.

FEDERAL LAW VIOLATIONS

Violations of 16 C.F.R. § 310.3(a)(2)

22. Defendants, by prematurely charging consumers who agreed to participate in Defendants' free product trial, and by charging consumers despite consumers' cancellations, as described in numbered paragraphs 11, 13 and 14 above, have misrepresented the total costs to receive or use the goods subject to the free trial offer.

23. Defendants have violated 16 C.F.R. § 310.3(a)(2)(i).

24. Defendants, whose telemarketer agents represented affiliation with third parties they did not have, as described in numbered paragraph 19 above, have misrepresented such affiliation.

25. Defendants have violated 16 C.F.R. § 310.3(a)(2)(vii).

Violations of 16 C.F.R. § 310.3(a)(3)

26. Defendants, by causing billing information to be submitted for payment without consumers' express verifiable authorization, as described in numbered paragraphs 15 and 17 above, have violated 16 C.F.R. § 310.3(a)(3).

Violations of 16 C.F.R. § 310.4(a)(6)

27. Defendants, by causing billing information to be submitted for payment without consumers' express informed consent, as described in numbered paragraphs 16 and 17 above, have violated 16 C.F.R. § 310.4(a)(6).

STATE LAW VIOLATIONS

28. Plaintiff re-alleges and incorporates by reference the allegations contained in numbered paragraphs 1 through 21 above.

Violations of the Indiana Deceptive Consumer Sales Act

29. The transactions and Defendants' activities described herein involve the sale, other disposition, or the solicitation of the sale or other disposition, of items of personal property to persons for primarily personal purposes, and are "consumer transactions" within the meaning of Ind. Code § 24-5-0.5-2(a)(1).

30. Defendants are, and at all past times relevant herein were, sellers who regularly engage in or solicit consumer transactions, and are "suppliers" within the meaning of Ind. Code § 24-5-0.5-2(a)(3).

Violations of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-3(a)(8)

31. Defendants, through the representations and actions described in numbered paragraphs 11 and 13 above, have represented to consumers that the consumer transactions provide consumers the right to receive and use product for a trial period without incurring more than shipping and handling charges, when in fact Defendants' premature submission of billing information effectively strips this right from the transactions.

32. Defendants have therefore misrepresented that the transactions involved a right that Defendants knew or reasonably should have known the transactions did not involve.

33. Defendants, through their actions described in numbered paragraphs 13, 14, and 17 above, have effectively represented to consumers, consumers' financial institutions, or other third parties either 1) that the consumers whose accounts were charged had authorized Defendants to submit the charges or 2) that the consumers whose accounts were charged were obligated to pay the charges submitted by Defendants, when in fact the consumers had not authorized the charges and were not obligated to pay them.

34. Defendants have therefore misrepresented that the transactions involved a right or obligation that the Defendants knew or reasonably should have known the transactions did not involve.

35. Defendants have violated Ind. Code § 24-5-0.5-3(a)(8).

Violations of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-3(a)(1)

36. Defendants, through the representations described in numbered paragraph 11 above, have represented that the subject of the consumer transactions includes the characteristics or benefits of providing consumers the right to receive and use the product for a trial period without incurring more than shipping and handling charges, when in fact Defendants' practice of prematurely submitting billing information, described in numbered paragraph 13 above, effectively eliminates these characteristics or benefits from the subject of the consumer transactions.

37. Defendants have therefore misrepresented that the subject of the consumer transactions had characteristics or benefits that Defendants knew or reasonably should have known the subject of the consumer transactions did not have.

38. Defendants have violated Ind. Code § 24-5-0.5-3(a)(1).

Violations of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-3(a)(14)

39. Given the nature of the products Defendants offered and sent to consumers, Defendants, through their actions described in numbered paragraph 14 above, have engaged in the replacement of product without the consumers' authorization, when the Defendants knew or reasonably should have known that the consumers had not authorized such replacement.

40. Defendants have violated Ind. Code § 24-5-0.5-3(a)(14).

Violations of the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-3(a)(7)

41. Defendants, through the actions of their telemarketers described in numbered paragraph 19 above, represented that the consumer transactions had third party sponsorship, approval, or affiliation that the consumer transactions did not have.

42. Defendants have therefore misrepresented third party sponsorship, approval, or affiliation in the consumer transactions, when they knew or reasonably should have known they were doing so.

43. Defendants have violated Ind. Code § 24-5-0.5-3(a)(7).

Violations of the Indiana Telephone Solicitations Act

Violations of the Indiana Telephone Solicitations Act, Ind. Code § 24-5-12-10

44. The actions of Defendants' telemarketers described in numbered paragraph 19 above make Defendants "sellers" as defined by Ind. Code § 24-5-12-8.

45. For the purposes of Defendants' consumer transactions described above, Indiana law requires Defendants to register with the Indiana Consumer Protection Division as a seller soliciting or attempting solicitations under Ind. Code § 24-5-12-10.

46. Defendants have not registered as required by Ind. Code § 24-5-12-10.

47. Defendants have violated Ind. Code §§ 24-5-12-10, -11, and -16, and have thereby committed deceptive acts under Ind. Code § 24-5-12-23.

PRAYER FOR RELIEF

48. Plaintiff, State of Indiana, seeks judgment against the Defendants for the following relief:

a. A permanent injunction, under 15 U.S.C. § 6103(a), enjoining Defendants from engaging in the activity described in numbered paragraphs 13 through 17 and 19 or otherwise violating the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 through 6108, or the Act's implementing Telemarketing Sales Rule, 16 C.F.R. § 310.1 through 310.9;

b. A permanent injunction, under Ind. Code § 24-5-0.5-4(c)(1), enjoining Defendants from engaging in the activity described in numbered paragraphs 13 through 17 and 19 or otherwise violating the Indiana Deceptive Consumer Sales Act, Ind. Code §§ 24-5-0.5-1 through 24-5-0.5-12;

c. A permanent injunction, under Ind. Code § 24-5-0.5-4(c)(1), enjoining Defendants from violating the Indiana Telephone Solicitations Act, Ind. Code §§ 24-5-12-1 through 24-5-12-25;

d. Consumer restitution, damages, and other compensation for aggrieved Indiana consumers under 15 U.S.C. § 6103(a);

e. Consumer restitution for all aggrieved consumers under Ind. Code §§ 24-5-0.5-4(c)(2) and 24-5-0.5-4(d);

f. Contract voidance for all aggrieved consumers under Ind. Code §§ 24-5-0.5-4(d);

g. Costs of the Attorney General's investigation and prosecution of this matter, under Ind. Code § 24-5-0.5-4(c)(3);

h. All other relief deemed just and appropriate by this Court, under 15 U.S.C. § 6103(a) and any other applicable law.

Respectfully Submitted,

Stephen Carter
Attorney General of Indiana

By:

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Deputy Attorney General
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State of Indiana v. Phillips Nutritionals, Inc., et al.

Consumer Last Name	First Name	State of Consumer's Residence	Defendant's Total Charge to Consumer
Bolton	Janet	AL	$494.25
Alexander	Terrah	AR	$225.75
Hillman	Sarah	AZ	unknown
Margerison	Robert	AZ	$61.00
Smith	Dawn	AZ	$996.50
Stuart	John	AZ	unknown
Couch	Deborah	CA	$337.50
Guilfoy	Jean	CA	$121.75
Hilbert	John	CA	$150.75
Levy	Nell	CA	$49.90
Mehling	Wolf & Debra	CA	$352.50
Pantino	Jahmela	CA	unknown
Ranard	Sharon	CA	$334.50
Simmons	Jerry	CA	$103.15
Forker	Michael	GA	unknown
Liebl	David	GA	$177.00
McCormack	Katherine	GA	unknown
Clouse	Paula	IL	$302.50
Johnson	Birgit	IL	$164.00
Watts	Susan	IL	unknown
Kinser	Susan	IN	unknown
Slay	Lori	KS	$359.00
Hook	Rodney	KY	$504.00
Rise	Amber	MD	$515.25
Brennan	Susan	MI	$327.50
Mize	Anthony	MI	$147.00
Presnall-Harris	Dawn	MI	$53.75
Wilder	Jamie	MI	$150.75
Winans	Connie	MI	$1,454.50
Fesenmeyer	Gary	MO	$304.50
Lehman	Tom	NC	$150.75
Patterson	Russell	NC	$385.21
Brown	Andrea	NH	$150.00
Summa	Joseph	NH	$150.75
Grant	David	NJ	$473.25
McGlinn	Marie	NJ	$155.50
Post	Susan	NJ	$437.40
Walcott	Shonelle	NJ	$424.50
Wilson	Anne	NJ	$155.50
Zummo	John	NJ	unknown
Summers	Jeanette	NV	$43.15
Wood	Shellie	NV	$150.23
Krylov	Yuriy	NY	unknown
Maxwell	Melinda	NY	$54.70

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Consumer Last Name	First Name	State of Consumer's Residence	Defendant's Total Charge to Consumer
Morley	Memory Anne	NY	$153.75
Selevan	Joseph	NY	$359.00
Smith	Linda	NY	$99.00
Squire	Juanita	NY	$481.50
Erlich	William	OH	$620.00
Fadenholz	Marilyn	OH	$155.50
Thomas	Sandra	OK	$388.00
Brady	Michael	PA	$352.50
Tunno	Mechele	PA	$203.30
Davidson	Joyce	RI	unknown
Looney	Jacqueline	TN	$473.25
Ross	Tony	TN	$150.75
Stallings	Billy & Lori	TN	$150.75
Adams	Victoria	TX	$547.50
Benjarano	Aimee	TX	$150.75
Hendrix	James	TX	$311.50
Holmes	Kip	TX	$1,018.75
Lawrence	David	TX	$270.00
Nicholson	Paul	TX	$337.50
O'Neill	Margie	TX	$117.00
Parks	Carole	TX	$189.75
Warren	Donald	TX	$352.50
Williams	Bessie	TX	$481.50
Brown	Sara	UT	$150.75
Brown	Ryan	UT	unknown
Shores, Jr.	James	VA	$276.00
Hyatt	Billy	WA	$481.50
Bonar	Melissa	WV	$150.75
Lawrence	Kathryn	WV	$382.50