

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. : 00-00515-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE BROWN

FEDERAL TRADE COMMISSION,)

Plaintiff,)

v.)

ADVANCED PUBLIC COMMUNICATIONS)
CORPORATION, a corporation, and)
MICHAEL PORTMAN and JAMES L.)
BIANCO, JR., a.k.a. John Taylor,)
individually and as officers of the corporation,)
and MICHAEL DRUCKER, a.k.a. MICHAEL)
DAVIS, individually)

Defendants.)

**STIPULATED JUDGMENT AND ORDER FOR
PERMANENT INJUNCTION AS TO MICHAEL PORTMAN**

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), commenced this action by filing its Complaint for permanent injunction and other relief pursuant to Sections 5, 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45, 53(b) and 57b charging that Michael Portman and the other defendants captioned above engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and the Commission’s Trade Regulation Rule entitled “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures” (“Franchise Rule”), 16 C.F.R. Part 436, in connection with the sale of payphone business opportunities.

The Commission and Defendant Michael Portman hereby stipulate to the entry of this Stipulated Judgment and Order for Permanent Injunction (“Order”) to resolve all matters of dispute between them in this action.

THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter and Defendant Portman pursuant to 28 U.S.C. §§ 1331 and 1337(a), and 15 U.S.C. § 53(b).
2. Venue is proper as to all parties in the Southern District of Florida.
3. The activities of Defendant Portman identified in Plaintiff’s Complaint are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

8. Defendant Portman agrees that this Order does not entitle him to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-64 (1996), and Defendant Portman further waives any right to attorneys' fees that may arise under said provision of law.

9. This Order is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law.

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

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. "Business Venture" means any written or oral business arrangement, however denominated, whether or not covered by the Franchise Rule, which consists of the payment of any consideration for:

- a. The right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and
- b. The promise or provision of assistance to any person in connection with: (1) the establishment, maintenance, or operation of a new business; or (2) the entry by an existing business into a new line or type of business, including, but

not limited to, referrals to one or more persons providing location services.

3. The “Franchise Rule” or “Rule” means the FTC Trade Regulation Rule entitled “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures,” 16 C.F.R. Part 436.

4. “Franchise” and “Franchisor” are defined as those terms are defined in Sections 436.2(a) and (c) of the Franchise Rule, 16 C.F.R. §§ 436.2(a) and (c), and include “business opportunity ventures” as defined in Sections 436.2(a)(1)(ii) and (2) of the Rule, and discussed in the FTC’s Final Interpretive Guide for the Franchise Rule, 44 Fed. Reg. 49966-68 (August 24, 1979). The term “franchise” in this Order shall also encompass any successor definition of “franchise,”

ORDER

I. PROHIBITED REPRESENTATIONS

IT IS FURTHER ORDERED that, in connection with the advertising, telemarketing, offering for sale, licensing, contracting, sale or other promotion, in or affecting commerce, of any Franchise, Business

4. The independence or authenticity of any third-party references, including persons represented to be prior purchasers, that are provided to potential purchasers;
5. The amount of competition within, or a purchaser's territorial rights to, any geographic territory;
6. The availability or existence of profitable locations in a purchaser's geographic area;
7. The assistance that will be provided purchasers, including, but not limited to, providing profitable locations or clients;
8. The terms and conditions of any assurances, refunds or guarantees of profitability that relate to any location service or company to which a purchaser is referred.

II. COMPLIANCE WITH FRANCHISE RULE

IT IS FURTHER ORDERED that, in connection with the advertising, telemarketing, offering for sale, licensing, contracting, sale or other promotion, in or affecting commerce, of a franchise, Defendant Portman, his successors, assigns, 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, are hereby permanently restrained and enjoined from violating, or assisting others to violate, any provision of the Franchise Rule as promulgated, or as it may hereinafter be amended, including, but not limited to:

1. Failing to provide any prospective franchisee with a complete and accurate basic disclosure document containing all the information in the form required by Sections 436.1(a)(1)-(24) of the Franchise Rule, in the manner and within the time frame prescribed by the Rule;

2. Failing to provide any prospective franchisee with an earnings claim document as required by Sections 436.1(b)-(e) of the Franchise Rule, in the manner and within the time frame prescribed by the Rule;

3. Failing to include in any advertisement that states or suggests a specific level of sales, income or gross or net profits that appears in a newspaper or other medium of general dissemination, including the Internet, the disclosures required by Section 436.1(e) of the Franchise Rule, including a clear and conspicuous disclosure of the number and percentage of prior purchasers known to have earned or made the amount claimed;

4. Making any earnings claim or projection without having a reasonable basis for the claim or projection at the time such claim or projection is made, as required by Sections 436.1(b)-(e) of the Franchise Rule; and

5. Engaging in any other act or practice prohibited by the Franchise Rule, 16 C.F.R. Part 436, or failing to fulfill any obligation imposed by the Rule.

Provided, however, that if the Commission promulgates a trade regulation rule or rules that modify or supersede the Franchise Rule, in whole or part, Defendant Portman shall comply fully and completely with all applicable requirements thereof on and after the effective date of any such rule; and *provided, further,* that Defendant Portman may choose to comply with the disclosure requirements of the Franchise Rule now in effect by fully and completely complying with the disclosure requirements set forth in the UFOC format for so long as the current Rule remains in force.

III. MONETARY JUDGMENT AND REDRESS

1. The Commission's agreement to this Order, requiring that Defendant Portman be liable for less than the full amount of consumer injury, is expressly premised upon the truthfulness, accuracy

and completeness of his financial statement, dated February 15, 2000, and affirmed on _____, 2000, and related documents that were submitted to the Commission. Such financial statements and supporting documents contain material information upon which the Commission relied in negotiating and agreeing to this Order. If, upon motion by the Commission, this Court finds that Defendant Portman has failed to disclose any material asset or has materially misstated the value of any asset in the financial statements and related documents described above, or has made any other material misstatement or omission in the financial statements and related documents described above, the Court shall enter judgment in the amount of \$5,000 against Defendant Portman. For the purposes of this Paragraph, Defendant Portman waives any right to contest any of the allegations in the Amended Complaint filed in this action.

2. Defendant Portman shall cooperate fully with the Commission and its agents in all attempts to collect the amount due pursuant to Paragraph A if Defendant Portman fails to pay the full amount due. In such an event, Defendant Portman agrees to provide the Commission with his federal and state tax returns for the preceding two years, and to complete new financial disclosure forms fully and accurately within ten (10) business days of receiving a request from the Commission to do so. Defendant Portman further authorizes the Commission to verify all information provided on his financial disclosure forms with all appropriate third parties, including but not limited to financial institutions.

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

Defendant Portman is further required, unless he has done so already, to provide the FTC with clear, legible and full-size photocopies of all valid driver's licenses he possesses, which will be used for collection, reporting and compliance purposes.

4. Defendant Portman agrees that the facts as alleged in the Complaint filed in this action shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this Order, including but not limited to a nondischargeability complaint in any bankruptcy proceeding.

5. 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 Commission may initiate to enforce this Order.

IV. TRANSFER OF CUSTOMER LISTS

IT IS FURTHER ORDERED that Defendant Portman, his successors, assigns, 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 are hereby permanently restrained and enjoined from selling, renting, leasing, transferring or otherwise disclosing the name, address and

V. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT PORTMAN

IT IS FURTHER ORDERED that within five (5) business days of receipt of this Order as entered by the Court, Defendant Portman shall submit to the Commission a truthful sworn statement, in the form shown on Appendix A, that shall acknowledge receipt of this Order.

VI. DISTRIBUTION OF ORDER BY DEFENDANT PORTMAN

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendant Portman shall:

A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from, each officer and director, each individual serving in a management capacity, all personnel

A. For a period of five (5) years after the date of entry of this Order, Defendant Portman shall notify the Commission in writing of the following:

1. Any changes in his residence, mailing addresses and telephone numbers, within ten (10) days of the date of such change;

2. Any changes in his employment status (including self-employment) within ten (10) days of such change. Such notice shall include the name and address of each business that Defendant Portman is affiliated with or employed by, a statement of the nature of the business, and a statement of Defendant Portman's duties and responsibilities in connection with the business or employment;

3. Any proposed change in the structure of any business entity that Defendant Portman directly or indirectly manages, controls or has a majority ownership interest in, such as creation, incorporation, dissolution (including the dissolution of any subsidiaries), assignment, proposed filing of a bankruptcy petition, or sale or merger resulting in the emergence of a successor corporation, or any other change in that entity, including a change in the corporate name or address, that may affect any compliance obligation arising out of this Order, at least thirty (30) days prior to the effective date of any such change; *provided, however,* that with respect to any proposed change in the structure of any business entity that Defendant Portman directly or indirectly manages, controls or has a majority ownership interest in, about which he learns less than thirty (30) days prior to the date such action is to take place, Defendant Portman shall notify the Commission as soon as is practicable after learning of such proposed change;

B. One hundred eighty (180) days after the date of entry of this Order, Defendant Portman shall provide a written report to the Commission, sworn to under penalty of perjury, setting forth in detail the manner and form in which Defendant Portman has complied and is complying with this Order. This report shall include but not be limited to:

1. Defendant Portman's then current residence address, mailing addresses and telephone number(s);

2. Defendant Portman's then current employment and business addresses and telephone number(s), a description of the business activities of each such employer or business, and Defendant Portman's title and responsibilities for each such employer or business;

3. A copy of each acknowledgment of t(

Federal Trade Commission
600 Pennsylvania Avenue N.W., Room 238
Washington, D.C. 20580

E. For the purposes of this Paragraph, “employment” includes the performance of services as an employee, consultant, or independent contractor; and “employers” include any individual or entity for whom Defendant Portman performs services as an employee, consultant, or independent contractor; and

F. For purposes of the compliance reporting required by this Paragraph, the Commission is authorized to communicate directly with Defendant Portman.

VIII. MONITORING COMPLIANCE OF SALES PERSONNEL

IT IS FURTHER ORDERED that, in connection with any business that Defendant directly or indirectly manages, controls or has a majority ownership interest in, that is engaged in the sale or distribution of any Franchise, Business Venture, or income-generating product or service, or assisting others engaged in these activities, Defendant Portman and his successors, assigns, 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, are hereby permanently restrained and enjoined from:

A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and independent contractors engaged in sales or other customer service functions comply with Paragraphs I and II of this Order. Such steps shall include adequate monitoring of sales presentations or other calls with customers, and shall also include, at a minimum, the following:

1. Listening to the oral representations made by persons engaged in sales or other customer service functions;

2. Establishing a procedure for receiving and responding to consumer complaints; and

3. Ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved;

B. Failing promptly to investigate fully any consumer complaint received by any business to which this Paragraph applies; and

C. Failing to take corrective action with respect to any sales person whom Defendant Portman or his Representative determines is not complying with this Order, which may include training, disciplining, and/or terminating such sales person;

Provided, however, that this Paragraph does not authorize or require Defendant Portman to take any action that violates any federal, state, or local law.

IX. RECORD-KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, in connection with any business that Defendant Portman directly or indirectly manages, controls or has a majority ownership interest in, that is engaged in the sale or distribution of any Franchise, Business Venture, payphone business opportunity, or income-generating product or service, or assisting others engaged in these activities, Defendant Portman, his successors, assigns, 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 are hereby restrained and

enjoined from failing to create and maintain for a period of three (3) years following the date of their creation, unless otherwise specified:

A. Books, records and accounts that, in reasonable detail, accurately and fairly reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Records containing the name, address, telephone number, social security number and alias(es) and/or phone names of each person employed by Defendant Portman in any business engaged in the sale or distribution of any Franchise, Business Venture, payphone business opportunity, or income-generating product or service, in any capacity, including as an independent contractor, that person's job title or position, the date upon which the person commenced work, and the date and reason for the person's termination, if applicable; and shall retain such records during the employment of any person, and for a period of two (2) years after the date of that person's termination;

C. Records containing the name, address, telephone number, quantity of goods or services purchased, and a description of the goods or services purchased, for all consumers to whom the business has sold, invoiced or shipped any Franchise, Business Venture, payphone business opportunity, or income-generating product or service;

D. Records that reflect, for every written or oral consumer complaint or refund request received by Defendant Portman, his successors, assigns, 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, whether directly or indirectly or through any third party: (1) the customer's name, address, telephone number; (2) the dollar amount paid by the consumer; (3) the written complaint or refund request, if any; (4) the basis of the complaint or refund request, including

the name of any salesperson complained about; (5) the nature and result of any investigation conducted concerning the complaint or refund request; (6) each response and the date of the response to the complaint or refund request; and (7) any final resolution of the complaint or refund request, and the date of the resolution; and (8) in the event of a denial of a refund request, the reason for the denial; and

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials utilized, which shall be retained for three (3) years after the last date of their dissemination or use.

X. ACCESS TO BUSINESS PREMISES

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, for the purposes of determining or securing compliance with its provisions, Defendant Portman, his successors, assigns, 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 shall grant to representatives of the Commission, within three (3) business days of receipt of written notice from the Commission:

A. Access during normal business hours to any office or facility storing documents of any business that Defendant Portman directly or indirectly manages, controls, or has a majority ownership

shall permit representatives of the Commission to remove such documents for a period not to exceed five (5) business days so that the documents may be inspected, inventoried, and copied; and

B. The opportunity to interview, without restraint or interference, officers, directors, employees, contractors, and agents, including all personnel involved in responding to consumer complaints or inquiries and all sales personnel, whether designated as employees, consultants, independent contractors or otherwise, of any business to which Subsection A of this Paragraph applies, regarding compliance with the provisions of this Order. Any person interviewed may have counsel present.

Provided, however, that upon application of the Commission for good cause shown, the Court may enter an *ex parte* order granting immediate access to Defendant Portman's business premises for the purposes of inspecting and copying all documents relevant to any matter contained in this Order.

XI. AUTHORITY TO MONITOR COMPLIANCE

IT IS FURTHER ORDERED that the Commission is authorized to monitor Defendant Portman's compliance with this Order by all lawful means, including but not limited to the following:

A. The Commission is authorized, without further leave of Court, to obtain discovery from any person (including a Defendant) in the manner provided by Chapter V of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26-37, including the use of compulsory process pursuant to Fed. R. Civ. P. 45, for the purpose of monitoring and investigating Defendant Portman's compliance with any provision of this Order.

B. The Commission is authorized to use representatives posing as consumers or suppliers to Defendant Portman, Defendant Portman's employees, or any other entity managed or controlled in whole or in part by Defendant Portman, without the necessity of identification or prior notice; and

C. Nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. § 49 and 57b-1, to investigate whether Defendant Portman has violated any provision herein or Section 5 of the FTC Act, 15 U.S.C. § 45, or any applicable rule or regulation promulgated and enforced by the Commission, including the Franchise Rule, 16 C.F.R. § 436.

XII. 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.

XIII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for the purpose of enabling the parties to apply to the Court at any time for such further orders and directives as may be necessary or appropriate for the interpretation or modification of this Order, for the enforcement of compliance therewith, or for the punishment of violations thereof.

XIV. COMPLETE SETTLEMENT

Plaintiff and Defendant Portman hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter as to Defendant Portman.

XIV. ENTRY OF THIS JUDGMENT

IT IS FURTHER ORDERED that there being no just reason for delay of entry of this judgment, and, pursuant to Rule 54(b) of the Federal Rules of Civil Procedures, the Clerk shall enter this Order immediately.

FOR THE PLAINTIFF:

FOR DEFENDANT PORTMAN

Karen Leonard
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, DC 20008

Alan Ginsberg, Esquire
LAW OFFICES OF ALAN GINSBERG
Senator Building
13899 Biscayne Boulevard, Suite 401
North Miami Beach, FL 33181

MICHAEL PORTMAN, individually

[insert address and phone]:

**DONE AND ORDERED in Chambers at Miami, Florida, this _____ day
of _____, 2000.**

Dated: _____

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. : 00-00515-CIV-UNGARO-BENAGES
MAGISTRATE JUDGE BROWN

FEDERAL TRADE COMMISSION,)
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 ADVANCED PUBLIC COMMUNICATIONS)
 CORPORATION, a corporation, and)
 MICHAEL PORTMAN and JAMES L.)
 BIANCO, JR., a.k.a. John Taylor,)
 individually and as officers of the corporation,)
 and MICHAEL DRUCKER, a.k.a. MICHAEL)
 DAVIS, individually)
)
 Defendants.)

MICHAEL PORTMAN, being duly sworn, hereby states and affirms as follows:

1. My name is Michael Portman. My current residence address is _____ . I am a citizen of the United States and am over the age of eighteen. I have personal knowledge of the facts set forth in this Affidavit.
2. I am a Defendant in the above captioned case.
3. On _____, I received a copy of the Stipulated Judgment and Order for Permanent Injunction, which was signed by the Honorable Ursula Ungaro-Benages and entered by

the Court on _____, 2000. A true and correct copy of the Order I received is appended to this Affidavit.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Michael Portman

Executed on _____, 2000 at _____ [city and state].

State of FLORIDA
County of _____

Subscribed and sworn to before me this ____ day of _____, ____ .

Notary Public
My Commission Expires:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
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individually and as officers of the corporation,)
and MICHAEL DRUCKER, a.k.a. MICHAEL)
DAVIS, individually)

Defendants.)

AFFIDAVIT

MICHAEL PORTMAN, being duly sworn, hereby states and affirms as follows:

1. My name is Michael Portman. My current!))ff

4. I hereby declare and affirm that the information contained in the Financial Statement is true and correct, and that there have been no material changes to the information as provided therein.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Michael Portman

Executed on _____, 2000 at _____ [city and state].

State of FLORIDA
County of _____

Subscribed and sworn to before me this ____ day of _____, ____ .

Notary Public
My Commission Expires:
