

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE TALBOTS, INC.,

Defendant.

Case No. 10-cv-10698

**COMPLAINT FOR CIVIL
PENALTIES, PERMANENT
INJUNCTION, AND OTHER
EQUITABLE 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 from Defendant for its violations 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.

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).

DEFENDANT

4. Defendant The Talbots, Inc. (“Talbots”) is a Delaware for-profit corporation with its principal place of business in Hingham, Massachusetts. Talbots is a specialty retailer and direct marketer of women’s apparel, shoes and accessories. Talbots operates stores in 587 locations in 47 states, the District of Columbia, and Canada, and an on-line shopping site at www.talbots.com. Talbots has marketed and markets the Talbots brand and, prior to July 2, 2009, conducted some marketing under the brand “J.Jill.” Its marketing has included telemarketing campaigns that deliver recorded messages. Talbots transacts or has transacted business in this District.

THE TELEMARKETING SALES RULE

5. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing And Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. §§ 6101-6108. The FTC adopted the original Telemarketing Sales Rule in 1995, extensively amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310 (“TSR”).
6. Under the TSR, an “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. 16 C.F.R. § 310.2(u).
7. The TSR recognizes that a person may make a “Do Not Call request” by stating that he or she does not wish to receive an outbound telephone call made by or on behalf of a particular seller. Under the TSR, it is an abusive telemarketing practice and a violation

of the Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, initiating an outbound telephone call to a person who has previously made such a Do Not Call request. 16 C.F.R. § 310.4(b)(1)(iii)(A).

8. On August 29, 2008, the Commission published an amendment to the TSR that prohibits initiating outbound telephone calls to deliver prerecorded messages unless the message makes certain disclosures and provides a mechanism for the recipients of such messages to make Do Not Call requests. 73 Fed. Reg. 51163, 51188 (2008). As amended, effective December 1, 2008, 16 C.F.R. § 310.4(b)(1)(v)(B)(ii) of the TSR requires that an outbound telephone call that delivers a prerecorded message promptly disclose the identity of the seller, that the purpose of the call is to sell goods or services, and the nature of the goods or services; and that these disclosures be followed immediately by disclosure of one or both of the following:
 - A. In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request at any time during the message; and
 - B. In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request.
9. As amended, effective December 1, 2008, 16 C.F.R. § 310.4(b)(1)(v)(B)(ii) of the TSR requires that an outbound telephone call that delivers a prerecorded message and could be answered by a person allow the recipient of the call to assert a Do Not Call request by

using an automated interactive voice and/or keypress-activated opt-out mechanism that will, once invoked, immediately disconnect the call.

10. Since December 1, 2008, it is an abusive telemarketing practice and a violation of the TSR for a telemarketer to initiate, or for a seller to cause a telemarketer to initiate, an outbound telephone call that delivers a prerecorded message that does not disclose that the recipient of the call may make a Do Not Call request as set forth in 16 C.F.R. § 310.4(b)(1)(v)(B)(ii), or does not immediately disconnect the call when the opt-out mechanism is invoked.
11. 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).

DEFENDANT'S BUSINESS ACTIVITIES

12. Defendant provides or arranges to provide goods or services to consumers in exchange for consideration, and has caused telemarketers to call consumers across the United States to induce the purchase of its goods or services.
13. Defendant is a “seller” as defined by the TSR, 16 C.F.R. § 310.2(z).
14. At all times relevant to this Complaint, Defendant has 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.
15. Since December 1, 2008, Defendant has 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. Specifically, Talbots engaged telemarketers to make outbound telephone calls that would deliver prerecorded messages advertising offers for the purchase of goods sold under the Talbots brand or the J.Jill brand. Telemarketers, at the request of Talbots, initiated at least 3.4 million outbound telephone calls that delivered prerecorded messages during telephone calls answered by persons, answering machines and voicemail services from February 11, 2009 through July 23, 2009.

16. The prerecorded messages that telemarketers delivered on behalf of Defendant did not provide information about an automated keypad mechanism or toll-free number to contact the sender immediately after disclosure of the seller, the purpose of the call and the nature of the goods and services. Instead, the prerecorded messages did not mention an automated keypad mechanism or toll free number until after thirty or more seconds of the telemarketing message had already been played.
17. The prerecorded messages that telemarketers delivered on behalf of Defendant did not inform consumers who answered in person that they may automatically assert a Do Not Call request any time during the message by invoking an automated interactive voice and/or keypress-activated opt-out mechanism. Instead, after approximately thirty or forty seconds of the telemarketing message, the recordings contained statements such as, “[i]f you’d like more information and to choose whether or not to receive future calls about special offers and promotions, press 1 now or call” a toll-free number, or “[t]o make sure you’ll receive pre-recorded exclusive J. Jill savings and event messages – like this one, please press 1 now or call” a toll-free number.

18. When consumers who answered Defendants' outbound telephone calls delivering prerecorded messages advertising for the Talbots brand or the J. Jill brand invoked the automated key pad mechanism described in the messages, the telemarketers who made calls on behalf of Defendant did not disconnect the outbound calls immediately and, instead, connected the consumers to additional recordings and additional advertising.

VIOLATIONS OF THE TELEMARKETING SALES RULE

19. In numerous instances on or after December 1, 2008, Talbots caused telemarketers to make outbound telephone calls to persons that delivered prerecorded messages that did not comply with 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(A) or (B), because the messages did not disclose that the recipients of the call could assert a Do Not Call request immediately after disclosure of the identity of the seller, the purpose of the call and the nature of the goods or services.
20. In numerous instances on or after December 1, 2008, Talbots caused telemarketers to make outbound telephone calls that were answered in person by a consumer and delivered a prerecorded message that did not comply with 16 C.F.R. § 310.4(b)(1)(v)(B)(ii)(A) because the messages did not inform the consumer that he or she could invoke an automated mechanism to assert a Do Not Call request at any time during the message, and the telemarketers who made calls on behalf of Defendant did not immediately disconnect the call when the automated mechanism was invoked.

CONSUMER INJURY

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

THIS COURT'S POWER TO GRANT RELIEF

22. 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.
23. 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) (2008) and by 74 Fed. Reg. 857 (Jan. 9, 2009) (to be codified at 16 C.F.R. § 1.98(d)), authorizes this Court to award monetary civil penalties of up to \$16,000 for each violation of the TSR after February 9, 2009. Defendant's 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).
24. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by Defendant's violations of the TSR 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 Defendant and in favor of plaintiff for each violation alleged in this Complaint;
- B. Award plaintiff monetary civil penalties from Defendant for every violation of the TSR;
- C. Enter a permanent injunction to prevent future violations of the TSR and the FTC Act by Defendant;
- D. Order Defendant 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,

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